Kluwer Competition Law Blog

The Norwegian Competition Authority's Prohibition Decision in a Below Threshold Transaction in the Digital Sector (Schibsted/Nettbil) Quashed by the Supreme Court

Heidi Jorkjend, Trine Siri Dahl, Eivind J. Vesterkjær (Advokatfirmaet Thommessen) · Thursday, March 2nd, 2023

In its judgement on 17 February 2023, Norway's Supreme Court quashed the Norwegian Competition Authority's prohibition of the 2019 acquisition of tech start-up Nettbil by media conglomerate Schibsted. This is the very first merger case heard by the Norwegian courts and represents an important development in Norwegian merger control.

Prohibition of a Below-Threshold Transaction in the Digital Sector

Nettbil launched in 2017 as a consumer-to-business online marketplace for the sale of second-hand cars. In 2019, media conglomerate Schibsted acquired a majority shareholding in the company. The acquisition did not meet the notification threshold in Section 18 of the Norwegian Competition Act due to Nettbil's modest revenues but was called in by the Norwegian Competition Authority (NCA) after closing.

The NCA found that Schibsted's online platform for car sales, Finn.no and Nettbil had horizontal overlap in a market for online sales of cars and that the transaction gave incentives to raise prices and reduce innovation. On this basis, the NCA ordered Schibsted to divest Nettbil.

Finn.no is a traditional online classified ads platform, entailing that private users and businesses purchase an ad to market a vehicle on the platform and thereafter conclude the sales process independently and at their own risk. Nettbil, on the other hand, assumes the risk for sales from private users to registered car dealerships, and offers a comprehensive sales process involving every step; from the valuation of the vehicle to a closed digital auction. Further, the seller pays 10 to 30 times more for Nettbil's services compared to Finn.no.

The NCA's decision was upheld by the Competition Appeals Board on appeal. The decision was, however, repealed by the Gulating Court of Appeal and this judgment was upheld by the Supreme Court. The Supreme Court's judgement includes important clarifications and represents a significant development in Norwegian merger control.

Key Takeaways from the Supreme Court's Judgment

The Courts May Review the NCA's Economic Assessments

With reference to Case T-584/19 *Thyssenkrupp*, the Supreme Court plainly rejects the NCA's statement that the Courts should exercise caution when repealing assessments that are based on the NCA's expertise, including their interpretation of information of an economic nature. The Supreme Court holds that the Courts shall indeed review whether the evidence relied on by the NCA is 1) reliable and consistent, 2) provides a sufficient basis for making a decision in the case, and 3) whether the conclusion drawn from the evidence can be sustained.

Market Assessments Must Be Methodically Correct

The NCA had not established to the requisite standard that the services belong to the same product market. Following a detailed review of the internal documents of the parties, the Court concluded that it could not be demonstrated with a sufficient degree of likelihood that the services provided by Nettbil and Finn.no were substitutable.

To this end, the Supreme Court clarified that the NCA's general assessments of overlap between the products offered by the parties to the transaction – which was based on internal documents from the companies referring to the parties as competitors – did not establish that they, in fact, belonged to the same product market. Further, the Competition Appeals Board's re-examination was methodically faulty as its approach to the market definition was incorrect. The Boards assessment was based on the existence of factors that implied that *"the products were not substitutes"*, instead of assessing the substitutability of the products. This suggested that the Board had based the assessment on whether there were any overlaps between the products instead of examining if they were part of the same product market. Thus, they could be considered competitors from a competition law point of view.

The NCA Cannot Uncritically Rely on the Wording in the Company's Internal Documents

The NCA had extensively relied on internal documents produced by Schibsted, Finn.no and Nettbil where they refer to each other as competitors in relation to its finding that the parties belonged to the same product market. The Supreme Court's decision proves that although internal documents of the transaction parties may constitute important evidence, the NCA cannot uncritically rely on the wording. Rather, the content, significance and value as evidence must be determined in light of the context.

Further, the NCA's interpretation of the documents deviated significantly from the Supreme Court's interpretation of the same documents during its judicial review. In the Court's opinion, the internal documents, pricing of the service of Finn.no and lack of countermeasures by Schibsted after the launch of Nettbil indicated that Nettbil did not exert competitive pressure on Finn.no, despite the existence of internal documents referring to the parties as competitors.

High Threshold for Intervention

Lastly, the Court clarified that there is a high threshold for finding a significant impediment of effective competition. The NCA had argued that the criteria *"significant"* entailed that the restriction had to be *considerable enough* to have an effect on competition, suggesting that a restriction of competition above *de minims* is sufficient for intervention.

The Supreme Court denied this, referring to the preparatory works for the Competition Act, which stated that the effect must be *"qualified"* and that, even in concentrated markets, a small increase in market concentration does not cause competitive concerns. Further, the Court highlighted that the preparatory works considered a prohibition decision to have similar effects to expropriation.

On the basis that the products did not belong to the same product market, it was not relevant to assess whether the transaction could have resulted in a significant impediment of effective competition with regard to price and quality. Nonetheless, the Court remarked that the acquisition was not capable of harming innovation.

Due Time for Adjustments to the NCA's Enforcement Practice?

From our perspective, the Supreme Court's decision is most welcomed. Within a span of one year, two decisions of the NCA have been quashed upon appeal. In addition to the Supreme Court's judgement in Schibsted/Nettbil, the NCA saw the Competition Appeals Board overturning its SIEC assessment in DNB/Sbanken last year, setting the threshold higher than the NCA.

These two cases, which are the only Norwegian merger cases ever tried by an appellate body, illustrate that it is a fair question to ask whether the threshold for intervention practised by the NCA has been too low compared to the legal standard provided in the Norwegian Competition Act. Moreover, the Supreme Court's clarification concerning the use of internal documents will likely have an impact also in cooperation and dominance cases.

We hope and expect the NCA to adjust its practice, as the timelines of most transactions do not allow an appeal process to the Supreme Court, and the parties depend on the NCA making correct decisions on substance.

---

ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Thursday, March 2nd, 2023 at 9:00 am and is filed under Digital competition, Digital economy, Digital markets, Merger control, Merger Thresholds, Norway
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.