

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2023 – Norway

Heidi Jorkjend, Eivind J. Vesterkjær (Advokatfirmaet Thommessen) · Wednesday, January 17th, 2024

The year 2023 witnessed notable developments in Norwegian competition law, including the resolution of four cases in the Norwegian courts, the introduction of new legislative measures addressing issues within the grocery market, and various legislative proposals. While Norwegian competition law mainly mirrors the laws of the EU, this blog post offers an overview of the specific developments in Norway for the year 2023, encompassing its country-specific policies and legislation.

The main developments can be summarised as follows:

- [The Schibsted/Nettbil case](#) marked a significant milestone as it became the first merger case to be presented before the Norwegian Supreme Court. A review of this landmark case can be found in a dedicated article [here](#). Following [the DNB/Sbanken case](#) from 2022, the Schibsted/Nettbil case became the second merger case in the last two years to overturn the Norwegian Competition Authority's ("NCA") decision, allowing the implementation of the acquisition. These merger cases, along with the Competition Appeals Tribunal's ("CAT") overturning of the NCA's decision in the [Bokbasen antitrust case](#), have raised questions about whether the NCA's application of the Competition Act has been excessively stringent.
- The NCA continues to actively enforce cooperation cases, with a particular focus on information exchange and non-traditional cartel cases. Several of its cases have, for instance, concerned publicly known cooperations between undertakings. Furthermore, the NCA has demonstrated its commitment to enforcing merger cases that fall below turnover thresholds.
- Private enforcement seems to be on the rise in Norway, although not many plaintiffs have achieved success thus far. In a damage claim arising from the [Commission's 2016 Trucks cartel](#), the plaintiff failed to establish any financial loss caused by the collusion. The Oslo District Court therefore [declined](#) their claim for compensation. The case has been appealed and is expected to be heard in the Court of Appeal in the autumn of 2024. Moreover, in a case arising from illegal collusion in the alarm market, the Supreme Court [rejected](#) a compensation claim from a customer association funded by a litigation funding firm. The Supreme Court did not render a decision on the substantive claim itself but examined whether the procedural rules permitted external financing of an opt-out lawsuit.
- The Norwegian legislators have been active in 2023, introducing a new [Act on Books](#), implementing measures within the grocery market, expanding the NCA's competence to file appeals and proposing legislative changes aimed at introducing a market investigation tool and various administrative sanctions for violations of the Competition Act.

## **Illegal cooperation (Section 10 of the Norwegian Competition Act / Article 53 EEA / Article 101 TFEU)**

### *CAT's final decision in the Bokbasen case*

In 2022 fines of NOK 545 million (approx. EUR 46 million) were issued by the NCA to some of the largest book publishing companies in Norway. The case concerned an online book database accessible to both bookshops and publishers, facilitating access to information about publications from other publishers. The NCA concluded that the publishers had shared competitively sensitive information through a subscription service offering publishers full access to the book database. According to the NCA, this information exchange constituted a restriction of competition 'by object'.

In its [decision](#) on 23 November 2023, the CAT unanimously overturned NCA's decision, providing complete vindication for the publishers and Bokbasen. This is the first time that NCA's decision to impose fines for violation of Section 10 of the Competition Act (art. 101 TFEU) has been overturned on appeal. CAT's decision provides important clarifications on when information exchange between competitors constitutes a restriction of competition 'by object'. The case has now reached its final conclusion as the decision cannot be appealed by the NCA.

### *The NCA's investigation in the grocery sector continues*

Both legislators (see "Regulatory and policy developments" below) and the NCA have maintained a robust focus on the grocery sector. In addition to a thorough merger control, the NCA holds a vigilant watch over the market to detect and address instances of illegal cooperation.

In 2018, the NCA initiated an [investigation](#) into the three largest grocery chains in Norway for engaging in illegal information exchange. This involved an agreement that allowed representatives from other chains to access their respective grocery shops in order to collect information about their publicly displayed retail prices. In late 2020, the NCA issued a statement of objections to all three undertakings, including preliminary fines which amounted to approximately NOK 21 billion. The fines imposed in this case surpass the highest amount ever levied by the NCA. While the NCA's final decision has been postponed and is expected in 2024, the parties involved have already publicly indicated that they are prepared to challenge any adverse decision.

## **Prohibition of abuse of dominance (Section 11 of the Norwegian Competition Act / Article 54 EEA / Article 102 TFEU)**

The NCA continues its [investigation](#) into a pension company for abuse of dominance, which commenced in 2022. No further information is currently available regarding the progress or outcome of this case.

## Merger control

### *Schibsted / Nettbil*

In 2019, the Norwegian media group Schibsted acquired the majority stake in the start-up company Nettbil. Schibsted is the owner of Finn.no, which is the largest online marketplace in Norway and advertises i.a. used cars. Nettbil offers online sales and advertising services for buying and selling used cars. The transaction was not notifiable due to Nettbil's limited turnover but the NCA called the transaction in for review post-closing.

The NCA **prohibited** the acquisition in 2020, which the Competition Appeal Tribunal subsequently **upheld** in 2021. Schibsted appealed the decision to the Court of Appeal, which **annulled** the NCA's decision. The court dissented with the NCA, both on the question of market definition and in its substantial analysis of the competition law concerns. In 2023, the case became the very first case tried before the Norwegian Supreme Court. The Supreme Court **concluded** that Finn.no and Nettbil indeed did not operate in the same product market and ruled in favour of the merging parties.

For a more comprehensive insight into the Schibsted / Nettbil case, see our previous piece: [The Norwegian Competition Authority's Prohibition Decision in a Below Threshold Transaction in the Digital Sector \(Schibsted/Nettbil\) Quashed by the Supreme Court](#).

### *Merger cases below the turnover threshold*

Contrary to most other European countries, the NCA has the authority to mandate merger notifications for concentrations that do not meet the national turnover thresholds. Such an order may not be issued later than three months after the final agreement is entered or control is obtained, whichever comes first. In 2023, a single transaction was prohibited based on such a mandated notification.

The transaction involved the acquisition of Betongvarer by ØB Group, both of which were active in the ready-mixed concrete market. The case highlights the NCA's focus on small, local markets. The target, Betongvarer, was well below the turnover threshold and the geographic market was limited to just one small peninsula on the west coast of Norway. ØB Group's owner was subject to the obligation to inform the NCA about prospected mergers, which resulted in the NCA calling the parties to submit a notification after closing, and eventually **prohibited** the transaction (case V2023-3).

Moreover, the NCA has tended to actively join referral requests from EU Member States to the European Commission pursuant to EUMR Article 22. The latest referral case is the proposed acquisition of [Nasdaq Power by EEX](#).

## Regulatory and policy developments

*Public consultation on the implementation of a market investigation tool and administrative sanctions for violations of the Competition Act*

The Ministry of Trade, Industry and Fisheries has proposed to extend the NCA's investigative powers. The proposal includes granting the NCA authority to conduct market investigations akin to that of the CMA in the UK. The proposal has arisen in response to challenges observed in both the grocery and digital markets. The tool is, however, proposed to apply to all sectors.

Also, the sanctions in the Competition Act are under review. A [legal report](#) conducted at the request of the Ministry of Trade, Industry and Fisheries proposes to grant the NCA the authority to impose infringement fines and management disqualification for individuals involved in violations of competition rules lasting up to five years. The proposed changes are intended to enhance the effectiveness of sanctions and raise the likelihood of holding individuals who play a central role in the offense accountable.

The deadline for the [public hearing](#) on the proposed changes to the Competition Act was 30 June 2023.

### *Measures within the grocery market*

The Parliament has requested the Government to present proposals of new regulations aimed at improving the competitive situation in the Norwegian grocery market:

- A [prohibition](#) of non-development clauses in real estate contracts came into effect on 1 January 2024. The prohibition includes clauses prohibiting owners of land in areas surrounding grocery shops from developing the land with the view of establishing competing grocery shops. The regulation is a response to the concern that grocery shops may prevent existing or potential competition from operating grocery businesses on properties they sell or lease, which, in turn, restricts access to premises and makes it challenging for competing companies to establish or extend their business. With the same objective, currently under review, is a proposal to also prohibit exclusivity clauses in rental agreements within the grocery sector.
- The Government has proposed a regulation that prohibits unreasonable differences in purchase prices (unreasonable price discrimination) in the value chain for food and groceries. The concern of the authorities is that the biggest market incumbents have negotiated lower prices at the wholesale level which make it harder for new market entrants and smaller competitors to compete.

### *The new Book Act coming into force*

On 1 January 2024 the [Book Act](#) came into effect, replacing the former [Regulation](#) on the exemption from the Competition Act Section 10 for cooperation in the sale of books. The law is meant to facilitate the creation of diverse literature in the Norwegian language, Sami, as well as the national minority languages. One of the key provisions in the law is the introduction of a mandatory fixed price for twelve months for each publication format published by the individual book.

### *Procedural Changes in the Competition Act*

Effective as of 1 July 2023, the NCA has been given the competence to file appeals for cases tried before the Competition Appeals Board, with the exemption of appeals in merger control cases. This means that it is no longer only the companies that can bring legal action against the Competition Appeals Board's decision. Furthermore, in order to contribute to more effective enforcement of the Competition Act, a legal basis for claiming interest on infringement fees came into effect 1 January 2023.

## **Private enforcement of competition law**

### *The Supreme Court decision on third-party financing for opt-out lawsuit*

In June 2023, we witnessed an important legal clarification in Norwegian procedural legislation impacting customers' access to pursue compensation claims. The Supreme Court **concluded** that the rules for class action in the Norwegian legislation do not permit the costs of external financing funding in opt-out lawsuits to be borne by the group members through a reduction in the potential awarded compensation.

The case was prompted by the NCA's infringement decision in 2020 against the top two players in the home alarm market for market sharing leading to customers paying overprice for their products (case [V2020-32](#) and case [V2019-18](#)). An alarm customer association wanted to claim compensation on behalf of the affected customers but required financial support to proceed as the individual customers were not able to foot the bill for such proceedings. The international litigation funding firm, Therium, requested to finance the lawsuit on behalf of the consumers, with the condition of receiving a payout three times the amount invested if compensation was granted.

The Supreme Court stated that the decision to introduce such access if considered desirable, must be implemented by the legislators. The case raised a number of complex questions, such as the extent to which various arrangements of external investments with the objective of financial profit should be regulated closer in the procedural legislation. We believe that there is a reasonable likelihood of witnessing a revision of the procedural framework in the future.

### *The Oslo District Court decision in the recycling case*

In the autumn of 2023, the Oslo District Court heard a case regarding the abuse of a dominant position in the waste market pursuant to Section 11 of the Competition Act (art. 102 TEUV). The defendant, who operated a waste sorting/recycling facility, was accused of abusing its dominant position by refusing to accept glass and metal packaging waste from the plaintiff at its facility.

In assessing the case, the court referred to the essential facility doctrine, which originated from [the Bronner case C-7/97](#). The Oslo District Court did not find it sufficiently demonstrated that access to the facility was an indispensable condition for competing in the relevant market or that the refusal led to the elimination of competition in the relevant market. Moreover, the Oslo District Court determined that there were no physical, geographical, or regulatory barriers preventing the plaintiff from duplicating the facility. The court, therefore, concluded that the defendant's refusal to accept waste from the plaintiff did not amount to an abuse of its dominant position in the waste market.

The case is not yet legally binding as the appeal deadline has not expired at the time of writing. The deadline for the appeal is set to expire in January.

### *The Oslo District Court's decision on Posten Norge's claim for damages*

On 28 February 2023, the Oslo District Court rendered its decision on a case regarding a claim for damages by Posten Norge, a customer of the manufacturers that were parties to the so-called [Trucks cartel](#). The basis for the claim was the 2016 settlement between the truck manufacturers and the EU Commission in which the former acknowledged to have committed a 'by object' infringement of article 101 TFEU.

The Oslo District Court [found](#) that there had been intentional violations of TFEU Article 101 and of the EEA Agreement Article 53, and that this constituted a basis for liability. As the [damages directive \(2014/104/EU\)](#) is not yet implemented into Norwegian law, the plaintiff had to prove that the illegal cooperation caused them actual economic loss. Since there was a lack of supporting empirical econometric analysis indicating that the collusion led to Posten Norge paying inflated prices for the truck services, the court found that no economic loss caused by the collusion had been established. Consequently, the conditions necessary for awarding compensation to the plaintiffs in relation to the illegal price collusion were not met.

In response to the ruling, Posten Norge has expressed its discontent and taken the step of filing an appeal. The case is anticipated to be heard in the Court of Appeal in the autumn of 2024.

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*\*Note that Advokatfirmaet Thommessen has acted as a legal advisor in several of the cases discussed in this blog post.*

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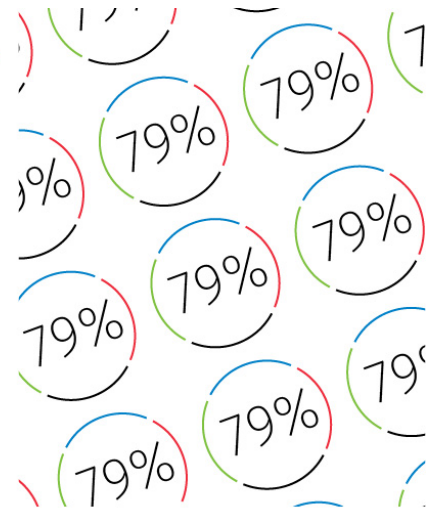
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