Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2024 – Norway

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Introduction and summary

The year 2024 brought us a lot of developments in Norwegian competition law, including the largest fine ever imposed by the Norwegian Competition Authority (NCA) for violations of competition law, the proposal of a new market investigation tool that will grant the NCA extensive powers to tackle competition challenges, alongside a continued rise in private enforcement of competition law. While Norwegian competition law materially mirrors EU regulations through the EEA Agreement, this blog post provides an overview of the country-specific developments in Norway for the year 2024.

The main developments can be summarized as follows:

- The NCA has reached a final decision in the price hunting case, imposing the largest fine ever in Norway on the three largest grocery chains for cooperating on the use of price hunters to check prices in competitors' stores. Earlier in 2024, the NCA decided to close the part of the case that related to a possible restriction of competition by object. Thus, the NCA fined the grocery chains based on the cooperation having an restrictive *effect* on competition.
- The Norwegian legislator are in the process of granting the NCA a new market investigation tool similar to several other European countries and the Competition and Markets Authority (CMA)'s tool in the UK.
- The NCA has only initiated one investigation over the last two years, but private enforcement is on the rise, reflecting a broader international trend that has been developing over the past few years. Notably, the Court of Appeal recently heard a damages claim stemming from the Commission's 2016 Trucks cartel, after the Norwegian District Court's decision of rejecting Posten's claims for compensation.
- The EFTA Court has issued an advisory opinion in a case related to alleged abuse of dominance, which notably facilitates easier access to evidence containing trade secrets in the private enforcement of competition law.
- As for mergers, the NCA prohibited another merger and required notification for a below-threshold merger. This reflects the NCA's historical strict approach to merger control.

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

The NCA Imposes Record-High Fines on Norwegian Grocery Chains

In August 2024, the Norwegian Competition Authority imposed its largest fines to date, totalling NOK 4.9 billion (approximately €420 million), on the country's three largest grocery chains – NorgesGruppen, Coop, and REMA 1000 – for having cooperated in a way that in the NCA's view increased transparency in the grocery market. The chains had in 2011 agreed to allow each other's so-called price hunters to access their respective grocery stores during opening hours to collect information about their publicly displayed retail prices. According to the NCA, this practice increased price transparency among the chains without benefiting consumers, concluding that the cooperation lead to impeding incentives to decrease prices, and thereby harming competition. This penalty surpassed the previous record set in 2018, when Telenor was fined NOK 788 million for abusing its dominant position in the mobile market.

The size of the fines in the NCA's final decision is less than a quarter of the size of the preliminary fines issued in the Statement of Objection in December 2020, which amounted to approximately NOK 21 billion (approximately €1.8 billion). At that time, the NCA's preliminary working hypothesis was that the practice amounted to an restriction by object. In its final decision, however, the NCA concludes on anti-competitive effect, which accounts for the significantly reduced fine. This shift may potentially be linked to the Competition Appeals Tribunal (CAT)'s reversal of the NCA's decision in the Bokbasen case in late 2023, where the NCA's "by object" decision was quashed.

The decision mark the first ever decision on anti-competitive effect from the NCA and concludes a six-year-long investigation. However, all three grocery chains have denied any wrongdoing and have announced their intention to appeal, suggesting that the NCA's decision is merely a temporary milestone in a potentially yearlong ongoing legal battle. The grocery chains can appeal the case to the Competition Appeals Tribunal within six months.

The NCA Closes Another Investigation Relating to Suspicion of Exchange of Competitively Sensitive Information

The NCA has since 2018 conducted several investigations with suspicion of illegal exchange of competitively sensitive information, including in industries such as grocery, fuel, construction services, publishing, moving services, waste management, shipping, trade association and finally, in 2021, the pharmacy sector. In June 2024, the NCA concluded that it had found no grounds to continue and closed the investigation, marking it as one of five investigations with suspicion of exchange of competitively sensitive information where the NCA has not found sufficient ground to continue. The ongoing investigation of the market for moving services still remain pending a final decision. The NCA has, however, underlined that it will continue to monitor the Norwegian pharmacy sector, which it views as highly concentrated and provides essential goods to society.

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

Procedural Issues Related to Attorney-Client Privilege in an Ongoing Investigation

The NCA continues its investigation into a pension company (KLP) for abuse of dominance, which commenced in 2022. No further information is currently available regarding the outcome of this case. However, procedural issues have recently arose during the investigation, more specifically related to the scope of attorney-client privilege for in-house counsel. In enforcing EU/EEA competition rules, the Commission and the EFTA Surveillance Authority (ESA) have the authority to seize a company's communications with its in-house lawyers. Several European countries have similar provisions in their national legal systems. However, under Norwegian law, the prohibition on seizure extends to both external and in-house lawyers.

In March, the Hordaland District Court confirmed that the seizure prohibition under Norwegian law extends to in-house lawyers, even when the NCA is enforcing EEA competition rules. The court determined that this prohibition only has a minimal impact on the NCA's ability to enforce EEA competition rules effectively, and therefore does not violate Regulation 1/2003 Article 35 no. 1. Furthermore, the court found that it is consistent with EU principles of non-discrimination and effectiveness.

The Competition Authority has appealed the ruling and requested that the case be referred to the EFTA Court for an advisory opinion. Recently, the Gulating Court of Appeal determined that there are no grounds to dismiss the appeal; however, the timeline for when the court will hear the case remains uncertain.

The NCA Waives Foodora's Behavioural Remedies

In January 2022, the NCA imposed behavioural remedies on Foodora, a food ordering platform delivering on behalf of restaurants and stores to consumers. Foodora had entered into exclusivity agreements with restaurants which in 2021 lead the NCA to investigate whether Foodora had abused its potential dominant position. Foodora suggested that the NCA should end its investigation, on the condition that Foodora amends its current agreements and does not enter into agreements with restaurants containing exclusivity provisions or other forms of exclusionary practices, for example charging a higher price from restaurants as a result of them also choosing to cooperate with other platform companies. The NCA informed on 10 December 2024 that the NCA considers the competition on the food ordering platform market to have improved significantly, more specifically due to the rise of the competitor Wolt and some smaller players, and has therefore decided to waive Foodora's restrictions.

Merger control

The NCA Concludes Two Phase II Investigations, Approving One Acquisition While Prohibiting the Other

In July 2023, Norwegian Air Shuttle ASA announced its intention to acquire Widerøes Flyveselskap AS. Norwegian is one of Europe's largest low-cost carriers, while Widerøe is known for connecting Norway's small regional airports. In September 2023, the NCA initiated a Phase II investigation, and later that year the NCA informed that it intended to prohibit the acquisition.

However, after reviewing the parties' response, the NCA concluded that there were insufficient grounds to prohibit the acquisition. Consequently, the NCA allowed the acquisition in December 2023, following an official decision of approval published in January 2024. This approval represents one of six phase II investigations since 2020 where the NCA subsequently concludes on insufficient grounds to intervene, including Sport 1's acquisition of Gresvig Retail Group, Axess Logistics' acquisition of Auto Transport Service, SKion Water International's acquisition of Enwa, Nordea Bank's acquisition of Danske Bank and TGS' acquisition of PGS. Thus, merging parties should note that the opening of a phase II does not represent a deal-breaker.

In May this year, Norva24 Vest notified the acquisition of Vitek Miljø to the NCA. Both parties offer emptying and pressure washing services, as well as related services, and are the two largest players in this market in former Hordaland County. In September this year, the NCA intervened and prohibited the acquisition. The NCA emphasized that the other players in the market are less close competitors to the parties, that there are high barriers to entry in the market, and that the concentration in the market would increase significantly as a result of the acquisition. The NCA's decision is final, but the companies have already appealed the decision.

The NCA Requires Notification of a Below-Threshold Merger

The NCA has the authority to require merger notifications for concentrations that do not meet national turnover thresholds ("call-in option"). Such an order must be issued within three months after a final agreement has been concluded or control has been acquired, whichever occurs first. In 2024, only one transaction was subject to such mandated notification.

The proposed transaction involves Infomedia A/S and Retriever Aktiebolag, two leading companies in media monitoring and analysis in the Nordic region, creating a new jointly owned holding company. Both companies have Norwegian subsidiaries that, in 2023, reported a combined turnover of approximately NOK 210 million, well below the mandatory notification threshold.

The NCA has determined that the establishment of a joint venture is likely to eliminate competitive pressure between these two players in a market already characterized by high concentration. As a result, the NCA's preliminary view is that the concentration could lead to both horizontal and vertical anti-competitive effects, prompting the imposition of a notification requirement for the transaction. The notification has, however, not yet been submitted, so it remains to be seen if the Parties uphold the transaction.

It should also be mentioned that 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 was the proposed acquisition of Figma by Adobe.

Regulatory and policy developments

Proposal of a Norwegian Market Investigation Tool

The Norwegian Parliament has decided to implement a new market investigation tool aimed at enhancing the powers of the NCA to address competition challenges in various markets, even in

the absence of specific violations of competition law. This tool will allow the NCA to impose remedies in markets identified as having conditions that significantly restrict competition, such as high concentration levels or barriers to entry. The new tool aligns with similar developments in other European countries, where authorities have found the need for additional mechanisms to tackle structural competition issues.

As the legislative process unfolds, businesses operating in Norway should prepare for potential changes in the competitive landscape. Although the proposal has sparked significant industry pushback, primarily due to concerns over legal certainty, procedural safeguards, and the necessity of such a tool, the Parliament decided on 16 December 2024 to adopt the legislative proposal.

Thommessen has published a detailed article on the new market investigation tool, available in Norwegian here.

New Committee Established to Modernize the Competition Act

This year marks the 20th anniversary of the enactment of the Norwegian Competition Act. Given that it has been over a decade since the Act was last revised, a new committee has been established to undertake a thorough review. The committee aim to simplify and modernize the law in response to developments in case law, EU/EEA regulations, and broader societal changes.

The committee will specifically evaluate the law's objectives within the context of evolving competition policy and determine whether amendments are needed to address societal concerns related to merger control. Additionally, it will assess the effectiveness of the CAT and consider whether changes to the appeals process are necessary. The committee will also review the NCA's procedural rules, regulatory mandate, and sanctions. It is expected to submit its findings to the Ministry of Trade, Industry and Fisheries by 1 December 2025.

New Electronic Communications Act

In November 2024, the Norwegian Parliament adopted a new Electronic Communications Act, to replace the current Act from 2003. The Act implements new EU directives and regulations, including the Electronic Communications Directive (EU) 2018/1972, the BEREC Regulation (EU) 2018/1971, and the Accessibility Directive (EU) 2019/882. Its primary goal is to balance competition with fair access to services.

From a competition law perspective, it is important to highlight that the Act imposes obligations on providers of electronic communications networks and services that are designated as having a "strong market position". This designation applies when a provider can operate largely independently of competitors, customers, and consumers, either unilaterally or collectively – essentially, when they are considered "dominant" under EU competition law.

For instance, providers may be required to grant competitors access to their networks if the current infrastructure access is inadequate to promote sustainable competition. The Act also allows for the imposition of broadband delivery obligations, and the regulator can impose specific obligations, such as the shift from copper to fiber during the transition from older to newer infrastructure.

Overall, the new Act has significant implications for large providers of electronic communications networks and services. This aligns with the broader trend of legislation that impose codified responsibilities on large market players, such as the Digital Markets Act (DMA).

Private enforcement of competition law

The Court of Appeal's Hearing of Posten Norge's Claim for Damages

This autumn, the Borgarting Court of Appeal reviewed the judgment of the Oslo District Court in a case concerning a damages claim brought by Posten Norge (the Norwegian postal service, owned by the Norwegian government), a customer of the manufacturers involved in the so-called EU Trucks case.

The Oslo District Court based its judgment on the Settlement Decision from the European Commission (AT.39824), which concluded that Article 101 TFEU and Article 53 EEA had been breached, as the basis for liability. Due to the fact that the Damages Directive (2014/104/EU) has not yet been implemented into Norwegian law, there is no presumption of harm in follow-on cases in Norway. Therefore, in accordance with the principles of Norwegian law, the Plaintiff had the burden of proof and was required to demonstrate actual economic loss and a causal link between the infringement and the economic loss – a burden that the District Court found Posten Norge had not met. Consequently, the truck manufacturers were acquitted.

The Court of Appeal was composed of three legal judges and two expert judges, the latter two possessing economic expertise. This was in contrast to the District Court, where there was only one judge. A total of three weeks of the three-month-long appeal hearing was devoted to the presentation of evidence regarding econometric analyses, during which a number of expert witnesses presented their reports and conclusions. The judgment from the Court of Appeal is expected in March 2025.

The EFTA Court Issues Advisory Opinion in Låssenteret / Assa Abloy

On 9 August 2024, the EFTA Court issued an advisory opinion in case E-11/23, concerning the interpretation of Article 54 EEA (Article 102 TFEU) and the Directive (EU) 2016/943 on the protection of trade secrets. The parties are Låssenteret AS and Assa Abloy Opening Solutions Norway, where Låssenteret accused Assa Abloy of abusing its dominant position in the market for mechanical locking systems. Låssenteret made several information requests to Assa Abloy in order to prove that it abused its position; however, because those documents also contained trade secrets, the district court referred several questions to the EFTA Court.

In its opinion, the EFTA Court emphasizes that it is up to national courts to establish procedural methods for the presentation of evidence, but that a balancing of protected interests – such as trade secrets on one hand and competition objectives on the other – must be conducted in each individual case. In instances of alleged abuse of a dominant position, the court must assess the interests of the parties before imposing the obligation to present evidence that constitutes trade secrets. Furthermore, the ruling confirms that national courts can establish confidentiality regimes, similar to a "clean team", and that the Trade Secrets Directive does not prevent this.

While the opinion has been interpreted in various ways, it notably facilitates easier access to evidence in the private enforcement of competition law, strengthening the rights of parties facing unlawful competitive practices. Furthermore, it is important to highlight that the EFTA Court places a greater emphasis on the principle of effectiveness than the Norwegian Supreme Court did in the 2023 alarm antitrust case (case V2020?32 and case V2019-18).

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