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Antitrust Litigation

Norway: Trends & Developments

Arntzen de Besche Advokatfirma AS

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Trends and Developments

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Arntzen de Besche Advokatfirma AS has roots that go back to 1870 and is among the leading law firms in Norway, with offices in Oslo, Trondheim and Stavanger. It is a full-service legal practice that provides advice mainly to large Norwegian and international corporations, as well as organisations in the public sectors. Today, 180 people work at the firm, approximately 130 of whom are lawyers, and it is recognised as a strong EU/EEA and competition law practice group. The competition group also assists with public procurement, state aid and EU/EEA regulatory matters.

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Overview

Antitrust litigation in Norway has until recently mainly concerned challenges to decisions adopted by the Norwegian Competition Authority (NCA) and the appellate body (previously the Ministry of Trade, now the Norwegian Competition Tribunal). A very limited number of 'pure' competition damages cases have been tried by Norwegian courts and no cartel damages claim has resulted in judgment yet. There are, however, examples of out-of-court settlements.

We expect an increase in private actions (injunctive relief or damages) over the next couple of years. There are several reasons for this. Firstly, private actions are in principle available in any type of antitrust matter. Claims can be made against members of cartels and against companies that abuse a dominant position, as well as against any party to a potentially anticompetitive agreement. Norwegian and EEA competition laws prohibiting agreements and concerted practices restrictive of competition (Competition Act, Section 10 and EEA Article 53) and abuse of dominance (Competition Act, Section 11 and EEA Article 54) generally mirror the EU competition rules, TFEU Article 101 and 102, respectively. Secondly, in the autumn of 2019, the Norwegian Supreme Court shall decide whether Article 6 (1) of the Lugano Convention is applicable to actions for infringement of competition law rules against a company that is not an addressee of the European Commission decision, and further, whether foreign plaintiffs can apply this provision against a company that is not an addressee of the European Commission decision. The Lugano Convention is modelled on the Brussels Convention of 1968 and Council Regulation (EC) 44/2001 respectively. If the Supreme Court rules that Norwegian courts have jurisdiction, this is likely to lead to several damages cases pertaining to the truck cartel case and other cartel damages actions. Thirdly, the introduction and maturity of class action rules and the expected adoption of Directive 2014/104/EU (Damages Directive) will likely increase enforcement.

At the same time, we expect an increase in legal actions challenging NCA decisions, given the intensified enforcement and increase in the level of fines evidenced over the last couple of years.

This trends and developments section shall therefore focus on the drivers of the expected increase in antitrust litigation. We comment on public antitrust litigation and its intensified enforcement, and we also comment on strategic assessment, from a 'defender' perspective, as to whether to settle with the NCA or challenge the decision. We further comment on private antitrust litigation and the jurisdictional issues to be decided shortly by the Norwegian Supreme Court, as well as Norwegian class action rules. Lastly, we look at the strategic question, from a plaintiff's perspective, as to when would be the right time to bring a damages action.

Public Antitrust Litigation

Intensified enforcement of competition rules

It might be argued that the seemingly increased enforcement of competition rules by the NCA is attributable to the particularities of the cases brought before, or initiated by, the NCA. In the authors' view, however, the activities of the NCA in recent years indicate that it is taking a more offensive approach to its role as competition watchdog in Norway. It is telling that we have recently seen an increase in the level of fines – both as concerns procedural infringements (a leading Norwegian grocery chain recently received a statement of objection indicating a fine of EUR2.5 million for breach of a notification obligation concerning acquisition of store sites) and as concerns substantive infringements.

Firstly, in a judgment of 22 June 2017, the Norwegian Supreme Court dismissed an appeal from Ski and Follo taxi companies relating to an NCA decision concerning joint bidding in a tender procedure for patient transport services. In its decision, the Supreme Court concluded that the two taxi competitors were competitors, since they had, in principle, a realistic possibility to bid in the tender and had therefore restricted competition by object. The case is part of a trend of increased enforcement against joint bidding – and a strict approach to joint bidding as 'by object' restriction of competition.

Secondly, the Norwegian Competition Tribunal (NCT) recently upheld a fine of NOK788 million (approximately EUR79 million) by the NCA against Telenor Norge. The basis for the fine was an alleged abuse of Telenor's dominant position in the Norwegian wholesale market for mobile communication services in the period 2010 to 2014 in violation of Section 11 of the Norwegian Competition Act. In essence, the NCA (and the NCT) held that the price structure in the wholesale roaming agreement between Telenor and Network Norway in the relevant period reduced Network Norway's incentive to roll out a third network by making it more profitable for it to roam in Telenor's network. This was, according to the NCA, part of Telenor's strategy to delay the roll-out of the third mobile network. The fine against Telenor is the highest fine ever imposed under the Norwegian Competition Act. Telenor has until September 2019 to decide whether to appeal the case to the Gulating Appellate Court (located in Bergen, Norway). An appeal appears likely.

Thirdly, on 17 June 2019 the NCA issued a statement of objections to Verisure and Sector Alarm, notifying the parties of its preliminary intention to impose fines of NOK784 million (approximately EUR78.5 million) on Verisure and NOK424.8 million (approximately EUR43 million) on Sector Alarm for collusion in the Norwegian market for residential alarm services (that is, alarm services to private homes). The infringement concerns collusion in that the two competitors allegedly agreed not to sell residential alarm services to each other's customers via door-to-door sales, and to share cus-

tomers in the market for residential alarm services. Sector Alarm has accepted the fine. Verisure had until 2 September 2019 to respond to the statement of objections.

Fourthly, in June 2018 the Oslo District Court upheld the NCA's decision that the publishing companies Gyldendal, Cappelen Damm and Aschehoug infringed the Competition Act when they exchanged information and boycotted the distributor Interpress, thereby restricting competition in the mass market for books, consisting of retail outlets for books that are not traditional book stores, such as kiosks, grocery stores and petrol stations. The NCA initially issued fines totalling NOK32 million – ranging from NOK4.56 million (Vigmostad & Bjørke) to NOK9.66 million (Aschehoug). In the appeal case brought by three of the four publishing houses (except Vigmostad & Bjørke), the court reduced the fines of Gyldendal and Cappelen Damm to NOK5 million each (approximately EUR500,000), down from NOK9.1 million and NOK7.88 million respectively, and the fine of Aschehoug to NOK3 million (approximately EUR300,000), down from NOK9.7 million. The NCA conducted a new dawn raid on the said publishers in January 2018 in a case concerning a possible illegal exchange of sensitive information related to the joint venture Bokbasen AS. The joint venture is a platform for e-books in Norway. The case is likely to lead to litigation.

From a defendant's perspective: Settle or challenge? Strategic implications

When assessing whether to settle or challenge a decision by the NCA or any other competition authority in competition cases, the defendant must take several key strategic considerations into account. In this section, we highlight the pros and cons of engaging in settlement discussions as opposed to challenging the decision by the NCA or any other competition authority.

Important considerations in assessing whether or not to accept a settlement are the allegations and charges put forward and the strength of the infringement case (ie, risk of a fine and possible level of fine), parallel investigations in other jurisdictions, damages exposure, reputational damage and legal defence costs, timing and cash flow effects. If the presented evidence is probably insufficient to convince a court of a competition infringement, the defendant should not accept a settlement. If an invitation to explore settlement could give the defendant insight into key evidence, this could help the defendant assess whether settlement is likely to be the preferable solution.

Pros of a settlement

Fine containment is the key advantage of settlements. Settlement discussions allow negotiation regarding fine calculation and the scope of the infringement, which could possibly lead to a substantial discount. A settlement agreement would effectively limit the boundaries for damages claimants.

Another essential advantage of a settlement decision is that it is less compromising. Settlement decisions are shorter and contain significantly fewer revealing details than a regular infringement decision would. This allows some degree of containment of facts in the public domain concerning the alleged infringement, which in turn can be a significant factor for shareholders.

Closely correlated with the above strategy to prevent disclosure of compromising details to the public, is the consideration of reputational damage. Admission of wrongdoing may be better tolerated by the public than persistently claiming innocence while being fined.

A settlement procedure is often considerably shorter and thus cheaper. This can lead to a speedy end-result.

Cons of a settlement

The main disadvantage with settlements is that there will be a monetary fine. The defendant must admit guilt, agree to a fine, and waive most of its procedural rights, whereas the chances of a successful appeal are in practice non-existent.

Another strategic implication that the defendant must take into account is if the admitted infringement and settlement decision includes trade to and from all jurisdictions. Authorities conducting parallel investigations can use the admission of guilt to leverage the defendant into submission in their jurisdiction. The presumption of harm in follow-on damages claims from any cartel decision will kick in faster and is unlikely to be subject to appeal. Damages claimants will refer to the admission of guilt in the settlement decision.

There is also an inherent risk that in 'hybrid' cases, ie, cases where some but not all companies involved settle with the competition authority, damages claims are more likely to be directed towards the settling companies. This has been the situation in the ongoing truck cartel litigation in Norway. In these cases, all parties risk being held jointly and severally liable.

A settlement can lead to disadvantages regarding cash flow with regards to the timing of the decision and speeding up of other processes.

In summary, for a settlement solution to be attractive, the settlement on offer should imply a monetary fine substantially lower than the possible worst-case scenario following a standard procedure. The competition authorities, at least the European Commission, are known to be more flexible in settlement discussion on other aspects relevant to the fine calculation, such as value of sales and the duration of the infringement, but it ultimately depends on whether the presented evidence is unconvincing or has some merit.

Private Antitrust Litigation

Jurisdiction

In July 2017, several Norwegian and foreign companies in the Norwegian Royal Mail (Posten) group brought a follow-on claim based on the European Commission decision in AT 39824 (Trucks) against several foreign defendants (truck manufacturers) as well as Volvo Norge AS (Volvo Norge), subsidiary of one of the other defendants, Volvo Lastvagnar AB. All of the defendants, except for Volvo Norge, are addressees of the Trucks decision. The defendants challenged the jurisdiction of the Norwegian courts, but the Oslo City Court decided on 1 July 2018 to advance the proceedings. On appeal, Borgarting Appellate Court decided on 4 December 2018 that only the case brought by the Norwegian plaintiffs was to be heard by the Norwegian courts. Both the decision to admit the case concerning the Norwegian plaintiffs, and the decision to reject the case concerning the foreign plaintiffs, have been appealed to the Norwegian Supreme Court. The oral hearing is scheduled for September 2019.

The core of the case is whether a claim for damages for violating the competition law rules against the foreign defendants, included in an infringement decision by the European Commission, can be cumulated pursuant to Article 6 (1) with an alleged claim for damages for the same infringement of the competition law rules against an 'anchor defendant' based in Norway (subsidiary of one of the foreign plaintiffs) that is not included in the infringement decision. This question has no precedents in Norway or in the CJEU.

Pursuant to Article 6 (1) of the Lugano Convention, a plaintiff may, under certain circumstances, combine actions against several defendants with jurisdiction in different countries before the courts of the country of origin of one of the defendants (henceforth referred to as the 'anchor defendant'). The provision states that:

"A person domiciled in a state bound by this Convention may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The appellants basically argue that jurisdiction in Norway cannot be based on Article 6 (1) of the Lugano Convention since the claim against Volvo Norge is not based on the same factual and legal situation as the claim against the other defendants. The appellants contend that there are significant factual and legal differences between the claims against Volvo Norge and the other defendants respectively. In effect, there is no risk of 'irreconcilable judgments' if the claims are heard separately. The fact that Volvo Norge is not an addressee of the European Commission infringement decision, nor mentioned in the decision, unlike all the other defendants, is especially important. In order to consider the claim for damages against Volvo Norge, extensive evidence and arguments are needed to decide whether there has been a violation of competition law rules and whether Volvo can be held liable. The case against Volvo Norge is, therefore, arguably, legally and factually a different case.

The respondent, Posten, argues that Volvo Norge is jointly liable with the foreign companies for the loss Posten has suffered. In particular, they hold that Volvo Norge could not have been ignorant of the long-lasting and extensive collaboration the Volvo group has had with other truck producers, and must be considered as having contributed to this, and having contributed to carrying out unlawful agreed-upon price increases. Reference is made to board representation and intra-group links. Further, and with reference to CJEU case law, Posten holds that differences in the evidence for the claims against Volvo Norge and the foreign defendants, and different legal bases, do not prevent cumulation.

The Appellate Court ruled that the claims for damages each of the Norwegian plaintiffs allege to have against Volvo Norge for violating the competition law rules were so closely connected with each of the Norwegian plaintiffs' claims against the other defendants that it would be expedient to hear them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The requirements for cumulation pursuant to Article 6 (1) were therefore in principle fulfilled.

The Appellate Court held that the fact that there was no European Commission infringement decision establishing liability for Volvo Norge did not in itself imply that the condition of the same legal and factual situation had not been fulfilled. In the authors' view, this is a crucial point of law where the Supreme Court may not agree. It might be argued that a follow-on claim (foreign defendants) is different to that of a standalone claim (Norwegian defendant).

The Appellate Court agreed with the City Court in that the difference between the evidence is not significant enough for the claims not to be connected, meaning that there is no risk of irreconcilable judgments. However, it would not be possible to cumulate cases where one defendant acknowledges liability, while another defendant disputes liability.

The Appellate Court noted that Lugano Article 6 (1) only regulates cumulation on the defendants' side, not the plaintiffs'. As long as each plaintiff has the same legal basis for its claims against the different defendants, the condition for cumulation will in any case be fulfilled for each of the plaintiffs. The claims for damages of each of the plaintiffs against Volvo Norge and the other defendants are based on joint liability for the infringement of the competition law rules. Any differences between the different plaintiffs in the legal

basis for the claims were therefore of no significance under Article 6 (1).

Turning to the second limb of the test, whether Posten had, in fact, reasonably substantiated that Volvo Norge could be jointly liable, the court concluded in the affirmative. In support of this conclusion, the court referred to a number of factual findings. Firstly, Volvo Norge is in the same group as several of the addressees. Secondly, the addressees of the European Commission infringement decision could have had board positions or other leading positions in Volvo Norge. Thirdly, and worth noting, the omission to respond to the plaintiff's request for access to the statement of objections and an overview of Volvo's board representation meant that too-strict requirements for the factual basis of the review could not be set.

The Appellate Court rejected jurisdiction for the foreign plaintiffs. The Appellate Court in particular held that the foreign plaintiffs have not alleged suffering any loss in Norway (directly or indirectly), unlike the Norwegian plaintiffs. The place where the (alleged) loss occurred is different for the Norwegian and the foreign plaintiffs, which means that different submission of evidence is required, at least as regards the size of the loss. The claims from the Norwegian and the foreign plaintiffs may also be based on different rules of law.

Class actions

The Norwegian system of civil justice was overhauled at the beginning of this century, and a new Civil Procedure Act came into force on 1 January 2008.

As part of the reform, the concept of class action was introduced in the Civil Procedure Act. The purpose was in particular to promote access to justice in cases involving multiple plaintiffs with small claims, and to obtain more efficient and effective justice in such cases. The American and, in particular, the Swedish rules served as inspiration for the specific chapter in the Civil Procedure Act devoted to class actions.

The enactment of the class action rules was subject to considerable debate in Norway. Advocates for consumer interest argued that class action would be an important instrument to ensure justice, while advocates for business interest warned against 'ill-founded blackmailing' lawsuits. However, the rules were adopted unanimously by the Norwegian parliament.

The Civil Procedure Act includes the possibility for both opt-in and opt-out class actions. Opt-in actions are actions where anyone who falls within the scope of the class, as defined by the court in its approval of the class action, is entitled to register as a member within the time limit set by the court. Opt-out actions are actions where anyone who falls within the scope of the class, as defined by the court in its approval of the class action, is automatically a member of the group (and will be bound by a subsequent ruling) unless they withdraw from the class.

According to preparatory work, the main rule for class action shall be opt-in. Which of the two procedures is most suitable for a specific class action is ultimately left to the court to decide. In order for a class action to be approved under the opt-out alternative, the claims or obligations must be of such a minor value individually that they would not justify a separate legal action and it must be assumed that the claims or obligations will not raise issues that need to be heard individually.

Class actions are heard before the ordinary courts (ie, there are no specialised courts for class actions).

Class actions may be brought either by a claimant meeting the conditions for becoming a group member, provided that the action is approved or representative, or by public bodies, provided that the action falls within their purpose and natural sphere of activity (eg, the Consumer Council).

In the early years following the introduction of the class action rules, there was some uncertainty as to whether class action would play any significant role in Norway. The development during the past years seems, however, to imply that the legal environment has matured and a number of class actions have been brought, or discussed, in cases where there may be a real benefit from applying the class action rules. Class actions have been brought in different sectors involving different areas of law (pension law, tax law, consumer law, etc). However, class actions typically involve some kind of monetary claim (ie, the class is seeking to obtain damages, repayment or similar from the defendant). To date, there are no competition class action cases in Norway, but recent NCA decisions, eg, the alarm case, may change this.

From a plaintiff's perspective: When is the right time to sue? Standalone v follow-on actions

The objective of this section is to identify the main obstacles in the system of antitrust damages claims, as well as the strategic differences in damages recovery through follow-on actions and standalone actions from a plaintiff's perspective.

While, in principle, private enforcement remains independent of public enforcement, the existence of a public decision eases the burden imposed on the plaintiff to prove the infringement. The infringement decision by the NCA or NCT is regarded as a key piece of evidence and important in establishing the evidentiary basis for the case, although it is not legally binding upon the courts in their appraisal of the merit of the claim.

An infringement ruling by a competition authority is therefore certainly helpful, but not a prerequisite for a private antitrust action in Norway.

The burden of proof rests on the claimant to substantiate a basis for liability, economic loss and causation between the harmful event and the loss. Violation of the cartel prohibition is generally regarded as sufficient basis for liability, which in turn makes it easier to establish the necessary legal basis for a claim in follow-on actions.

From a plaintiff's perspective, it is therefore advisable to wait for the finding of the authority or the outcome of criminal or public competition cases. From a strategic standpoint, follow-on cases often deal with more serious infringements, lead to greater sums of recovery, and settlement rates are higher for cases that succeed a government decision.

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Although the decisions of the European Commission and the judgments of EU courts are not binding upon Norwegian courts, the court has previously found that a pending ECJ judgment that will clarify liability in a competition follow-on claim case, gives legal basis for a stay order.

The plaintiff should also consider whether the main objective for suing the defendant is damage recovery or to end an abusive anticompetitive refusal to supply goods or services. Norwegian damages law does not provide for punitive damages. Damages are calculated on the basis of the difference between the financial position of the claimant after the infringement occurred and the hypothetical financial position the claimant would have been in if the competition law infringement had not occurred. However, the principle of natural restitution may lead to the defendant being ordered by the court to contract with the claimant and supply goods or services.