

The Handbook of Competition Enforcement Agencies

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Overview

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The primary enforcement body of the competition rules is the Norwegian Competition Authority (NCA), located in Bergen.

The NCA has the statutory power to enforce the Norwegian Competition Act of 5 March 2004 No. 12 (the Act). The NCA has the powers to enforce adherence to the prohibitions and orders of the Act; intervene against concentrations where necessary; implement measures to promote market transparency; enforce articles 53 and 54 EEA; and call attention to any restrictive effects on competition of public measures and, where appropriate, submit proposals aimed at furthering competition and facilitating market access by new competitors.

In practice, enforcing the prohibitions of the Act (and the corresponding articles 53 and 54 EEA) and merger control is the predominant responsibility of the NCA. Further, the NCA is obliged to assist the EFTA Surveillance Authority (ESA) or the EU Commission, or both, in their enforcement of the competition rules of the EEA Agreement and of the Treaty on the Functioning of the European Union (TFEU), respectively.

The Norwegian Competition Act

The substantive law of the Act regulating the conduct of undertakings is modelled upon articles 101 and 102 TFEU (formerly articles 81 and 82 EC). Thus, the Act prohibits anti-competitive agreements and the abuse of dominant position. The substantive law shall mainly be interpreted in accordance with EU competition law.

As regards the substantive review of mergers, the Act relies on the substantial lessening of competition test (SLC test); contrasting the ECMR and establishing the significant impediment of effective competition test (SIEC test). As the thresholds for mandatory notification of mergers are unintelligibly low, the NCA considers numerous merger cases each year. Any company involved in a merger or being the purchaser in an acquisition should as a starting point take for granted that there is a duty to notify. Foreign-to-foreign concentrations must also be notified if the thresholds are fulfilled. Further, the Act lays down a prohibition to implement the

merger prior to NCA approval. The NCA regularly fines companies for violating this prohibition.

The primary sanction for violating prohibitions of the Act or any decisions made by the NCA is administrative fines. The rules on the setting of administrative fines are based on the corresponding EU rules. As opposed to the EU rules, the Act further criminalises violation of the Act and NCA decisions by establishing criminal fines or imprisonment as possible sanctions. Criminal sanctions are in practice the responsibility of the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM). In practice, enforcement of criminal sanctions will be subject to cooperation between the NCA and ØKOKRIM, at least in the initial phases.

Norway also has a leniency programme, applicable to infringements committed after 1 May 2004.

In line with the situation within the EU, the Act is based on private enforcement supplementing public enforcement. Two follow-up proceedings on damages have been announced. Further, cases in which one party to a contract claims that the contract is void due to breach of competition rules are increasingly instigated before the courts.

Judicial review

The relevant administrative appeal body for NCA decisions is the Ministry of Government Administration and Reform (the Ministry). This includes, inter alia, merger decisions. Several NCA decisions prohibiting mergers were set aside by the Ministry during the first years after the implementation of the Act (1 May 2004), resulting in a higher focus on remedies by the NCA. In merger cases involving questions of principle or interests of major significance to society, there is a provision giving the government the powers to make a decision on appeal without the prior consideration of the Ministry.

NCA decisions imposing administrative fines can not be appealed to the Ministry but must be challenged before the courts. Up to now, two high-profile cases on abuse of dominant position have

been challenged before the courts. One resulted in an amicable settlement prior to the proceedings in the Court of Appeal; the other case will be heard by the Court of Appeal around Easter 2010. Additionally, annulment actions against infringement decisions by NCA concerning cartels are increasingly instigated.

Trends

In contrast to its initial focus on cases concerning the abuse of dominant position, the NCA is now increasingly focusing on fighting cartels. The NCA has implemented several measures to improve both its own investigation unit and the cooperation with ØKOKRIM. Further, the Ministry has suggested several amendments to the Act. These proposed amendments comprise first and foremost provisions relevant for prospective leniency applicants, as the Norwegian leniency programme has so far not been a success at all. The amendments are somewhat controversial in

Norway, and it is not clear whether they will be passed. If the fight against cartels is successful, we believe that more follow-up damages actions will be instigated before Norwegian courts. Further, the number of annulment actions against infringement decisions by the NCA will increase.

Public procurement

The Norwegian rules regulating public procurement is based upon corresponding EU rules. The enforcement body is the Norwegian Complaints Board for Public Procurement (KOFA), whose secretariat is administratively subordinated to the NCA.

State aid

There is no administrative body in Norway enforcing the state aid rules. Any alleged breach must be brought before the ESA, or challenged in front of the national courts in that the standstill obligation has direct effect in Norway.

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