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Norway

CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Norway.

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NORWAY CARTELS



1. What is the relevant legislative framework?

The relevant legislative framework for cartel prohibition in Norway is section 10 of the Norwegian Competition Act of 5 March 2004 (the “Competition Act”) and Article 53 of the Agreement on European Economic Area (“EEA”). These provisions mirror Article 101 of the Treaty on the Functioning of the European Union (“TFEU”), and prohibit any agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.

It follows from Norwegian case law and preparatory works that the case law of the European Court of Justice, the General Court, the European Commission, the EFTA Court and the EFTA Surveillance Authority (ESA) is of relevance when enforcing section 10 of the Competition Act. The interpretation of the Norwegian provisions will therefore correspond with EU law.

The Competition Act and ancillary regulations also provide procedural rules related to the investigation of cartel behaviour. For civil or criminal procedures, the Dispute Act and Criminal Procedure Act offers further procedural rules. Protocol 4 on the Functions and Powers of the EFTA Surveillance Authority in the field of Competition (“Protocol 4”) sets out the procedural rules for the enforcement of Article 53 of the EEA.

2. To establish an infringement, does there need to have been an effect on the market?

Cartel conduct is considered to restrict competition by object, and no effects analysis is required.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Section 5 of the Competition Act establish that the law apply to any conduct implemented or with effect within

the Kingdom of Norway. Hence, the conduct in question does not need to have taken place in Norway, nor does the undertakings involved need to have a presence in Norway.

4. Which authorities can investigate cartels?

The competent authority in relation to enforcement of the Competition Act is the Norwegian Competition Authority (“NCA”). The NCA may also investigate potential infringements of Article 53 of EEA, if the cartel may affect trade between Norway and one or more EEA states. The NCA will then apply Article 53 in parallel with section 10 of the Competition Act.

The EFTA Surveillance Authority (“ESA”) may investigate potential infringements of Article 53 EEA. If proceedings are initiated by ESA, the NCA will lose its competence to apply Article 53 for the matter in question. In practice, the NCA usually “hands over” such cases to ESA at an early stage.

Finally, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) can investigate and prosecute cartel behaviour with a view to impose criminal sanctions, but this has not happened since the Competition Act entered into force in 2004.

5. What are the key steps in a cartel investigation?

An investigation by the NCA or ESA may be initiated in different ways. It may arise from the authorities’ own analysis, an application for leniency, or from a tip.

The first step in the investigation is normally either an information request or an unannounced inspection. Everyone is obliged to provide any information requested by the NCA and the NCA is empowered to examine all forms of documentary evidence and business records in order to secure evidence.

Comparable powers are granted ESA through Protocol 4.

After initiating the case, the authorities will examine the collected evidence. They may issue additional information requests and request oral testimonies from employees or officers. The authorities may also collect evidence from third parties, e.g. customers. There are examples of the NCA conducting a second unannounced inspection. During this investigating phase, it is not uncommon for the company under investigation to request meetings with the authorities or send written submissions to present relevant facts and provide their view on the matter.

After the examination of relevant facts and evidence, the authorities will decide upon whether to proceed with the case. If the Authority proceeds towards decision, the undertaking will be provided a statement of objections and given the opportunity to provide their comments, before a final decision is issued.

6. What are the key investigative powers that are available to the relevant authorities?

Pursuant to the Competition Act section 24, the NCA is empowered to request information relevant to the potential infringement. This comprises documentary evidence as well as statements from any relevant person. The undertaking is obliged to provide the NCA all required information. Relevant exemptions from this obligation relates to self-incrimination and legal privileged documents.

Where there are reasonable grounds to suspect an infringement of the Competition Act, the NCA may also get access to properties and premises, cf. the Competition Act section 25. Such access is dependent on decision by the District Court. The NCA may confiscate or seal important evidence for closer examination. Usually, only copies will be seized. However, original documents will be seized in cases where the original in itself have a particular value as evidence.

Section V of Protocol 4 grant ESA the power to request information, take statements and to conduct inspections.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The legal privilege principle applies to both internal and external counsel under Norwegian law. However, when

the ESA investigates on the basis of EEA law, the legal privilege does not extend to communication with in-house counsel.

During an unannounced inspection, electronic material will normally be seized without separating documents protected by legal privilege. The undertaking will be given the opportunity to identify legal privileged documents at a later stage, in advance of the Authorities' access to the seized material. Physical documents which are protected by legal privilege will normally not be seized.

Any dispute regarding whether a document is legally privileged, shall be tried before a court of law, and the document or device in question will remain sealed until the matter has been resolved.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The NCA and ESA have similar leniency programmes, which also correspond to the leniency programme of the EU Commission.

To be granted full immunity by the authorities, the undertaking must be the first to submit information and evidence about a cartel which was unknown to the authorities. The evidence provided must enable a targeted inspection in connection with the alleged cartel, or the finding of an infringement in connection with the alleged cartel.

Further the company must co-operate in the proceeding to the fullest extent and terminate the cartel conduct immediately. Full immunity is not available for undertakings which have taken steps to coerce other undertakings to participate in the cartel.

The application must include the identity of the undertakings participating in the cartel and a detailed description of the infringement itself, duration of the infringement, what products and geographic area the infringement involves, as well as if other competition authorities have been contacted regarding the infringement.

An application for leniency may be issued in writing or orally to the NCA. The NCA will provide a written confirmation, with date and time of the leniency application, as well as identifying the evidence provided by the company.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

If subsequent applicants assist with the evidence that represents "significant added value", a partial leniency may be granted. A reduction of 30-50% is granted to the first applicant that fulfils this condition. The second applicant is granted a 20-30% reduction, while subsequent applicants is granted a reduction of up to 20%.

When determining the reduction to be granted, it is of relevance how early the evidence was provided, the nature and strength of the evidence and to what extent the undertaking has cooperated with the authorities.

10. Are markers available and, if so, in what circumstances?

Both the NCA and ESA may grant an undertaking a prioritised right to leniency from the time the initial application was filed, while the undertaking continue its collecting of evidence. The priority is valid only for a time period set by the authority. Also, if a company submits a leniency application in other languages than Norwegian, Swedish, Danish and English, the NCA will grant a priority, provided that a translation is provided by the deadline set by the NCA.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

The Competition Act require all leniency applicants to fully cooperate with the NCA during the whole process. All evidence and other relevant information in the company's possession shall be submitted at all times, and the company must respond to all requests from the NCA, as well as, to the extent possible, make sure their current and former employees are accessible for testimony.

Any actions hampering the investigations of the NCA may lead to the undertaking losing its right to leniency. This applies also when the undertaking considers to apply for leniency, but before the application is submitted.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former

employees and directors?

The grant of leniency only extend to administrative fines. Therefore, employees involved in cartel conduct risk criminal sanctions, even though the undertaking is granted full or partial leniency. However, in 2016 the NCA published a guidance on the use of criminal sanctions towards individuals. Pursuant to this guidance the NCA will normally not report an individual for criminal prosecution if that individual disclosed the existence of the cartel. The individual in question must fulfil corresponding criteria as an undertaking applying for leniency.

13. Is there an 'amnesty plus' programme?

There is no formal basis for "amnesty plus" in Norwegian law and we are not aware of instances where the NCA has granted additional reduction of sanctions in one case in exchange for a cartelists's revealing another prohibited agreement on an unrelated market.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The Competition Act does not contain a specific procedure for plea bargain, but a settlement procedure has been available since 2016. Section 29a of the Competition Act allows cartel settlements in which the fine might be reduced with 10%. The provision is modelled after the EU cartel settlement system.

The NCA initiate a cartel settlement process if it is adequate, and it is normally initiated after some investigation. The NCA will then invite one or more of the undertakings to negotiations, where they inform the undertaking on their view on the case, the evidence in their possession and the fine they consider to impose. The undertaking must thereafter prepare a settlement submission within a deadline set by the NCA, which shall be minimum 15 working days. After the settlement submission is received, the NCA will issue a statement of objections with a proposed fine, and the undertaking may decide whether it wishes to enter into a settlement. If the undertaking declines the proposal of the NCA the ordinary cartel investigation continues.

15. What are the key pros and cons for a party that is considering entering into settlement?

The rules on cartel settlement entered into force mid-2016 and we are not aware of cases where the procedure has been used so far. The obvious advantage is however the reduction of the fine and the possibility to end the investigation at an earlier stage. As a cartel settlement requires admission of guilt, it may not be advisable if the undertaking disagrees with the NCA on facts or law, in particular if there is a risk of follow-on damages claims.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

Both the Competition Act and the Public Administration Act limits the exchange of information in cooperation with other investigating authorities. Inter-agency cooperation is however not unusual due to the widely formulated exemptions in the acts. Consequently, there exist few limitation on the ability to exchange information between public enforcement bodies. This is especially true when it comes to potential infringements of the law.

The NCA takes part in various cooperations under the EEA agreement. Inter alia, the NCA is the representative of Norway in the European Competition Network and the International Competition Network. Also, the NCA has an extensive cooperation with the other Nordic Competition Authorities. A renewed agreement between the Authorities of Denmark, Sweden, Iceland, Finland and Norway, and also including the territories of Greenland and the Faroe Islands, was signed in 2017, and adopted by the Parliament in June 2019.. The Agreement on Cooperation in Competition Cases inter alia allows the Nordic competition authorities to collect information and carry out unannounced inspections on their own territory on behalf of the other authorities party to the agreement.

17. What are the potential civil and criminal sanctions if cartel activity is established?

The NCA's basic remedy is to require the cartel conduct to be brought to an end, see section 12 of the Competition Act. In addition, any behavioural remedy deemed adequate may be imposed, as well as structural remedies provided that there are no behavioural remedies equally effective or if such remedies would be more burdensome on the company. Structural remedies have not yet been imposed.

Pursuant to Chapter 7 of the Competition Act cartel violations can result in civil and criminal sanctions. Administrative fines will regularly be imposed when undertakings are found guilty of intentional or negligent violations of the Competition Act.

In accordance with section 32 of the Competition Act, a court can impose criminal fines (on individuals and undertakings) and prison sentences (on individuals) found guilty of intentional or grossly negligent violations of the Competition Act. Criminal sanctions have not been used since the Competition Act entered into force in 2014 (but were sometimes used under the former competition legislation). Note however, that in 2016 a guidance was issued by the NCA concerning the use of criminal sanctions against individuals, and it is expected that such sanctions may be used in future hard-core cartel cases.

Where there are an infringement of article 53 of EEA, ESA may impose administrative fines.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In principle the NCA calculates fines using a methodology similar to that of the European Commission, but in practice the level of fines is lower.

When calculating the fine, the NCA will start by looking to the undertaking's turnover related to the goods or services directly or indirectly affected by the cartel, and within the geographic area in question. Depending on the gravity of the conduct, the NCA will start with an amount up till 30% of this turnover. When deciding on gravity, relevant factors are the nature of the infringement, the actual effect on the market, the size of the affected market, intent, the combined market share of the involved undertakings and whether agreements or efforts has been completed. In cases decided to date the basic amounts have corresponded to 15-19% of the affected turnover.

When the basic amount has been determined, the NCA will multiply the amount with the number of years the company has participated in illegal conduct. Periods under six months will be counted as a half year, while periods between six months and a year will be counted as one year.

For cartel conduct the fine may be increased by 15 to 25% of the basic amount. Finally, a number of

aggravating and mitigating factors may be taken into account, which together with the gravity assessment, provides the NCA with substantial discretion when calculating the fine. Note, that the calculation method is presumed to be in accordance with the principles laid down in EU competition law.

The fine may not exceed 10% of the undertaking's relevant turnover in the previous fiscal year. Note that the undertaking include all companies which forms a single economic unit, i.e. all group companies.

The highest fine for cartel activity to date was imposed in the NCA's decision V2013-3 - *Veidekke ASA / Veidekke Industri AS og NCC AB*, where NCC received a fine of NOK 140 million (c. EUR 14 million). In the same decision the NCA calculated a fine of NOK 220 million (c. EUR 23 million) that would normally have been imposed on Veidekke, but the fine was eliminated as Veidekke was granted full immunity under the NCA's leniency programme.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Whether a parent company may be jointly and severally liable with an infringing subsidiary will depend on whether the parent company and its subsidiary form a single economic unit and therefore form a single undertaking. The regulation of parent liability is presumed by the NCA to be in accordance with EU competition law.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Anyone harmed by cartel conduct may seek damages (economic loss) by an ordinary court proceeding. Class actions may also be initiated, cf. Chapter 35 of the Civil Procedure Act.

21. What type of damages can be recovered by claimants and how are they quantified?

Pursuant to Norwegian tort law, only economic losses can be recovered. The compensation will correspond to the substantiated, net economic loss. The court may reduce the compensation if this seems reasonable. There is no case law in Norway on how damages in cartel cases shall be calculated.

22. On what grounds can a decision of the relevant authority be appealed?

A decision of the NCA can be appealed to the Norwegian Complaints Board for Competition. The appeal can be based on errors in law or fact, as well as procedural errors.

ESA's decisions can be appealed to the EFTA Court in a similar manner to how the European Commission's decisions can be challenged before the EU's General Court. A decision can be challenged on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EEA or the so-called Surveillance and Court Agreement or of any rule of law relating to their application, or the misuse of power by ESA.

23. What is the process for filing an appeal?

An appeal against the NCA's decisions in cartel cases must be sent to the Competition Complaints Board for competition, which is the mandatory body for appeal in these cases. A decision made by the Competition Complaints Board for competition can be appealed to Gulating Court of Appeal, which is one of five regional appeals courts in Norway and located in Bergen (as the NCA). Finally, the case may be appealed to the Supreme Court of Norway, subject to permission from the Appeals Selection Committee. Only cases concerning principles of general importance, will normally be permitted for review by the Supreme Court.

If several companies appeal a cartel decision from the NCA, the case will normally be heard as one case.

Criminal sanctions are tried in the ordinary court system. The court of first instance is the District Court. A judgement made by the District Court is appealed to the Court of Appeals.

A judgement by the EFTA Court cannot be appealed.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

The NCA has not issued any decisions under section 10 since 2017. That year two decisions were issued, as well as a Supreme Court judgement concerning bid rigging. The judgement by the Supreme Court concerned a collaboration in tender proceedings for taxi services.

The collaboration was not a typical cartel, as the undertakings did not seek to hide their collaboration, and the undertaking involved were small market players and the collaboration would increase the quality of the service. The Supreme Court still upheld the NCA decision stating the joint offer restricted competition by object, as the undertakings could have issued separate tender bids. The judgment represent a strict and non-effects based approach.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

Currently, the NCA is intensifying its scrutiny of the Norwegian groceries sector. This sector has been in the Authorities spot light for some time, and there is an ongoing investigation of the main grocery chains. The NCA was also recently granted funding to employ 6-7 new case handlers, which will work solely with the grocery sector. It is therefore believed that there will be

additional investigations in this market. The NCA is also investigating the retail fuel market. Furthermore, the NCA is currently investigating its second case in the book market, which is a sector closely monitored by the NCA. We are not aware of any ongoing leniency or settlement cases. A case concerning collective boycott in the book market is currently under appeal to Borgarting Court of Appeal.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

There are no expected statutory or procedural changes. There are ongoing investigations concerning section 10 in the grocery section, in the retail fuel market, in the book market and in the alarm and security service market. There may also be ongoing investigations not known to the public.

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