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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"), Article 53 of the Agreement on European Economic Area ("EEA") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which all 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. The provisions differs to some extent as Section 10 of the Competition Act does not require the practice to affect trade between Member States.

It furthermore follows from Norwegian case law and the preparatory works to the Competition Act that case law of the European Court of Justice, the General Court and the EFTA Court is relevant for the application of Section 10 of the Competition Act.

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 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement") 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, while regulation 1/2003 sets out procedural rules for any investigation pursuant to Article 101 of the TFEU by the Commission.

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

Pursuant to both national and EU/EEA case law, cartels, i.e cooperation involving market sharing and price fixing,

are considered to restrict competition by object. Furthermore, as the restrictive effects can be both actual and potential in nature, there does not need to have been an effect on the market.

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

Section 5 of the Competition Act establishes that the Act apply to any conduct that has effect, or is liable to have 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 (Nw. *Konkurransetilsynet*) ("NCA"), while the relevant authority in relation to enforcement of Article 53 EEA is the EFTA Surveillance Authority ("ESA").

If the cartel may affect trade between Norway and one or more EEA states, the NCA may also investigate potential infringements of Article 53 EEA. The NCA will then apply Article 53 in parallel with Section 10 of the Competition Act.

If proceedings are initiated by ESA, however, the NCA will lose its competence to apply Article 53 for the matter in question. In practice, the NCA therefore 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 (Nw. *Økokrim*) have competence to investigate and prosecute cartel behaviour with a view to impose criminal sanctions. Such sanctions has not yet been imposed pursuant to the Competition Act of 2004, but the NCA has stated that it recently reported such behaviour to the Norwegian National Authority for

Investigation and Prosecution of Economic and Environmental Crime. It is not publicly known whether the case is under investigation.

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

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

With regard to the NCA, the first step of the investigation is normally either an information request or an unannounced inspection (dawn raid), pursuant to Section 24 and 25 of the Competition Act respectively (see question 6 below). Following that review, the NCA may issue a statement of objection and initiate further investigations.

Comparable investigative powers are granted ESA through Protocol 4. Subsequent to a review of the collected evidence, ESA may then decide that there is sufficient information to initiate proceedings pursuant to Article 2(1) of Chapter III of Protocol 4, e.g. by issuing a statement of objection, and to proceed with an in-depth investigation.

After initiating the case, the authorities will further 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. They may also conduct a second unannounced inspection.

The contact between the undertaking and the relevant authority is normally extensive during the investigating phase. Typically, this contact includes the relevant authority conducting biannual "state of play"-meetings and issuing requests for information, while the undertaking requests additional meetings and file (often numerous) written submissions to present relevant facts and provide their view on the matter.

Following its examination of relevant facts and evidence, the authorities will decide upon whether to proceed with the case. If the authorities 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 Section 24 of the Competition Act, the NCA is empowered to request any kind of information relevant to the potential infringement, unless it is covered by the firm's rights concerning self-incrimination or by the legal privilege (see question 7 below).

Where there are reasonable grounds to suspect an infringement of the Competition Act or the EEA, the NCA may also get access to properties and premises, cf. Section 25 of the Competition Act. Such access is dependent on decision by the District Court. The NCA may also confiscate or seal important evidence for closer examination such as business premises, books and business documents for the duration of the investigation and as long as deemed necessary. 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 similar 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, for the former, the Supreme Court have ruled that the internal counsel's legal privilege is limited to communication that is part "common legal activities" (cf. Rt. 2000 s. 2167 (Balder)). Furthermore, when the ESA investigates on the basis of EEA law, the legal privilege does not extend to communication with inhouse counsel (cf. C-550/07 Akzo Nobel).

During an unannounced inspection, electronic material will normally be seized without separating documents protected by legal privilege. The undertaking will then, pursuant to Section 25 of the Competition Act, receive a copy of all electronic material which has been seized, and will be given the opportunity to identify legal privileged documents at a later stage, in advance of the NCA's 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, will be brought 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 in Section 31 of the Competition Act and pursuant to the 2009 Notice on immunity from fines and reduction of fines in cartel cases, 2009/C 294/04, respectively. The leniency programmes of the NCA and ESA 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 prior to the submission of the undertaking. In addition, the evidence provided must enable a targeted inspection in connection with the alleged cartel, or the finding of an infringement of applicable competition law in connection with the alleged cartel. To be granted full immunity, the NCA cannot have obtained sufficient evidence to prove such infringement prior to the submission of the undertaking. Further, the undertaking 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 for leniency must include the identity of the undertakings participating in the cartel and a detailed description and evidence of the infringement itself, the object, form and 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" and fully cooperates, a partial leniency may be granted by both the NCA (pursuant to Section 31 of the Competition Act) and ESA (pursuant to the 2009 Notice on immunity from fines and reduction of fines in cartel cases, 2009/C 294/04, which corresponds to the EU Commission's notice on the same subject).

A reduction of 30-50% of the fine may be granted to the first applicant that fulfils this condition. The second applicant may be granted a 20-30% reduction of the fine, while subsequent applicants may be granted a

reduction of up to 20% of the fine. 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.

In order to obtain leniency or partial leniency from the NCA or ESA, the applicant must terminate its involvement in the cartel and fully cooperate with the relevant authority, as further described below (see question 11).

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 continues its collecting of evidence and until all application conditions are met. The priority is only valid for a time period set by the authorities. In addition, if an undertaking 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?

In order to obtain leniency or partial leniency from the NCA or ESA, all leniency applicants are required to fully cooperate with the relevant authority during the entire process. This entails, inter alia, to provide the relevant authority with all relevant evidence in its possession and to respond to all requests from the relevant authority, as well as, to the extent possible, ensure that their current and former employees are available to answer questions from the NCA.

Any actions hampering the investigation of the relevant authority may lead to the undertaking losing its right to leniency. This applies similarly when the undertaking considers to apply for leniency, but before the application is submitted. The applicant must in addition terminate its involvement in the cartel.

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 solely extends to administrative

finances and only undertakings can be subject to such fines for breach of Section 10 of the Competition Act or Article 53 EEA. Therefore, employees and directors involved in cartel conduct risk criminal sanctions on an individual level pursuant to Section 32 of the Competition Act, regardless of whether the undertaking is granted full or partial leniency. Individual criminal sanctions may only be granted pursuant to breaches of the Competition Act.

In 2016 the NCA published a guide on the use of criminal sanctions towards individuals. Pursuant to the guide, the NCA will normally not report an individual for criminal prosecution if the 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" under Norwegian law and we are not aware of instances where the NCA or ESA has granted additional reduction of sanctions in exchange for a cartelists' 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 may be reduced with 10%. The provision is modelled after the EU cartel settlement system, which is mirrored in ESA's settlement procedure.

The NCA may 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.

An alternative available to the undertaking may be, depending on the case, to offer commitments pursuant

to Section 12 of the Competition Act. The procedure corresponds to the commitment procedure set out in article 9 of EU Regulation 1/2003, and has been increasingly used by the NCA (see question 25 below).

Under ESA's settlement procedure, the Parties may also acknowledge their involvement in the cartel subsequent to having seen the evidence collected by ESA. ESA will not enter into negotiations, but can reward the cooperation by reducing the fine imposed upon them by 10%. If no settlement is reached, the standard procedure apply by default.

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 however 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 enable to some extent the exchange of information between investigating authorities within the limits of their duty of confidentiality. Hence,, inter-agency cooperation is not unusual. This is also the case for ESA, where the information exchange is facilitated by the Norwegian EEA Competition Act.

The NCA also takes part in various cooperatives with entities from other jurisdictions. 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 allows, inter alia, 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?

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

Pursuant to Chapter 7 of the Competition Act cartel violations may result in both civil and criminal sanctions. Administrative fines will regularly be imposed when undertakings are found guilty of intentional or negligent violations of the Competition Act. Pursuant to Section 32 of the Competition Act, a court may 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 2004 (but were sometimes used under the former competition legislation), but the NCA have recently stated that they have reported an individual or individuals to the police for breach of the cartel prohibition. Furthermore, note that a guide was issued by the NCA in 2016 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 is an infringement of article 53 EEA, ESA may impose administrative fines on the undertakings concerned (but not on individuals).

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. 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 until 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.

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.

The calculation method is presumed to be in accordance with the principles laid down in EU competition law, and the fine may not exceed 10% of the undertaking's relevant turnover in the previous fiscal year. The highest fine for cartel activity to date was imposed on Verisure AS (NOK 766 million) in 2020 and Sector Alarm AS (NOK 467,3 million) in 2019 for collusion in the market for the provision of alarm services to residential customers (see question 24 below). Another notable case, is the ongoing investigation by the NCA of potential collusion between three grocery chains, where the Statement of Objection from mid-December 2020 states that the authorities are considering to impose fines totalling 21 billion NOK.

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 entity and thus 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, and this right is not affected by a potential grant of leniency for the undertaking. 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?

As the Damages Directive (2014/104/EU) have not yet been implemented in neither EEA law nor national law, damages claims must be based solely on Norwegian tort law, whereby only economic losses can be recovered. The compensation will correspond to the substantiated, net economic loss, and the court may reduce the compensation if they find reasonable grounds for doing so. There is however no applicable Norwegian case law providing further guidance 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 Competition Tribunal. 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 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 Tribunal which is the mandatory body for appeal in these cases. The deadline for complaints about administrative fines pursuant to Section 29 in the Competition Act is six months from the day the parties received the decision, while an order to bring illegal conduct to an end pursuant to Section 12 in the Competition Act must be brought before the Tribunal within two months from the day the parties received the decision.

A decision by the Competition Tribunal may be appealed to Gulating Court of Appeal, which is one of six regional appeals courts in Norway, located in Bergen (as the NCA). The deadline for appeal is three months from the day the parties received the decision.

A judgement of the Court of Appeal may be further 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 brought before court the ordinary court system. The court of first instance is the District Court. A judgement by the District Court can be appealed to the Court of Appeals, and thereafter to the Supreme Court of Norway subject to permission from the Appeals Selection Committee.

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)?

In June 2019, the NCA issued a Statement of Objection towards Sector Alarm AS and Verisure AS for collusion in the market for the provision of alarm services to residential customers. Sector Alarm chose to accept the fine shortly after receiving the Statement of Objection from the NCA. The NCA accordingly adopted a decision directed against Sector Alarm in 2019, in which it imposed a fine of NOK 467,3 million on Sector Alarm. Verisure did not however not accept the fine. Consequently, the NCA continued its investigation and issued its final decision a year later in November 2020, where it imposed a fine of NOK 766 million on Verisure.

Verisure unsuccessfully appealed the decision to the Competition Tribunal and has now paid the fine of NOK 766 million. Pursuant to the NCA's findings, Verisure and Sector Alarm agreed not to sell alarm services to each other's customers through door-to-door selling. From 2011 until 2017, both companies allegedly limited the extent to which their door-to-door sales representative could sell alarm services to the other company's customers. There were also a substantial number of direct contacts between the two companies during the period in questions, in which detailed information about market strategies allegedly was exchanged. The NCA has stated that the difference in the imposed fines is due to differences in the companies' relevant sales. In 2021, a large class action was brought against Verisure and Sector Alarm by an association representing approx. 400 000 Norwegian customers. The case has not been heard in court yet.

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, impact of COVID-19 in enforcement practice etc.)?

The NCA has in general raised the level of fines imposed over the last couple of years, as evident from the sanctioning of cartels by the abovementioned fine imposed on Verisure and Sector Alarm at a total of NOK 1,233 billion. The trend is similarly evident from the Statement of Objection concerning a potential fine of NOK 21 billion in total for an alleged collusion in the grocery sector.

The grocery sector has been a prioritized market for the NCA for some time, and in 2019 the NCA was granted funding to employ 6-7 new case handlers which solely work with the grocery sector. This has resulted in further increased monitoring of the market, and the above mentioned Statement of Objection was a result of that effort. Additional investigations in the grocery sector is expected in the coming years.

Another sector which is closely monitored by the NCA is the book market, where the NCA is currently investigating a case concerning information exchange. Furthermore, in that same sector, the Norwegian Supreme Court recently ruled in a case concerning collective boycott. The Court concluded that the cooperation between companies (in this case information sharing and a joint decision of boycott) that removes uncertainty regarding the markets function constitutes a restriction of competition by object, and is hence usually in violation Section 10 of the Competition Act. The involved parties were fined NOK 13,5 million in total.

A third focus area for the NCA have been digital markets. In January 2021, the NCA opened an investigation into digital food delivery platform Foodora's agreements with restaurants. The investigation was ended in January 2022 by a commitment decision, preventing the use of exclusivity agreements and practices towards restaurants related to the use of Foodora's food ordering

platform. While the investigation was initiated with a view to ascertain whether the prohibitions of Sections 10 and 11 of the Competition Act against anticompetitive agreements and abuses of a dominant position had been infringed, the decision seemingly solely concerned potential abuse of dominant position. However, the case illustrate a recent trend from the NCA in using commitment decision to close its investigation. The investigation and subsequent commitment decision is to date the only publicly known investigation relating to a digital market.

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

The biggest, foreseeable development going forward is probably an ongoing legislative work concerning amendments in the procedural rules of the Competition Act, one being a potential major change in the appeal process and the proposed deviation of the Competition Tribunal as the appeal body to decisions of the NCA. The final outcome of the ongoing legislative work is still unclear.

Another developmental trend, concern the Commission's work on collective bargaining agreements in the digital economy, where the NCA has announced that they will not prioritize cases that may be covered by the draft Guidelines on the application of EU competition law to collective agreements until these guidelines are final.

Finally, there are ongoing investigations concerning Section 10 in the grocery sector, the book market, in a finance/pension related market, the market for construction services, the market for relocation services, a health related market and a trade association. There may also be ongoing investigations not yet known to the public.

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