



**COUNTRY  
COMPARATIVE  
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# **The Legal 500 Country Comparative Guides**

## **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 prohibition on restrictive agreements and concerted practices is set out in section 10 of the Norwegian Competition Act of 5 March 2004 (the "Competition Act") and article 53 of the Agreement on the European Economic Area ("EEA"). Both provisions are harmonised with article 101 of the Treaty of the Functioning of the European Union ("TFEU"). Guidelines and case law from the European Court of Justice, the General Court and the EFTA Court is relevant and applicable for the interpretation and application of section 10 of the Competition.

Article 53 EEA is applicable in cases where a restrictive agreement or concerted practice may affect the trade between the contracting parties to the EEA. The Norwegian Competition Authority (norw.: Konkurransetilsynet) ("NCA"), the EFTA Surveillance Authority ("ESA") and the EU Commission ("EC") have the competence to enforce article 53 EEA.

Section 10 paragraph 3 of the Competition Act and article 53(3) EEA provides that Section 10 paragraph 1 and Article 53(1) are inapplicable if the restrictive agreement or concerted practice produces efficiency gains, of which consumers are allowed a fair share of the benefits, as long as the restriction(s) is/are necessary for the efficiency gains, and does not eliminate competition for a substantial part of the products in question (identical to article 101(3) TFEU).

In the same way as article 101 TFEU, the Competition Act does not apply to terms and conditions relating to work or employment. Further, two separate regulations are in effect, giving exemption from section 10 of the Competition Act. First, cooperation for sales and distribution of books, and second, in the industries for agriculture and fisheries, necessary for implementing agriculture and fisheries policies.

EU's policies on agriculture and fisheries are not part of the EEA Agreement, cf. article 8(3) EEA, and article 53 EEA is not applicable for products related to these

industries. However, it is predominantly primary industry (raw materials) that is exempt and processed agricultural products might be covered by the EEA Agreement.

Provisions regarding procedure in cartel investigations are predominantly set out in the Competition Act and ancillary regulations. For civil or criminal procedures, the Dispute Act, Criminal Procedure Act, and the Public Administrations Act offer further procedural rules. Procedural rules for the enforcement of article 53 EEA are set out in Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") on the Functions and Powers of the EFTA Surveillance Authority in the Field of Competition. Regulation 1/2003 sets out procedural rules for any investigation pursuant to article 101 TFEU by the EC.

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

Section 10 of the Competition Act and article 53 EEA distinguish between restriction by object and restriction by effect. In cases regarding restrictions by object, there is no requirement that the conduct has had any effects on the market.

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

The Competition Act applies to terms, agreements and actions that are undertaken, have effect or are liable to have effect within the Kingdom of Norway. Thus, the Competition Act is applicable on restrictive agreements conducted outside of Norway if they have or are liable to have effect in Norway.

### 4. Which authorities can investigate cartels?

The NCA can investigate infringements of section 10 of the Competition Act and article 53 EEA. The latter only applies in cases where trade between the EEA-states may be affected. The NCA is exclusively competent to enforce the Competition Act.

In accordance with article 11(6) in Chapter II of Protocol 4 SCA, if ESA initiates proceedings for the adoption of a decision for an infringement of article 53 EEA, the NCA cannot apply article 53 EEA on the same restrictive agreement.

Both ESA and the EC can investigate cartels who infringe article 53 EEA in cases where trade between the contracting parties to the EEA may be affected. The attribution of cases between ESA and the EC is regulated by article 56 EEA. The basic rule on jurisdiction for cases under article 53 EEA, is that ESA is exclusively competent in cases where there is an effect on trade only between EFTA States (which in practice happens rarely) and the EC handles cases under EEA competition rules, where such cases also fall under EU competition rules.

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

A cartel investigation is initiated by the NCA, ESA or the EC, either ex officio, by a complaint or (anonymous or non-anonymous) tip from a third party or as a result of a leniency application.

The first external step in an investigation is often an information request or an unannounced inspection ("dawn raid"). An inspection conducted by the NCA requires a decision from a Norwegian district court. In recent years, "digital/remote inspections," i.e., where the authorities require remote access to an undertaking's servers etc., have also been conducted. *Please advise Question 2.3 for further information on the NCA's powers of inspections and information requests.*

ESA has similar investigative powers as the NCA, pursuant to section 3 of the EEA Competition Act as set out in Protocol 4 SCA. However, ESA's own inspections of an undertaking's premises ordered by decision of ESA, does not formally require a prior decision from a district court in Norway. *Please advise Question 2.3 for further information on ESA's powers of inspection.*

There are no key deadlines by which submissions must be made, but if the NCA issues a Statement of Objection (S.O.) in the case, the parties will be given a deadline for submitting their comments to the S.O. The deadline is however not preclusive, as the parties' right to be heard will result in the NCA accepting written submissions after

the deadline.

Pursuant to section 29 paragraph 4 of the Competition Act, the statute of limitations for imposing administrative fines for infringement of section 10, is ten years from the day the infringement ceased. The limitation period is interrupted if the NCA conducts an inspection or informs an undertaking that it is under suspicion of infringing the Competition Act. For ESA, the limitation period is five years from the day the infringement is committed or, in continuing or repeated infringements, from the day the infringement ceased. The limitation period is interrupted by any action taken by ESA or the NCA, including authorisation to conduct inspections issued by ESA, initiation of proceedings by ESA or the NCA or issuing of an S.O. of ESA or the NCA.

ESA has published a notice on best practices for the conduct of proceedings concerning article 53 (and 54) EEA, which is an adoption of the equivalent notice from the EC on best practices for proceedings related to article 101 and 102 TFEU. The notice presents the principles of inter alia state of play meetings, access to file, written reply to the S.O. and an oral hearing. The NCA has not published any guidelines or best practices for the conduct on proceedings concerning section 10 of the Competition Act or article 53 of EEA. However, the NCA will often respect the principles set out in guidelines and notices adopted by ESA and is usually open to dialogue and meetings with affected parties. In addition, the Public Administration Act includes several provisions regulating a party's rights in proceedings with a public authority or body, including the right to advance notification (S.O.) and access to file. Parties are normally, however, not given the right to an oral hearing, and are not provided with a hearing officer, as in proceedings with ESA or the EC.

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

The key investigative powers of the NCA are its power to require information from any natural or legal person, and conduct inspections, cf. section 24 and 25, respectively, of the Competition Act.

Any natural or legal person must provide the NCA with information it needs to perform its duties, cf. section 24 of the Competition Act. The duty to provide information also applies to tax authorities, other authorities levying taxes or fees, and authorities responsible for supervising public regulation of commercial activities, notwithstanding any duty to maintain confidentiality. Noncompliance or incorrect, incomplete, or misleading

information can be sanctioned with administrative fines, or criminal sanctions (fines or imprisonment) for individuals.

ESA has similar powers, cf. pursuant to section 2 of the EEA Competition Act. Noncompliance or incorrect, incomplete, or misleading information can be subject to fines. The NCA has the power to conduct inspections if there are reasonable grounds to assume that the Competition Act has been infringed, or necessary to meet Norway's obligations under agreements with foreign states or international organisations. Inspections require a decision from a district court. The inspection power includes undertaking's premises, land, means of transport and other places where evidence of an infringement may be found. This includes private homes, if there are particular reasons to assume that evidence may be kept there.

As a general rule, the NCA must take copies of documents, but may confiscate items and original documents, when the original in itself has particular value as evidence, or the value is reduced by copying it. The undertaking subject to the inspection shall be given a copy of the seized document if that can happen without harm or risk to the investigation.

Pursuant to section 3 of the EEA Competition Act, ESA has the power to conduct inspections, or the NCA can conduct it on ESA's behalf, cf. article 22 of Chapter II of Protocol 4 SCA. The power includes any of the undertaking's premises, land and means of transport. ESA's inspections of an undertakings' premises do not require prior decision from a district court in Norway, cf. article 20 paragraph 4 of Chapter II Protocol 4 SCA. ESA's powers also include "other premises", including homes, if there is a reasonable suspicion that evidence is kept there, cf. article 21 of Chapter II of Protocol 4 SCA. For inspection of other premises than the undertaking's, a prior authorisation from a district court is required. ESA does not have the power to seize original documents.

## **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?**

According to preparatory works to the Competition Act, the duty to provide information to the competition authorities does not apply to information with regard to which certain professionals, including lawyers, have a duty of confidentiality, cf. section 119 of the Criminal Procedure Act. This principle is later established and upheld in case law by the Supreme Court of Norway (Rt-2000-2167, *Balder*). According to this case law, the

NCA will consider legal advice from in-house counsel as legal professional privilege ("LPP") to the extent the correspondence regards legal advice. When ESA investigates infringements of article 53 EEA, correspondence with in-house counsel is not considered LPP.

The NCA may seize privileged information when copying electronic material, of which the undertaking will receive a copy. Prior to the NCA accessing the electronic material, the undertaking may identify privileged information. The undertaking also has a right to be present when the NCA accesses electronic material, to clarify whether the information is considered privileged or not. Disputes regarding whether information is privileged or not, are settled by the district court.

*To address whether legal advice produced by in-house counsel and/or lawyers qualified outside the jurisdiction is protected by the rules of privilege.*

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

Both the NCA and ESA have leniency programmes, cf. section 30 and 31 of the Competition Act and ESA Notice on Immunity from fines and reduction of fines in cartel cases (2009/C 294/04) (the latter is an adoption of the EC's notice 2006/C 298/11).

Full immunity is granted to the first undertaking which in connection to a specific case provides all evidence in its possession on its own initiative, in an infringement priorly unknown to the NCA. The evidence must be sufficient to obtain a decision from the district court to conduct an unannounced inspection or prove an infringement of section 10. If the applicant has coerced, or tried to coerce, other undertakings to participate in the infringement, full leniency cannot be granted.

The evidence can be submitted together with the leniency application or can be provided later within a deadline set by the NCA. The applicant may be granted a prioritised right for immunity from the date the application was submitted, while the undertaking gathers evidence (marker system). The prioritised right for immunity is valid for a limited time period set by the NCA.

A formal admission of the leniency application is required, and the application must provide available information about the undertakings involved and a description of the nature and duration of the

infringement, the products and geographical scope comprised and whether the applicant has been in contact with other competition authorities.

The leniency application can be submitted in Norwegian, Swedish, Danish, and English, but a translation in Norwegian provided within a deadline, set by the NCA, is necessary to be granted priority.

A leniency application to the NCA cannot provide full legal certainty for the applicant if article 53 EEA is applicable, in addition to national competition law. ESA or the EC will also have jurisdiction for the application of article 53 EEA. To fully protect its position, the leniency applicant must also submit an application to ESA or the EC (as only one of the authorities will have jurisdiction in a case).

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

Applicants which do not fulfil the requirements for full immunity (including being the first applicant), can be granted reduction of fines (partial leniency), cf. section 31 of the Competition Act. The applicant must provide evidence which significantly strengthens the NCA's possibility of proving an infringement. ESA has similar arrangement, set out in 2009/C 294/04.

The first applicant which fulfils the conditions set out in section 31, can achieve a reduction of administrative fines between 30 and 50%. The second applicant can achieve a reduction between 20 and 30%. Other applicants in the same case can achieve up to 20% reduction of fines.

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

A marker system is available. *Please advise Question 3.1.*

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

The leniency applicant must cooperate fully on continuous basis on its own initiative, until the conclusion of the case. The applicant must also end its involvement in the infringement on its own initiative (unless the NCA requests otherwise). This entails gathering and presenting evidence and all relevant information, respond to RFI's and facilitate that current

and (to the extent possible) former employees are available to give statements.

### **12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

The grant of immunity for an undertaking does not extend to immunity from criminal sanctions for individuals, and employees and directors are at risk of criminal sanctions, even if the undertaking is granted full or partial leniency (about criminal sanctions for individuals, see *Question 6.1*). Immunity is granted by the NCA, but prosecution is decided at the prosecuting authority's discretion, and the NCA has not means to influence the decision.

### **13. Is there an 'amnesty plus' programme?**

As set out in section 30 and 31 of the Competition Act (see *Question 3.1*), immunity from fines will be granted to the first undertaking in connection to a particular case. The wording of the provisions strongly suggest that immunity only can be granted in the particular case which the application concerns.

### **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 NCA has had the ability to enter into settlement agreements since 2016, cf. section 29a of the Competition Act. A cartel settlement will reduce fines by 10% (after reduction in fines as result of a leniency application). As of March 2023, there are no publicly known examples of settlement agreements. The settlement process is modelled after the equivalent system in the EEA/EU, as set out in ESA Notice on the conduct of settlement procedures (2014/C 48/05), which is an adaptation of the equivalent notice by the EC (2008/C 167/01).

It is expected that the NCA will have investigated the case for some time before settlement discussions are initiated. The NCA may invite one or more undertakings for settlement discussions if it finds the case suitable. The NCA must present the evidence in its possession, its preliminary assessment and amount of the fine which is considered. The NCA will then give the undertaking a deadline of minimum 15 business days to prepare a settlement submission. The submission must i.a. include



an unreserved admission of the infringement, the maximum fine the undertaking will accept and a confirmation that the undertaking wishes to settle the case.

The NCA will issue a S.O., with a deadline for the undertaking to reply. After that deadline, the NCA can adopt a decision with reduced fines, without court approval. If the undertaking decides to discontinue the settlement discussions after receiving the S.O., the NCA will return to standard investigation procedures. The settlement submission cannot be used as evidence in the case.

Settlement proceedings with ESA is similar to the NCA's, including the right to discontinue the discussions after ESA has presented its evidence. If ESA adopts an S.O. which does not reflect the undertaking's settlement submission, the acknowledgements in the submission will be deemed withdrawn and cannot be used as evidence against any of the parties to the proceedings. If ESA rewards a party for settling the case, it will reduce the fine by 10%. In addition, any specific increase for deterrence will not exceed a multiplication by two.

An undertaking under investigation for an infringement of section 10 of the Competition Act may also offer remedies, cf. section 12 of the Competition Act. The NCA may then issue a decision which commit the undertaking to the remedies, before conducting a full assessment of whether the undertaking has infringed section 10.

Access to information, pursuant to the Freedom of Information Act, will not be granted to documents that the NCA receives in relation to settlement discussions, also after the case has been closed.

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

Possible advantages of entering into cartel settlement are the reduction of fines (10%) and earlier conclusion of the case, as cartel investigations can be resource and time consuming. Due to the possibility to discontinue the discussions at a rather late stage, including after receiving the S.O., entering into settlement discussions may be advantageous, especially if the result is acceptable for the undertaking. In discussions with the NCA, the total amount of fines will be disclosed in the S.O., but for ESA, the final fine should not exceed the maximum amount indicated by the party.

Possible disadvantages are mostly related to the requirement for admission of the infringement. Admission may expose the undertaking for third-party

damage claims. In accordance with Norwegian tort law, cartel members may have joint and several liability for damages. As a settlement will include an admission of guilt, there is a risk that the settling undertaking can become liable for claims towards other cartel members who have not entered a settlement.

Due to lack of settlement cases to date, the limits for disclosure of settlement material have not yet been set in Norwegian law. However, the preparatory works to the Competition Act implies that a damage claim may be grounds for disclosing some relevant information in settlement material. The admission of guilt will not be disclosed in a damage claim case, but the existence of a settlement decision from the NCA will de facto disclose the admission of guilt from the undertaking. ESA will not transmit settlement submissions to national courts without the consent of the relevant applicants, cf. ESA's notice on the conduct of settlement procedures paragraph 39.

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

ESA and the national competition authorities shall cooperate closely when applying the EEA competition rules, cf. Protocol 4 SCA, including exchange of information and cooperation on inspections. ESA can request the NCA to issue RFIs on its behalf. ESA shall also transmit information it has received from the EC to the NCA (if competent in the case), pursuant to Protocol 23 to the EEA Agreement.

The competition authorities in the Nordic countries cooperates and the authorities in Denmark, Finland, Iceland, Norway, and Sweden renewed an agreement in 2017, replacing similar agreements from 2001 and 2003. In 2017, Greenland and the Faroe Islands were also included in the agreement. The agreement comprises, *i.a.* notifications of investigations and proceedings, exchange of information (including confidential information), requests for information and inspections on each other's behalf.

The NCA also represents Norway in the European Competition Network and the International Competition Network.

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

The NCA may issue administrative fines up to 10% of the undertaking's annual turnover.

Participation in cartels is also subject to criminal sanctions for individuals, with fines or imprisonment for a maximum up to six years. Since the Competition Act entered into force in 2004, there is only one known case where the NCA has reported an individual to the prosecuting authority (in 2021). The NCA has not disclosed any information about those proceedings.

An amendment to the Competition Act came into effect January 2023, which impose interest surcharges on fines. From the date of the NCA's decision to a legally binding judgment, the interest rate is the central bank of Norway's deposit interest rate with an addition of 1 percentage point. From a legally binding judgment until the fine is paid, the interest rate follows the Act relating to interest on overdue payments etc., which currently sets an interest rate of 10,75% p.a. (set every six months).

### **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?**

Fines are set in accordance with the Norwegian regulation on calculation and leniency of fines, modelled after the EC Guidelines on the method of setting fines (2006/C 210/02). The NCA establishes the value of sales related to the infringement. This amount is multiplied with a gravity factor of 0-30%, then multiplied with the duration of the infringement. In addition, the NCA may add an increase for deterrence of 15-25%. This will result in the "basic amount." Then, several adjustments to the basic amount can be applied; aggravating/mitigating circumstances, specific deterrence, legal maximum of 10% of total annual turnover, leniency up to 100% reduction, cartel settlement of 10% reduction and the undertaking's potential inability to pay.

The NCA has applied the method rather strictly and has publicly expressed a goal to impose large fines on undertakings infringing the competition rules. Recent examples are the Alarm and Book Publishers II cases, where total fines imposed were respectively MEUR 122 and 54.

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

The NCA will apply the single economic entity doctrine, in accordance with EU/EEA case law. This notion that a parent company has decisive control over its subsidiaries was upheld by an appeals court in the Asphalt-case (Veidekke ASA/NCC AB), where a Swedish parent company was held jointly and severally liable for the Norwegian subsidiary's infringement of section 10 of the Competition Act.

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

Pursuant to the Dispute Act, private damages claims are available for infringement of section 10 of the Norwegian Competition Act and article 53 EEA. Both opt-in and opt-out class action lawsuits are available in Norway. However, some procedural issues regarding such proceedings are currently dealt with by the Supreme Court. *Please advise Question 9 for further information.*

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

Since the Damages Directive (2014/104/EU) is not incorporated into EEA, damage claims in relation to cartels will be based on Norwegian tort law. In accordance with Norwegian tort law, only actual net economic losses are subject to compensation.

So far jurisprudence regarding damage claims in relation to cartels has until lately been non-existent in Norway. However, on 1 March 2023, Oslo District Court ruled against the public postal service, Posten Norge AS, following the company's damage claim against six truck manufacturers (from the EC's decision in the "Truck Cartel"). The court did not find sufficient evidence for Posten being overcharged by the cartel participants. Since the Damages Directive (2014/104/EU) has not been incorporated into the EEA, plaintiffs cannot rely on the presumption of economic loss set out by the Directive. Hence, normal tort law applies where the burden of proof lies with the plaintiff that has suffered an actual economic loss.

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

Decisions from the NCA must be challenged before the Competition Appeals Tribunal ("CAT"), which can review all aspects of the case. Decisions from CAT can be appealed to Gulating Appeals Court, which also can

review all aspects of the case. An appeal to the Supreme Court of Norway must, like all other cases, be approved by the Appeals Committee of the Supreme Court, which also determines the scope of the Supreme Court's review.

As of March 2023, the NCA does not have competence to appeal a decision from CAT. The government has recently proposed giving the NCA appeals competence in cartel cases.

### **23. What is the process for filing an appeal?**

The deadline for a complaint over administrative fines from the NCA is 6 months. If CAT has not reached a decision within 6 months after the complaint, the NCA decision can be appealed to Gulating Appeals Court. The deadline for appealing CAT's decisions to the appeals court is 3 months.

### **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 Book Publishers II, the four largest publishing houses in Norway were fined for exchanging sensitive information through a third party, Bokbasen (eng.: The Book Database). The publishers uploaded information about future release dates and prices to a database they all had access to. According to the NCA, the conduct gave the publishers easy, prompt, and reliable access to sensitive information, and facilitated a coordination of prices and selection. The total fines were MNOK 545 (approx. MEUR 53.9 / MUSD 56.6), where MNOK 4.1 (approx. MEUR 0.41 / MUSD 0.43) was a fine to Bokbasen as facilitator.

### **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.)?**

A prominent recent trend in Norwegian cartel enforcement, is the NCA's focus on information exchange, and the fines imposed in such cases. In the NCA's decisions regarding information exchange, the gravity has been set equally to naked cartels. All of the NCA's ongoing cartel investigations (that are public) are related to suspicion of information exchange or increased transparency.

The grocery market has been under scrutiny from the competition authorities for several years, and in recent years there has also been an increase in political interest and involvement. Two regulatory proposals have been published for public consultation: (i) a prohibition on restrictive covenants and exclusivity agreements for real estate and (ii) regulation of input price discrimination from grocery suppliers to grocery chains. In addition, several other types of measures have been announced for the grocery market, i.a. a study of which link in the value chain has the largest margins, assessment of price signalling through the media, the market share and effect of private labels, and whether to lower the threshold for the presumption of dominance in the grocery sector.

The Ministry of Trade, Industry and Fisheries has also announced that there will be a public consultation regarding a market investigation tool, providing the NCA with new tools to impose commitments on undertakings, even in cases where no lessening or distortion of competition has been found. As of March 2023, the public consultation has not been initiated.

In the NCA's Strategy Plan for 2022 – 2027, the grocery market, digital markets, and green industries were highlighted as prioritised sectors, which foreshadows that the NCA will have higher focus and prioritise potential cases in these industries.

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

In March 2023, the government published a proposal to give the NCA competence to appeal CAT's decisions in cartel cases (which they currently do not have). The government is currently also working on a proposal related to changes in the appeals procedure, including potentially amending the system where the CAT is mandatory appeals body to decisions from the NCA.

The NCA has also mentioned in its podcast that they expect a conclusion in an investigation in the grocery market, where it has signalled a fine of total MNOK 21 000 (approx. MEUR 2 077 / MUSD 2 182) to the three largest grocery chains in Norway.

The Supreme Court of Norway will in May 2023 hear a case where an interest organisation for alarm customers has filed a class action damages claim against Sector Alarm and Verisure for their infringement of the cartel rules. The action is financed by a third-party, and the



Supreme Court will decide on procedural questions

relating to third-party financing in combination with opt-out class action suits.

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