# THE CARTELS AND LENIENCY REVIEW

SEVENTH EDITION

**Editors**
John Buretta and John Terzaken

THE LAWREVIEWS

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**Editors**
John Buretta and John Terzaken

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# PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

**John Buretta**
Cravath, Swaine & Moore LLP
New York
January 2019

**John Terzaken**
Simpson Thacher & Bartlett LLP
Washington, DC

**Chapter 18**

# NORWAY

*Carl Arthur Christiansen, Catherine Sandvig and Maria M Lisiecka*[1]

## I ENFORCEMENT POLICIES AND GUIDANCE

The primary statutory framework in Norway concerning cartels is the Norwegian Competition Act of 5 March 2004 No. 12 (the Act), Chapter 3, Section 10. Pursuant to Section 10 of the Act, cartels are prohibited. The main aim of the Act is to further competition for the benefit of consumers and to regulate anticompetitive behaviour. New amendments to the Act came into force on 1 January 2014.

Norway is part of the European Economic Area (EEA). Through the EEA Competition Act, Norway is entitled and obliged, if trade between Norway and other EEA Member States is affected, to apply Article 53 of the EEA Agreement. Norway is not an EU Member State. However, Section 10 of the Act corresponds with Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement. The wording in Section 10 of the Act is largely a verbatim reproduction of these Articles.

Pursuant to the preparatory work of the Act, Section 10 shall be interpreted and applied in accordance with the case law of the Court of Justice of the European Communities, the Court of Justice of the European Free Trade Association (EFTA) States and the administrative practice of the European Commission and the EFTA Surveillance Authority (ESA). The Norwegian Competition Authority[2] (NCA) relies heavily on the EU Commission's notes and guidelines and its own guidelines are to a large extent equal to these documents. Although there are some differences between Norwegian competition law and EU competition law, these mainly relate to provisions concerning procedural questions.

The cartel prohibition applies to 'undertakings' as defined in Section 2 of the Act and encompasses all entities that practise commercial trade within either the private or the government sector, including both corporations and self-employed persons. The definition of an undertaking also encompasses infringements of the Act performed by persons acting on behalf of their employer or contributing to a company's infringement. The cartel prohibition applies to cooperation between two or more independent undertakings. Thus, cooperation within the same economic unit is not within the scope of Section 10.

The cartel provision prohibits agreements or resolutions between two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, unless the conditions for exemption are satisfied. The prohibition applies regardless of the form of the agreement and it does not

1 Carl Arthur Christiansen is a partner, Catherine Sandvig is a senior attorney and Maria M Lisiecka is an associate at Ræder, Attorneys-At-Law.

2 See www.konkurransetilsynet.no.

have to be a legally binding agreement. The prohibition encompasses both written and oral agreements and applies to cooperation between undertakings in either horizontal or vertical relation to one another.

Agreements or resolutions that are prohibited pursuant to Section 10 will be declared null and void between the parties.

The NCA enforces competition legislation and is responsible for investigating cases of cartel conduct. It is a subordinated entity of the Ministry of Trade, Industry and Fisheries[3] (the Ministry). All decisions about merger control and cartel matters made by the NCA can be appealed to the Competition Appeal Board, which was established in 2017. The Appeal Board and the NCA are both located in Bergen. In September 2018, the first appeal regarding collusive tendering (*El Proffen*) was decided. The final procedural rules for the Appeal Board are expected to be adopted during 2019. The Appeal Board is an administrative body; however, its decisions can be directly appealed to the Gulating Court of Appeal and thereafter to the Supreme Court.

The authority to reverse decisions by the NCA and the Ministry (namely, cases involving questions of principle or interests of major significance to society) can also be brought before the Appeal Board. However, such questions will very rarely apply to standard cartel cases.

Sanctioning a cartel agreement is subject to a dual-track system: either an administrative or civil law track, or a criminal law track. Hence, civil sanctions pursuant to Section 12 entail (1) orders to bring an infringement to an end, (2) structural measures, (3) interim measures or (4) the imposition of administrative fines, pursuant to Section 29. The criminal sanctions (fines or imprisonment) are pursuant to Section 32. Following the amendments of 1 January 2014, criminal sanctions apply only to individuals and not to undertakings. Therefore, undertakings will only be subject to administrative fines and civil procedures. If the NCA reports an individual for criminal prosecution, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) will investigate possible infringements in accordance with the Criminal Procedure Act.[4]

## II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to Section 7 of the Act, and in accordance with Norway's agreements with certain foreign states and international organisations, the NCA is obliged to provide those states and organisations with any information necessary to enforce the competition rules of either Norway or the state or organisation concerned, in order to meet the obligations undertaken by Norway in such agreements. Thus, the NCA, upon application by an authority in a state with which Norway has entered into an agreement on legal assistance in competition law matters, may order an undertaking to provide information, documents and other materials.

The Nordic countries have a long history of cooperation in competition matters. An agreement was established in 2003 for the notification of information concerning cases of interest, and the exchange of both non-confidential and confidential information between the national authorities. On 8 September 2017, Norway, Sweden, Denmark, Finland, Greenland and the Faroe Islands entered into a new and extended cooperation agreement. By virtue of the new agreement, the national competition authorities can request information and carry out dawn raids in their own territory on behalf of each other.

3 Prior to 2013, the Ministry of Education and Church Affairs.

4 Act of 22 May 1981 No. 25.

The ESA may perform investigations and request information when applying Articles 53 and 54 of the EEA Agreement. According to Article 3 of the EEA Competition Act,[5] the ESA may request the assistance of the NCA during information requests, or searches or dawn raids performed by the ESA. A number of these raids have been conducted.

The EFTA states have not been included in the European Competition Network (ECN). However, the ESA and the competent authorities of the EFTA States do participate in ECN meetings, with a view to ensuring effective enforcement of the EEA competition rules and their uniform interpretation and application across the EEA. Hereby, the NCA participates in ECN meetings from time to time.

Denmark, Iceland, Sweden and Norway have entered into a Nordic agreement on cooperation in competition matters. The main object of this agreement is to provide for notification of information concerning cases of interest and to exchange both confidential and non-confidential information regarding mergers, cartels and abuse of dominant position. If confidential information is exchanged, the agreement provides for an obligation of secrecy on the part of the receiving authority, and restrictions on use and further distribution.

The NCA also participates in events held by international organisations, such as the International Competition Network and the Organisation for Economic Co-operation Development, and in legal developments concerning competition policy.

The Extradition of Criminal Offenders Act[6] prohibits the extradition of Norwegian nationals. Under Norwegian law, extradition requires an offence punishable under the law of both countries (dual criminality) that is of a certain degree of seriousness (punishable by a minimum of one year's imprisonment). Specific regulations apply between the Scandinavian countries.[7]

## III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

### i Jurisdictional limitations

When determining the scope of the Act, it is of vital importance whether an agreement has actual or potential effects in Norway. Thus, the Act does not contain any territorial limitation. As a consequence, there is no general condition that one or all of the participating undertakings are seated within the Norwegian borders or are Norwegian nationals or companies. Furthermore, it is not necessary that the anticompetitive conduct occurs within the Norwegian borders, as long as the conduct is liable to have effects within Norway (including Svalbard).

The conduct of a subsidiary may be imputed to its parent company, either by joint and several liability or sole responsibility. The NCA is of the opinion that the Act fully incorporates EU practice, under which there is a rebuttable presumption that parent companies direct the actions of wholly owned subsidiaries in this regard. In a court case decided at the end of November 2015 (*NCC Roads AS*), the Court of Appeal found that if, and to the extent to which, a subsidiary is liable, EU precedence is directly relevant.

5 Act of 5 March 2004 No. 11.

6 Act of 13 June 1975 No. 39.

7 Act of 20 January 2012 No. 4.

### ii Affirmative defences

If anticompetitive conduct leads to increased efficiency and increased consumer welfare that, in total, is sufficient to outweigh the restrictive practice, Section 10(3) provides for an exemption from the general cartel prohibition. The exemption is given under the justification that if the effect of anticompetitive conduct will be to the benefit of the consumer and thereby the positive effect outweighs the negative effects, the conduct will not be prohibited.

The responsibility for assessing whether certain anticompetitive conduct is exempt lies with each participating undertaking. The NCA cannot grant a dispensation from the general cartel prohibition. Further, the burden of proving that the conditions in Section 10(3) are met lies with the participating undertaking.

In order for affirmative defences to apply to anticompetitive agreements or cooperation between undertakings, the conduct in question has to:

*a* contribute to the improvement of production or allocation of products or the furtherance of technology or economic development. Hereby, only socioeconomic efficiency that leads to cost savings is emphasised; and

*b* ensure a fair share of the resulting benefit for consumers, including business customers. The joint effect of the consumer benefit is based on an assessment involving only the relevant market.

Furthermore, cooperation between undertakings must not:

*a* impose on the undertakings involved any restrictions that are not indispensable to the attainment of these objectives (set out under point (a), above). One must assess whether the restriction is necessary to achieve the efficiency gains, that is, whether it is possible to achieve the same efficiency gains through other conduct that is less restrictive on the competition; and

*b* afford the possibility of eliminating competition for the undertakings involved in respect of a substantial part of the products in question. This entails a minimum requirement regarding the level of competition, which cannot be derogated from even if the cooperation results in substantial efficiency gains.

Pursuant to Section 10(4), the King of Norway may, according to regulations, determine the rules applicable to certain groups that shall be exempted under Section 10(3) (block exemptions). Individual regulations equal to those of the European Union have been adopted, which include regulations applicable to coordinated conduct concerning motor vehicles, research work, agreements concerning research and development, and specialisation agreements.

### iii Exemptions

Pursuant to Section 3(1), the Act does not apply to terms and conditions relating to work or employment.

Section 3(2) states that the King may determine exemptions relating to certain markets or industries. Through regulations applicable as of November 2014, there are three sector-specific exemptions comprising:

*a* cooperation within the agricultural and fishing industry;

*b* certain categories of agreement relating to the sale of books; and

*c* certain categories of agreement within the private sector of health and care services.

## IV LENIENCY PROGRAMMES

The Penal Code provides that cooperation may be considered as a mitigating circumstance when a criminal matter is adjudicated. In 2016, Norway implemented a cartel settlement procedure modelled on EU rules. Under these rules, the NCA can settle cases without reaching a formal decision (similar to 'Article 9 decisions' from the European Commission). The settling procedure equates to that of the European Union and is implemented in Section 29a of the Act. After a settlement meeting with the NCA, an undertaking will have 15 business days to accept the settlement, which may result in a 10 per cent reduction of the fee. Outside these rules, there are no specific provisions concerning plea bargaining in the Act. While in practice, plea bargaining may occur both in administrative and criminal cartel investigations, the circumstances and details surrounding such bargaining seldom become publicly known.

The conditions for obtaining leniency, which until 2014 were governed by the Leniency Regulation, are now included in new Sections 30 and 31 of the Act and cover, respectively, complete leniency and partial leniency.

The competence to grant leniency lies with the NCA. Only undertakings can be beneficiaries of the leniency programme, and therefore leniency will not encompass individuals who are subject to criminal prosecution. In practice, the NCA has previously issued statements to individuals that it will abstain from prosecution. The scope of the leniency provisions is further defined through the regulation on the calculation of and leniency from administrative fines.[8]

### i Immunity

To attain full leniency, an undertaking must be the first to submit information and evidence about a cartel that would otherwise be unknown to the NCA. The informant must cease its cartel activities and must cooperate completely with the NCA. Also, the undertaking must not have sought to coerce other undertakings into participating in the infringement. The information must either enable the NCA to secure evidence or carry out dawn raids according to Section 25, or provide the NCA with evidence sufficient to prove an infringement of Section 10 of the Act.

### ii Partial leniency

Partial leniency can be attained whether the information is given to the NCA before or after the initiation of proceedings. However, it is a condition that the undertaking provides the NCA with evidence that considerably increases the possibility of proving an infringement of Section 10 of the Act. Furthermore, the informant must cease its activities no later than from the time the evidence is provided. The undertaking must cooperate fully, and the cooperation must last throughout the entire procedure.

The first undertaking to meet the conditions in Section 31 of the Act will be granted a reduction of its fine of between 30 and 50 per cent. The second will be granted a reduction of 20 to 30 per cent and all others will be given a reduction of up to 20 per cent. Hence, there is no limit to the number of undertakings that can be granted partial leniency.

8 Regulation of 11 December 2013 No. 1465.

### iii The leniency application

There are no specific formal requirements for an application for leniency. However, the applicant must present the NCA with the necessary proof, including both documents and allegations, and therefore the application is most likely to be in writing. Accordingly, the NCA will provide the undertaking with a written acknowledgement of receipt. If the applicant meets the conditions set out in either Section 30 or 31, the NCA will grant leniency by a formal decision.

An undertaking can be deprived of the right to leniency if the NCA later discovers that it has not put forward all the evidence that is known to the undertaking, or it complicates or hinders the NCA's investigation.

### iv Marker system

The new Section 30(2c) adopted in 2014 introduces a marker system intended to closely mirror the European Commission's practice. The marker constitutes the only material change to the leniency conditions as previously defined under the Leniency Regulation.

The main scope of this system provides that, where justified, an application can be accepted on the basis of limited information. The applicant is then granted time to elaborate on the information and evidence to qualify for immunity. Thus, the 'marked applicant' is urged to furnish proof of cartel activity, which can lead to immunity.

## V PENALTIES

### i Civil or criminal offence

In the event of an undertaking, or someone acting on its behalf, whether it is intentionally or by negligence violating Section 10 of the Act, the conduct can be sanctioned under Section 29 with fines or under Section 32 of the Act with fines or imprisonment (Section 32 being applicable only to individuals). The severity of the violation must be assessed in each case, but participation in a 'hardcore' cartel is illegal *per se* and can be considered both a civil (or administrative) offence and a criminal offence.

Pursuant to Section 29(2), the fine is determined by the NCA and is based upon an overall assessment, considering the undertaking's annual turnover, the severity and durability of the infringement, and leniency. The Regulation on the calculation of administrative fines and leniency elaborates the calculation of fines, the rules being based on the European Commission's 2006 Guidelines. In practice, the calculation of administrative fines for cartel activity has been of a rather modest size in Norway compared to, for example, the European Union. However, recent developments show that the NCA has significantly raised the level of imposed fines (see Section VIII), which is also in accordance with the preparatory works of the Act.

In its more recent decisions, the NCA has frequently included references to its considerable 'discretionary powers' and the need to measure out 'sufficient' fines. Further, it is stated that, accordingly, no undertaking shall be able to pre-calculate a reaction.[9] As the

9 See, e.g., rational under Paragraphs 352 and 353 in the *NCC* case: http://kt.no/globalassets/vedtak-og-uttalelser/vedtak-og-avgjorelser/2013/offentlig-versjon-av-vedtak-v2013-3.pdf.

most recent fines have been calculated based on a general verbatim reiteration of the law, it is difficult to assess how and to what extent future fines will deviate from the level prescribed by the EU Commission.

The NCA can press criminal charges against any individual indulging in infringements of Section 10 of the Act. Prosecution of individuals will only take place if the NCA presses charges or in cases of 'material public importance' (under Section 33 of the Act). Cases are handled by Økokrim, which can be granted case-specific surveillance powers by a court order during investigations against individuals. Depending on the results of an Økokrim investigation, the defendant will have the matter adjudicated by the court. Once convicted, misconduct may be punished with fines or imprisonment for up to three years, although cooperation from those convicted can affect the extent of the punishment. Under severely aggravated circumstances of cartel conduct, the punishment may be imprisonment for up to six years.

Since Norway adopted the EU Regulations in 2004, only companies have been prosecuted. This has been an accepted strategy by the NCA and the police. Under the previous regime, there were instances in which individuals received fines on the basis of involvement in cartel activity, but there are no examples of imprisonment. From the preparatory work for the newest amendments to the Act, it is clear that the Ministry intends criminal sanctions to be used to a greater extent than is reflected in today's practice. This has been met with reluctance by the NCA and certain scholars, as they fear that a more active approach in this respect will undermine the effect of the leniency regime. The NCA has issued guidelines on when and how to press charges against individuals.[10] Under these guidelines, the NCA will, as a rule, press charges against the participants in a cartel. However, the NCA may, for example, issue a statement that no charges will be pursued against individuals who report cartel activity and fully cooperate with the NCA during the 'investigation and the following legal procedure'. Individuals can, by themselves or through counsel, apply for an 'immunity statement'.

For individuals under investigation for anticompetitive conduct that is subject to criminal prosecution, the general principle of protection against self-incrimination is in accordance with the Norwegian Criminal Act.[11] However, it is debatable at what point in the investigation this protection applies and to what extent. Hence, pursuant to Section 24 of the Competition Act, individuals are required to provide information or data at the request of the NCA. If they do not, they will find themselves in breach of this duty, which can result in both administrative and criminal sanctions. However, pursuant to the European Convention on Human Rights (ECHR), an individual has the right not to be punished twice for the same offence.

The protection against self-incrimination under the ECHR and its application to Section 24 of the Competition Act was touched upon during the latest revision of the Act. The Ministry indicated that as the NCA now has the legal competence to request the prosecution of individuals, any information gathering by the NCA that 'is intended to obtain data regarding the actions of an individual' will result in that individual being protected by Article 6 of the ECHR. However, circumstances whereby an individual falls within the scope of the ECHR, thus expunging the obligation to answer questions put to them by the NCA, were not included in the revised Act.

10 Guidelines dated 14 June 2016 – see http://kt.no/globalassets/filer/faktaark/veileder---personstraff.pdf.

11 Act of 22 May 1902 No. 10.

## VI 'DAY ONE' RESPONSE

The NCA is afforded extensive investigative powers by the Act, which are broadly similar to those of the European Commission. There are some differences, but as a result of the latest amendments to the Act, the legal position of any undertaking that is subject to investigation is strengthened, and the system is now more in line with EU rules. The investigations are subject to civil procedures, although the sanctions that such investigations might lead to are considered a criminal sanction under the ECHR. However, if the NCA connects Økokrim to an investigation, criminal proceedings might be instigated instead.

To secure evidence, a search of premises is most likely to be carried out pursuant to Section 25 and is further detailed through the regulation regarding investigation and dawn raids.[12] The search is executed by employees of the NCA, consisting of a mixture of specialist investigators, lawyers, economists and occasionally forensic information technology specialists. When necessary, the NCA may require police assistance. The search is carried out unannounced (dawn raid) and may be a search of both business and residential premises.

To instigate a search of premises, the NCA must have an order of the court. To search business premises, it is sufficient that the NCA can provide evidence for a real suspicion that there is an infringement of the Act. The threshold for searching, for example, a private house, is more qualified and requires a particular reason to assume that evidence is being kept there. The court order must describe the scope of the search, entailing a description of the dawn raid's purpose, what types of infringements the NCA is investigating and the markets the NCA is looking into. A court order to search premises can also be given, if necessary, for the NCA to meet Norway's obligations under agreements with foreign states or international organisations.

When carrying out a dawn raid, the NCA is empowered to search premises, land, means of transport and other places that may be found relevant, and to confiscate items, such as documents and electronic storage media, that may be significant as evidence. Electronic devices, such as laptops and smartphones, are regularly confiscated and copied during a dawn raid. Furthermore, the NCA has the right to secure premises overnight, order the production of specific documents or information, and carry out compulsory interviews with individuals. The NCA also has the right to demand extradition of documents. Before the latest amendments to the Act entered into force, the NCA usually confiscated original documents; now the NCA mainly takes copies of the relevant documents. Original documents will only be confiscated if they have a particular evidential value that may not be visible on a copy or have the same effect. In such cases, the undertaking will normally be provided with a copy.

Pursuant to Section 24 of the Act, both in general and during a dawn raid, anyone has a duty to provide the NCA with the information they might require for the Authority to perform its tasks. The right to demand such information also applies if it is necessary to enable the NCA to meet Norway's obligations under the agreements with foreign states or international organisations.

The instigation of a search is normally not subject to complaints or appeal by those affected by the search. However, if the investigation results in the confiscation of evidence, the legality of the confiscation can be tried before the court.

In accordance with Norwegian public administration law, any party is entitled to be represented by a legal counsel. Whether the undertaking is represented by an external or an

12 Regulation of 11 December 2013 No. 1491.

in-house lawyer, the legal privilege pursuant to the Criminal Procedure Act applies. If the undertaking invokes that certain information is legally privileged, the relevant document or hard drive will be sealed, and the dispute will be held before the court. The undertaking is also entitled to be represented by legal counsel during a dawn raid. The NCA is not obligated to delay the search but will normally wait approximately 30 minutes for the undertaking's legal counsel to reach the premises.

Pursuant to Section 27 of the Act, employees of the NCA have a legal obligation to maintain secrecy in regard to the identity of the undertaking and its representatives and those who may have provided the NCA with information about a possible infringement.

## VII PRIVATE ENFORCEMENT

In regard to private enforcement, one can pursue a claim for damages in accordance with the general principles of the law of damages. The liability lies with the undertaking causing the damage through its anticompetitive behaviour and, in cases where cartel activities have been established, it will not be difficult to establish a legal basis for a claim. However, it is not sufficient to establish anticompetitive behaviour; a claimant also has to prove an economic loss caused by the anticompetitive behaviour. Finally, there has to be a causal link between the liability and the incurred economic loss. The calculation of damages is based upon the proven economic loss.

The burden of proof lies with the claimant. A decision made by the NCA or the ESA establishing an infringement of the Act does not automatically establish a right for damages. However, needless to say, an established infringement will be an important consideration in the court's assessment.

Anyone with a legitimate legal interest can demand access to the NCA's files in closed cartel cases to facilitate follow-on damages actions, in accordance with Section 27a of the Act. However, this right does not apply to information about leniency applications and other related documents, such as corporate statements.

In accordance with the rules of limitation, a claim for damages must be brought before the court no later than three years from the time the injured party acquired knowledge of the damage and the undertakings causing the damage.

In addition, Section 34 of the Act warrants a special provision to pursue a claim for damages as a consequence of an infringement of the Act, within one year of a decision made by the NCA or a final and enforceable judgment.

Although there have been relatively few cases of private enforcement of antitrust law to date, the numbers of both Section 10 cases and Section 11 cases (abuse of dominance) seem to be increasing. Among others, a few high-profile cases of private litigation came as follow-up to two infringement decisions by the ESA.[13] One of these (*Posten Norge/Schencker*) was settled for an undisclosed amount in 2015. The Act does not contain specific provisions on damages actions for breach of the competition rules, although the preparatory work makes it clear that infringements shall give rise to liability for damages.

In the absence of relevant case law, it is currently not possible to establish principles as to the relevance of, for example, the passing-on defence. We presume that Norwegian courts will address this on a case-by-case basis. The burden of proof for passing on will be on the offender. Specific provisions concerning class actions are provided for in the Civil Procedure

13 Case No. 59120 *Color Line* and Case No. 34250 *Posten Norge*.

Act. Infringements of competition law are referred to as an area particularly suitable for the application of the provisions concerning class actions. However, bringing a claim under these provisions still requires that one or a few parties assume the risk involved with litigation, as the provisions do not provide for the risk to be borne by law firms, for example.

## VIII CURRENT DEVELOPMENTS

Recent years have indicated that the NCA wants to be more active in general, and especially against more concentrated markets.

On 21 June 2018, the NCA issued its first decision under the abuse of dominance provision in more than a decade with the largest fine it has ever imposed against Norway's leading telecommunications provider (Telenor) for abusing its dominant position to hinder the establishment of a third mobile network operator in Norway.

The decision stems from an investigation started in December 2012 when the NCA and the ESA carried out a joint dawn raid at the premises of Telenor in Norway. The ESA has already issued a statement of objections covering a potential margin squeeze but has not yet adopted a decision. The NCA decision relates to another aspect as it concluded that Telenor abused its dominant position when it replaced a linear usage fee structure with a two-part tariff, under which a competitor (Network Norway) lost any incentives to expand its own third network. Telenor has stated that the decision and the fine of 788 million krone will be appealed to the Appeal Board.

In April 2018, the NCA carried out dawn raids at the premises of several grocery chain operators in Norway on the basis of a suspected exchange of price information between the different chains. The Norwegian grocery market is highly concentrated, on both the retailer side and the supplier side.

A collective boycott aimed at a rival distributor of books to the mass market was considered as a by-object infringement by the NCA in its 2017 *Bladcentralen* decision. The publishers were shareholders of Bladcentralen, a mass-market distributor, with Interpress being the only other competitor. Interpress was owned by Reitan, a Norwegian conglomerate that operates supermarkets and convenience stores. The NCA imposed fines totalling 32 million krone for collusion. The decision was appealed by three of the publishers to the Oslo District Court. In its judgment of 21 June 2018,[14] the City Court upheld the NCA decision in substance, finding that the publishers' acts amounted to a restriction of competition by object. However, the level of the fines was reduced. In particular, the Court considered that the NCA's method for setting the fines did not correctly reflect each of the appealing parties' blameworthiness. As a result, the fines imposed on the three appealing participants were reduced, respectively, from 9.1 million krone to 5 million krone, from 9.6 million krone to 3.5 million krone and from 7.8 million krone to 5 million krone. Two of the publishers have appealed the NCA decision to the Appeal Court.

Joint tendering also continues to be an area of interest. This matter was at the heart of the decision to fine six members of El Proffen, a chain of electricians owned by its members. Five of the undertakings were electrical firms in and around Oslo while the sixth was a joint venture owned by the members. Noting that each of the electrical firms had both the ability and the capacity to submit an individual tender, the NCA held in its 2017 decision that they must be considered as competitors. Citing the judgment in *Ski Follo Taxi*, the ensuing

14 Case Nos. 17-084113TVI-OTIR/04, 17-148655TVI-OTIR704, 17-147201TVI-OTIR/04.

coordination of prices was considered to be a 'by-object restriction'. The open nature of the cooperation and the fact that it allowed the firms to provide a higher combined capacity did not affect the NCA decision. *El Proffen* was appealed and the Appellate Board rendered its decision in September 2018. The NCA decision was upheld in essence; however, the level of the fines was substantially reduced – from 18 million krone to 4.7 million krone. In particular, the Appellate Board considered that the NCA's method for setting the fines did not correctly reflect the appealing parties' blameworthiness within an open cooperation.

Both the *El Proffen* and the *Bladcentralen* cases are interesting in the sense that while the appeal bodies often agree with the NCA in substance, the level of fines imposed are scrutinised.

The *El Proffen* case is also the first application of the 'facilitator' doctrine by the NCA. However, the application of this doctrine is in line with EU practice, and is therefore not unexpected.

In its decision of September 2018, the Appeal Board mirrored the rationale from the *Ski Follo Taxi* decision. The ruling in *El Proffen* is in line with *Ski Follo Taxi* case and the NCA's guidelines on joint tendering, which all take a rather strict stand on such cooperation. Although not stated in the rulings themselves, the results may indicate that joint tendering will be subject to more intense scrutiny in Norway than in the rest of Europe.[15] The decisions also leave some questions unanswered, particularly in regard to tenders where in which the parties, when considering capacity, risk or strategy, have a need to cooperate with one or more competitors. In the Norwegian market, where players are relatively small but getting bigger (especially civil construction contracts), some scope for joint bidding, where in which both undertakings could potentially submit an individual bid, should be granted. Enterprises entering into joint bidding arrangements in Norway should seek legal advice and ensure a careful assessment and documentation of whether or not the cooperation in effect leads to otherwise non-achievable efficiencies.

15 See, e.g., CJEU Case C-179/16 *F. Hoffmann-La Roche Ltd and Others*.

**Appendix 1**

# ABOUT THE AUTHORS

**CARL ARTHUR CHRISTIANSEN**

*Ræder, Attorneys-At-Law*

Carl Arthur Christiansen, partner, is head of the firm's competition law group. Carl has been retained in a number of cartel cases, for example in the construction sector. In addition to his competition law practice, Carl has extensive experience in providing advice in connection with acquisitions, financing and various forms of commercial cooperation. Carl has particular experience in the construction industry, information technology and oil services, and the retail and service sectors.

**CATHERINE SANDVIG**

*Ræder, Attorneys-At-Law*

Catherine Sandvig, senior attorney, has extensive experience particularly in competition law and public procurement. Catherine also has extensive litigation experience, both in her primary disciplines and within more general contract law, torts, etc. Catherine holds a master of business and economics degree and a master of laws degree, and has worked at the Norwegian Competition Authority.

Catherine provides assistance particularly in connection with mergers and acquisitions, and processes towards the competition authorities in connection with cases of breach of competition law, as well as general counselling and litigation.

**MARIA M LISIECKA**

*Ræder, Attorneys-At-Law*

Maria M Lisiecka, associate, has experience in writing and editing professional literature as author and through her previous employment as research assistant at the University of Oslo. Maria holds an LLM degree from the Pennsylvania State University and a master of laws degree from the University of Oslo. At Ræder, Maria is affiliated with the competition law department and assists clients in various competition law matters.

**RÆDER, ATTORNEYS-AT-LAW**

Henrik Ibsens Gate 100
0255 Oslo
Norway
Tel: +47 23 27 27 00
Fax: +47 23 27 27 01
cac@raeder.no
cas@raeder.no
mli@raeder.no
www.raeder.no/en


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