Organisation for Economic Co-operation and Development

DAF/COMP/WP2/WD(2021)9

Unclassified

English - Or. English

10 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

Competition Enforcement and Regulatory Alternatives – Note by Norway

7 June 2021

This document reproduces a written contribution from Norway submitted for Item 1 of the 71st OECD Working Party 2 meeting on 7 June 2021.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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JT03476187

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1. Introduction

1. The Norwegian Competition Authority's (NCA hereafter) main task is to enforce the Competition Act; to prevent and deter competition crime and affect market structure in a direction that promotes healthy competition. The NCA's goal to promote competition is pursued through a combination of anti-cartel activities, clear signals to dominant firms on what they can and cannot do, an effective merger control and not the least active advocacy work to enhance knowledge and compliance and promote more competition friendly regulation.

2. Even though the prohibition regulations combined with the tools for structural control provided for in the Act makes the responsibilities of economic entities clear, conflict with and overlap between the competencies of the NCA and other regulatory authorities might occur. The Act has provisions that gives a tool to resolve such conflicts by regulation. If this tool is used, it will limit the competency of one or the other regulatory authority. To date, this tool has not been invoked. Instead, the NCA have established operative cooperation agreements with several other regulatory authorities, in addition to more informal contact and cooperation. Some of these are described briefly in this submission.

3. The Act also has provisions in Section 3, providing a tool to exempt specific sectors or markets from the prohibition regulations of the Act by specific regulation. However, the interaction between sectors exempt and those not present various enforcement challenges. Two examples which illuminates some of these challenges are presented in the contribution. In the first case presented, the major dairy producer in Norway claimed in its defence against an abuse of dominance charge that it did not enjoy a dominant position in the cheese market, arguing that the agricultural regulations implied that it lacked the ability to act independently of its competitors and customers. In the firm's opinion, the regulations in the dairy market taken together have the effect that Tine’s prices are effectively determined by the government. In addition to presenting the criteria for a successful regulated conduct defence, the cases presented in this part of the contribution also illustrate another challenge with allowing for exemptions from the Act, ie. that the presence of this tool inevitably will result in a political pressure for further exemptions. The NCA has in several cases expressed concerns relating to exemptions from the Act, arguing that public policy goals are better served by direct measures rather than exemptions.

4. In addition to enforcement, the NCA also has a role in designing, implementing and eventually the removal of regulation when regulation is no longer called for. The Competition Act has a specific tool in this regard, namely Section 14 which states that if necessary to promote competition in the markets, the government may intervene with regulation against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act. This contribution presents an example where this tool was used.

5. Advocacy is an important part of the NCA's work, and a complementary tool to enforcement. The final part of this contribution describes some examples of successful advocacy, where regulations have been pushed in a direction providing for more competition.

2. Overlaps Between Competition Law Enforcement and Economic Regulation

6. The issue of the relation between competition policy, enforcement of competition law and other regulatory interests in the event of conflict is complex, and cannot be covered in much detail in this contribution.

7. Here, two issues will be illuminated. Firstly, the Norwegian Competition Act has a specific provision providing a tool to resolve conflict between the competencies of the NCA and other regulatory authorities if this should occur in significant matters. Secondly, two cases relating to the regulated conduct (state compulsion) defence will be presented.

2.1. Conflict and Regulation of Respective Competencies of Regulatory Authorities

8. The Competition Act has a specific provision providing a tool to resolve conflict of competencies if this should occur in significant matters. Section 4 in the Act states that if a matter governed by the Competition Act also is governed by regulatory and control provisions of other acts, the government may issue specific rules to delineate the various authorities' areas of responsibilities.

9. Section 4 provides authority for regulating the competencies of different administrative bodies. This can be a suitable tool in situations where several administrative authorities have authority to intervene in markets. A typical problem is the relationship between competition authorities and sector authorities, where there may be several authorities where competition policy considerations are relevant when practicing the legislation. The purpose of the provision is to avoid possible conflicts between the interventions of various bodies. A decision to regulate competence imply that one authority has limited competence in relation to the original power of attorney.

10. Notably, this provision can also be used to allocate tasks and authority between regulatory authorities in an optimal fashion. One example mentioned by the Committee assessing and proposing the changes to the law in 2003 is that this provision give the government the power to regulate the relation between the Competition Authority and the Consumer Ombudsman (now Consumer Authority) relating to respective competencies according to the marketing act ("markedsføringsloven).

11. Thus far, no regulations according to Section 4 have been enacted. Instead, the NCA have established cooperation agreement with several other regulatory authorities, in addition to more informal contact and cooperation. Some of these are described briefly in this submission.

12. Moreover, according to Section 3 in the Competition Act, the government[1] may, by regulation, exempt certain markets or industries from all or part of this Act. The purpose of the exemption authority provided by Section 3 is to ensure that other politically or socially important objectives can be realized without hindrance from the Competition Act, at the same time as competition policy objectives can be balanced against other non-economic considerations. This is the case relating to the regulations exempting cooperation in the book market from Section 10 based on cultural policy considerations.

13. There have, however, been cases where the conduct in question was sought justified under the regulated conduct defence, or where this could have been used as defence. Two examples will be presented below.

[1] Formally, the decision to introduce new regulation is taken by the "King-in-Council". For simplicity, the term 'the government' is used hereafter.

2.2. The Regulated Conduct Defence

14. Under the Competition Act, an undertaking means any private or public entity that carries out commercial activities. Thus, the Act applies fully to public corporations and state owned enterprises in the same way as to private corporations to the extent they are involved in commercial activities. Thus, terms of business, agreements and actions that are undertaken, have effect, or are liable to have an effect on competition between undertakings, are covered by the law, regardless of the legal status or if it is private or a public undertaking.

15. There are, however, some general and specific exemptions from the Act introduced, based on Section 3. The Act does not apply to terms and conditions relating to work or employment. In addition, this Section provides the legal basis to exempt certain markets or industries from all or parts of the Act by regulation. Accordingly, as long as cooperation in production or sales is in accordance with law, regulations or agreement between the state and the trade associations, fisheries and agriculture are exempt from the prohibition regulations of the Act through specific regulation to implement agriculture and fisheries policies. To achieve cultural policy objectives specific forms of cooperation in the book market is exempt from Section 10 (Agreements between undertakings that restrict competition) by specific regulation.

16. Cooperation in sectors and markets which fulfils the criteria for exemption from the competition law for specific policy reasons will inevitably interact with sectors not exempt. This might create situations where competition enforcement is influenced by regulation. In sectors not exempt, certain behaviour or cooperation can follow from a public directive reflecting public policy objectives, and a regulated conduct defence can be brought forward. And if certain forms of cooperation are prohibited by the Act, there can be a political push for regulatory exemptions provided for in Section 3 based on public policy grounds. Two examples illuminating these aspects of interaction between enforcement and regulation are presented below. Notably, the NCA has in several cases expressed concerns for exemptions from the Act, arguing that public policy goals are better served by direct measures rather than exemptions.

2.2.1. Alleged Abuse of Dominance in the Dairy Market

17. In 2007, the NCA decided to impose a fine on Tine, the major dairy producer and distributor in Norway, for violating the prohibition regulations in the Competition Act. The background was that Tine acquired a position as a sole supplier of cheese to Rema 1000, a grocery chain, as a result of its annual negotiations in 2004. The infringement also comprised a similar behaviour vis-à-vis the grocery chain Ica. The NCA found that Tine had infringed the Competition Act provision on abuse of dominant position (section 11), as well as the prohibition against agreements that restrict competition (section 10). The NCA concluded that there was a great risk that Tine's only competitor, Synnøve Finden, would be entirely or partly foreclosed as a result of Tine's exclusionary behaviour. The reduction in competition would harm consumers in the form of higher prices, more limited selection and reduced product development. The Authority concluded with a fine of NOK 45 million (approximately 4.5 million Euros) on Tine.

18. A number of complicated regulations are relevant for the Norwegian dairy markets. Notably, dairy products are exempt from the EEA agreement, making it legitimate for Norwegian authorities to protect national dairy production without violating the terms of the agreement. The primary sector exemption from the prohibition regulations of the

competition law added to the complexity of the case. Some of the regulations that were relevant in the Tine case were comprised by this exemption.[2]

19. In its defence, Tine claimed that the firm did not enjoy a dominant position in the cheese market, arguing that the agricultural regulations implied that Tine lacked the ability to act independently of its competitors and customers. In Tine's opinion the regulations in the dairy market taken together had the effect that Tine's prices are effectively determined by the government. Tine also argued that the regulations were relevant for the delineation of the relevant market.

20. In dominance cases it may be problematic to use the traditional SSNIP-test on the existing prices, since the prices may already be influenced by the market power of the dominant firm. This error – the Cellophane Fallacy – is clearly a relevant problem in the Norwegian dairy markets. When this problem is present, the test will exaggerate the scope of the relevant market.

21. Tine claimed that since the high prices were caused by the regulations, not by Tine's market power, there could be no Cellophane Fallacy problem.

22. While Tine claimed that the impact of the regulations on Tine's pricing implied that Tine did not hold a dominant position, the NCA argued that the regulations established a national market, and that Tine held a dominant position in this market. The Court of Appeal agreed with the NCA. Tine appealed the case to the Supreme Court. Notably, the assessment of dominance were not appealed.

23. The case was concluded in 2011, when the Norwegian Supreme Court rendered its judgment ultimately vindicated the dairy producer Tine for its practices on the Norwegian cheese market in 2004, practices which that the NCA considered amounted to an abuse of dominance in its 2007 decision.

2.2.2. Regulated Conduct Defence for Cooperation on Coastal Bus Route

24. A case relating to the regulated conduct (state compulsion) defence, and the criteria that must be fulfilled is described below, in the Kystbussen ("Coastal Bus ") case.[3]

25. In 2007, the NCA decided that Tide Reiser AS and Veolia Transport Sør AS no longer could cooperate on the Kystbussen express bus route between Bergen and Stavanger. The NCA considered that the cooperation was a violation against the prohibition regulations in Section 10 of the Competition Act.

26. The Coastal Bus is an express bus that operates the section Bergen - Stord - Haugesund - Stavanger. The Ministry of Transport and Communications approved and issued a permit for the establishment of the Coastal Bus for the first time in 1993. The allocation of licenses meant that the parties connected their existing licenses, thus, a continuous bus route on the section Bergen – Stavanger could be established. The cooperation the Coastal Bus route was formalized through an agreement between the parties in 1999.

27. When the Coastal Bus applied for renewal of the license in 2005, an application was made for a continuous permit on the stretch. It was also stated that the companies wanted to continue the current operating model, but that it was considered to establish a

[2] See a Norway's contribution to the OECD policy roundtable on the regulated conduct defence for more details: https://www.oecd.org/regreform/sectors/48606639.pdf

[3] For a thorough discussion, see See Hjelmeng, E. (2009) Offentlig regulering og konkurranseretten : en analyse av "state compulsion"-forsvaret, Fagbokforlaget (in Norwegian).

limited company with the operators as sub-transporters. The application was approved by the Ministry in 2006.

28. Relating to the NCA's case, the parties argued that the co-operation agreement was a result of the exercise of public authority, thus not covered by the prohibition regulations in Section 10 of the Competition Act.

29. In its decision, the NCA stated that it follows from established case law and jurisprudence that if public authority by law, regulations or individual injunctions have encouraged parties to enter into an agreement with a specific content, the agreement is considered a result of directives from the public sector, and not private autonomy. Such agreements fall outside the concept of an agreement in Article 101 TFEU, Article 53 of the EEA Agreement and Section 10 of the Competition Act. However, case law and jurisprudence also require that three cumulative conditions must be met for agreement shall be considered entered into in accordance with directives from the public sector, and thus fall outside the scope of Section 10.[4]

30. First, the public authority must have made a certain behaviour compelling. It is not sufficient that public authorities express that an agreement with a specific content is desirable. Secondly, public directives must have a clear legal basis. Finally, there is a requirement that the directives do not leave to the autonomy of the private parties to determine the details of the agreement.

31. In its assessment, the NCA did not find information that indicated that there are public directives that have forced the parties into a collaboration on the Coastal Bus.

32. After assessing the facts of the case, the NCA concluded that the cooperation restricted competition, in violation of Section 10 of the Competition Act.

33. The parties appealed NCA's decision. After the NCA dismissed the appeal, the parties' complaint regarding the decision was considered by the Ministry of Government Administration and Reform. In its decision from 2012, the Ministry agreed that the cooperation could have certain effects limiting competition. Without the cooperation on the Coastal Bus, the Ministry found it reasonable to assume that the parties would develop competing routes. However, the Ministry argued that the strength of this argument was reduced by the fact that a competing route (Nettbus) in the meantime was established. Moreover, the Ministry found that the efficiency gains related to the cooperation was significant, exceeded the negative impact on consumers and were to the benefit of the consumers. In its decision, the Ministry concluded that the cooperation not was in violation of Section 10 of the competition law. Consequently, the NCA's decision was repealed.[5]

34. Following the decision, the Ministry of Government Administration and Reform considered implementing a regulation exempting this form of cooperation on commercial express bus routes crossing counties from the prohibition regulations in Section 10 of the Competition Act. A similar exemption is implemented for cooperation in the book sector, based on cultural policy objectives. In its hearing statement, the NCA was very critical to the proposal from the Ministry. The proposal for regulatory exemption was eventually dropped.

[4] See eg. Case T-228/97 Irish Sugar vs. the Commission; Whish, Competition Law; or Kolstad/Ryssdals, Norsk Konkurranserett

[5] See https://www.regjeringen.no/globalassets/upload/fad/vedlegg/konkurransepolitikk/klagevedtak/klagevedtak_kystbuss.pdf (in Norwegian)

3. Competitition Enforcement and Impact on Economic Regulation.

35. In some markets, deregulation can lead to market failure and destructive competition along other dimensions than price. Such non-price competition may be detrimental to both customers and the companies involved. The result may be a reduction in welfare. Such a situation can justify targeted regulation to lay the foundation for healthy competition to the benefit of consumers.

36. Here, two examples based on NCA experience will be presented. The first example illuminates the role the competition authority had in the design, implementation and eventually the removal of regulation in two important markets – using a tool complementing the traditional enforcement tools; namely Section 14 in the Norwegian Competition Act. This section provides the legal basis to implement measures to promote competition. More specifically, if necessary to promote competition in the markets, the government may introduce regulation, which intervenes against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act.

3.1. Role in Design, Implementation and Eventually the Removal of Regulation

37. The first example is from the airline industry. Here, destructive competition led to regulatory measures using the tools at NCA's disposal. The second example is from the retail electricity market in Norway, also a market which is deregulated. This is an example where the challenges are addressed through dialogue with other regulatory authorities.

3.1.1. The Norwegian Airline Industry

38. The Norwegian airline industry after the deregulation in 1994 is a story of market failure followed by success. This is well described in Sørgard and Steen (2006).[6] The authors describe how the airline companies competed along the wrong dimensions seen from the customers' point of view. The lack of price competition in the business segment led to destructive competition on location and capacity. According to the authors, it was not only the customers that did not gain much from the competition triggered by deregulation. The carriers did not gain either. They competed on costly excess capacity, they did not price discriminate optimally according to the demand elasticities, and they lost substantial revenues from fierce competition for the large customers.

39. Color Air's entry failed and exited the market in the fall of 1999, 14 months after entry. Braathens became a failing firm in the fall of 2001 and was acquired by SAS. The regulated monopoly prior to 1994 was replaced by an unregulated monopoly in 2002.

40. The NCA considered that the SAS attractive Frequent Flyer Programs (FFP) was an important explanatory factor limiting the ability for new entrants to compete effectively on price. Consequently, in 2002, the NCA used the legal powers provided by section 3-10 of the former Competition Act of 1993, Section 14 in the current Act, to intervene by regulation against terms of business, agreements and actions that could limit the

[6] The development in this market described here is based on a chapter by Frode Steen and Lars Sørgard ("From failure to success in the airline industry") in *Competition and welfare: The Norwegian Experience*, edited by Lars Sørgard.

competition contrary to the purpose of the law. The regulation implied that FFP offered by SAS (EuroBonus) was banned from 2002.[7]

41. Thus, from July 2002 and onwards SAS could no longer offer frequent flyer points on domestic flights. In 2007, the regulatory ban according to Section 14 ban was extended to all FFPs by all airlines operating on domestic flights.

42. At the time the ban was passed, SAS had a monopoly position in Norway. In September 2002, Norwegian entered on four domestic routes. From 2002 to 2011, Norwegian increased its market share dramatically in the domestic market. In 2011 SAS and Norwegian had equal market shares in terms of number of passengers. Furthermore, the price of domestic flight tickets decreased in the period. Sørgard and Steen conclude that after the ban on FFP's we experienced entry and competition on prices rather than capacities: Instead of a large number of empty seats, the result was lower prices. Deregulation finally became beneficial for the consumers, and the firms no longer competed in a way that led to higher costs.In 2011-2012, the NCA undertook an assessment of the economic effects of the ban on FFPs. The purpose was to investigate the need to for a continued ban. The NCA performed an extensive survey of the current domestic market situation and a comprehensive review and assessment of the economic effects of FFPs in the given market situation. Based on the assessment, the NCA concluded that there was a risk that the competitive environment would worsen considerable if the ban was repealed.

43. In 2013, the Ministry of Government Administration and Reform[8] did repeal the regulatory ban on FFPs given according to Section 14. The Ministry stated that the ban had been important to support a new entrant (Norwegian) and ensure competition in the domestic market. However, in 2013, there were two large players (SAS and Norwegian) and the Ministry did not see the need for a continuation of the ban.

44. In June 2013, the Ministry asked the NCA to monitor the domestic airline market and report findings that suggest the need for remedies. This monitoring is ongoing and has been intensified as a result of the Covid-19 pandemic and its detrimental impact on aviation.

3.1.2. The Norwegian Electricity Market

45. A more recent example relates to the Norwegian retail electricity market. The market conditions in the retail market for electricity to households indicates strong competition and a well-functioning and efficient market. Electricity is a homogeneous product and the most important competition parameter is price. There are over 100 suppliers of electricity and market concentration is low.[9] Furthermore, the switching rate in Norway is increasing and among the highest in Europe.[10] Under these circumstances, there should be fierce competition and we would expect prices close to marginal costs.

46. Nevertheless, the retail electricity market is not as efficient as could be expected. A major concern is that customers lack access to adequate information or that the

[7] See Norway's contribution to OECD Roundtable on fidelity rebates in 2016: DAF/COMP/WD(2016)52.

[8] The NCA was an agency under the Ministry.

[9] CR3 is 38.3 and HHI below 1000, cf. ACER/CEER, "*Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2019."* Energy Retail and Consumer Protection Volume, October 2020. https://acer.europa.eu/en/Electricity/Market%20monitoring/Pages/Current-Edition.aspx

[10] Ibid.

information provided is opaque. This makes it more difficult to compare the products/prices from different suppliers. Adding to the opaqueness is that standard terms are not always used in a uniform manner in marketing of electricity tariffs. Thus, it might be difficult to compare prices and contract terms even within the same types of tariffs, as the total price in a given tariff often consists of several different price elements and additional services and products.

47. A report commissioned by The Norwegian Energy Regulatory Authority (RME) in The Norwegian Water Resource and Energy Directorate (NVE), describes in detail challenges and possible solutions to the challenges to competition in the retail electricity market.[11] The report recommends some measures for direct implementation, none of which are specifically related to enforcement of the competition law. The recommendations mainly involve clarification, and stricter enforcement, of already existing regulations. In addition the recommended changes include requirements for standardized price information in marketing, an obligation to specify all price elements and an to clearly outline promotional offers.

48. The Norwegian Competition Authority (NCA) participates in regular discussions regarding the retail electricity market with a variety of institutions, including RME, the Consumer Authority, the Norwegian Consumer Counsel and the industry organization Energy Norway. The NCA published a feature article in February 2020, in which it expressed its assessment of different types of measures to address challenges in the retail electricity market.[12] Furthermore, the NCA is ready to provide its assessment in a consultation response when RME and the Consumer Authority present their proposals of measures to implement.

49. The NCA is positive to measures directly aimed at solving the main challenges in the market, related to the fact that it is difficult for customers to find good and sound information that makes it possible and easy for them to choose among suppliers and tariffs.

50. A stricter enforcement of existing regulations will contribute to alleviate the problems, but in the NCA's view there is also need for a clarification of existing regulations to give suppliers sufficient clarity. When considering implementing more detailed sector regulation, like prohibition of certain types of tariffs or price regulations, it is important to conduct thorough assessments of possible negative effects on future competition in the market.

3.2. Role in Influencing the Design of Regulation

51. In addition to more direct role in the design of regulation alluded to above, the NCA also plays an active role in influencing the design of regulation under the responsibility of other regulatory bodies in a more competition friendly. This advocacy task follows from Section 9 in the Competition Act, which states that the NCA shall call attention to any restrictive effects on competition of public measures and, where appropriate, submitting proposals aimed at furthering competition and facilitating market access by new competitors. Some examples of successful advocacy efforts in this regard is presented

[11] Oslo Economics, RME ekstern rapport Nr. 5/2021, *"Tiltak for et effektivt sluttbrukermarked for strøm"*, only in Norwegian. https://www.nve.no/reguleringsmyndigheten/nytt-fra-rme/nyheter-reguleringsmyndigheten-for-energi/ny-rapport-om-utfordringer-i-sluttbrukermarkedet/.

[12] https://konkurransetilsynet.no/kronikk-strommen-blir-dyrere-om-vi-regulerer-bort-konkurransen/

below. A key point is the importance of good working relations with the regulator in charge. This is a key factor for success.

3.2.1. Aviation Market and PSO-routes

52. Most of the Norwegian air traffic are commercially operated, and the prices are set in a market with free competition. However, not all routes can be operated profitably, leading to a non-satisfactory service in some areas. In order to ensure a desirable coverage and frequency on routes throughout the country, the authorities purchase flight services on these routes after a tender among the airlines, and impose so-called public service obligations (PSO). When PSO are implemented, requirements for ticket prices, capacity, frequency, routing, etc. are set, in exchange for monopoly for the airline company on the relevant routes. Historically, there has been little competition in the tenders for the PSO routes. The Norwegian airline company Widerøe, is the largest regional airline in Scandinavia and has been operating close to all the PSO routes in Norway. There has been few actual and potential competitors.

53. Prior to the PSO-routes being announced for tenders, the authorities hold consultations related to the requirements set in the tenders. The NCA is a consultation body in these consultations. In its responses to these consultations, the NCA has focused on pointing out factors that may influence whether new players will/can establish themselves in the market.

54. An example of such a requirement is for navigation equipment. Some regional airports in Norway are equipped with an approach system called "SCAT-1". The approach system is used to guide planes safely to the runway by communicating with SCAT-1 equipment on board the approaching plane. For several years, PSO-tender requirements included the use of this specific type of navigation equipment. Widerøe was the only airline owning on-board SCAT-1 equipment, since the manufacturer had ceased to produce it.

55. The NCA has repeatedly stated that the technical requirements were too strict, leading to higher barriers to entry and therefor few or no competitors submitting bids in the tenders for the PSO routes. The NCA argued that unnecessary demands on the airlines should be avoided as it may prevent effective competition. A specific assessment must be made for each airport as to whether SCAT-1 is the only navigation system that can be used. In recent years, a review of these requirements has been undertaken, and other, more available navigation systems have been approved.

56. It can added that in 2016, ESA opened a formal investigation into whether Widerøe may have abused a dominant position by refusing to sell or lease its spare on-board equipment to other operators, so that those operators could not put in a successful bid for publicly-financed service routes involving airports using SCAT-1.

57. However, during 2016–17, shortly after ESA opened formal proceedings, the Norwegian government approved alternative guidance solutions, based on different technology, for the airports in question. That meant that the SCAT-1 system was no longer required for market access. Regardless, ESA continued its assessment. In 2020, the Efta Surveillance Authority decided to discontinue its investigation.[13]

[13] See https://www.eftasurv.int/newsroom/updates/competition-esa-discontinues-wideroe-investigation

3.2.2. Spectrum Auctions and the Role of the NCA in Design

58. Electronic telecommunications markets in Norway are regulated by the Norwegian Communications Authority (Nkom), which is an agency subject to the Ministry of Local Government and Modernisation.

59. Regulating telecommunications markets includes organizing the allocation of electromagnetic frequencies, primarily through the rules governing licensing and use of spectrum. Mobile Network Operators (MNOs) use electromagnetic frequencies to produce mobile communication services. These frequencies are a limited natural resource: if one MNO uses a given range of frequencies, another MNO cannot.

60. Consequently, the way spectrum licenses are allocated has consequences for competition, and for a wide range of other concerns. Examples include the revenues the spectrum auctions raise; conversely, the revenues the auctions draw from market participants; the efficient allocation of economic resources; and the incentives and opportunities for expanding network coverage.

61. Norway's mobile telecommunications markets are special in that Norway only has two MNOs with national coverage. A third MNO has long been a goal for the electronic communications authorities, in order to strengthen competition in these markets. The NCA has supported this goal through its enforcement of the Norwegian Competition Act, and when submitting views on proposed regulation, including spectrum allocation.

62. Specifically, setting a cap on the maximum share of frequencies that one MNO may acquire – both in the auctions in isolation, and in conjunction with frequency resources the incumbent MNOs already have – ensures that a minimum share of frequency resources is available for a third MNO. In designing spectrum auctions, this consideration must be held up against the other important considerations listed above.

63. The NCA has argued for frequency caps in the auctions, and the spectrum auctions in Norway have indeed included, and continue to include, caps which ensure that a third competitor may win a share of the available spectrum. Other goals which could be affected by the caps, has been ensured through other means. One example is the designation of one of the frequency bands being auctioned off as a "coverage band", with special rights and obligations connected to it, to facilitate the build out of rural mobile coverage.

64. In this way, aims for rural coverage have been achieved, while at the same time the growth of smaller competitors has been protected in a highly concentrated market.

3.2.3. The Grocery market and the Legal Latitude for Planning for Increased Competition

65. The Norwegian grocery market is highly concentrated and the barriers to entry are considered high.

66. One barrier to entry is access to suitable locations, a complex barrier consisting of several challenging factors.

67. One factor of relevance in this regard is the use of regulatory powers according to the Norwegian Building and Planning Act. This act provide local governments the authority to determine for what specific areas can or cannot be used. Consequently, the opening of a new grocery store is often dependent on approval from local planning authorities. Where local planning authorities has passed local regulations regarding the location of grocery stores, this approval can be more difficult to obtain, as the regulations are sometimes restrictive of competition.

68. Although the grocery market is highly concentrated on a national level, even higher concentration is observed in some local grocery markets. It is especially in these circumstances the NCA consider it beneficial if the local planning authorities were to take into consideration the positive effect an applicant could have on the competition when deciding whether or not to approve an application. This is especially of importance where approval would mean new entry into the grocery market, either on a local or national level.

69. The NCA has attempted to influence local planning authorities' practices by bringing the issue to their attention on several occasions. As a response, it is often argued that the Planning and Building Act does not allow the planning authorities to take effects on competition into consideration.

70. According to the Planning and Building Act § 3-1 d), cf. § 1-1, the planning authorities are expected to facilitate value creation in their planning. This could for instance mean facilitating increased competition, as increased competition usually lead to socio-economic value. The NCA's has argued that effects on competition should be considered both when passing local regulations and when considering whether to approve an application.

71. In 2019 the NCA decided to conduct further investigations in this area. Our legal assessment concluded that, contrary to the common perception expressed by local planning authorities, the Planning and Building Act does in fact allow the local authorities to take effects on competition into consideration when processing applications, although not explicitly expressed in the wording of the Act.

72. In order to gain support for our legal assessment, a dialogue was established with both the Ministry of Trade, Industry and Fisheries and the Ministry of Local Government and Modernisation, which is the ministry responsible for the Planning and Building Act. Both ministries agreed with the legal assessment conducted by the NCA.

73. Further, the Ministry of Trade, Industry and Fisheries, on behalf of the Government, gave the same assessment in its white paper on the Grocery Market and Competition in 2020 (Meld. St. 27 (2019-2020)). In order to clarify that the Planning and Building Act allows effects on competition to be taken into consideration, the Government proposed in the white paper to conduct further assessments on whether changes should be made to the Planning and Building Act. Taking effects on competition into consideration does not preclude other considerations from being decisive or essential to the outcome. Effects on competition is simply an additional consideration, consistent with the Planning and Building Act § 3-1, cf. § 1-1.

74. The proposal to consider amendments to the Planning and Building Act is considered a successful result of the NCA's advocacy efforts, as this would highlight the importance of competition to the local planning authorities as well as eliminate any doubt as to whether effects on competition can be taken into consideration.

4. Coordination Mechanisms

75. In many areas, sector regulators pursue objectives and make decisions that directly impact conditions for competition in markets. Thus, the NCA's has extensive contact with sector regulators for major markets. The contact varies from informal regular meetings, ad hoc meetings based on specific issues, to formal regular contact, institutionalized through cooperation agreements and regular meetings.

76. The background for the relationships varies. In some cases, the contact is based on specific information needs of the NCA related to its enforcements task; in other instances,

the regulator obtains information of relevance to the NCA's enforcement work. In addition, the contact follows from NCA's tasks and strategic goals, not the least related to promoting a more competition friendly regulatory environment. For the NCA, frequent contact has been an important channel to discuss alternative ways to reach regulatory goals in a way less restrictive to competition, to promote technology neutral regulations and not the least to provide fertile ground for innovations and new entrants.

77. Below, the working relationship with the regulatory authorities for the financial markets and the post and telecommunications services. The NCA's relations to these and other regulatory authorities are described in more depth in Norway's contribution to the WP2 discussion on Competition and Regulation in 2019.[14]

4.1. Financial Market and the relation between the NCA and the Financial Supervisory Authority

78. Through the EEA Agreement, EU financial market regulation is implemented in Norwegian law. The Financial Supervisory Authority (FSA)[15] is the supervisory authority. The FSA is responsible for the supervision of banks, finance companies, mortgage companies, insurance companies, pension funds, investment firms, securities fund management and market conduct in the securities market, stock exchanges and authorised market places, settlement centres and securities registers, estate agencies, debt collection agencies, external accountants and auditors. The FSA strives to promote financial stability and orderly market conditions and to instil confidence that financial contracts will be honoured, and services performed as intended.

79. Both the NCA and the FSA are concerned with the financial markets and how they function, even though the two authorities do not enforce the same regulations. To coordinate both authorities' efforts, the NCA and the FSA are in regular contact through meetings and consultation processes.

80. One type of cases where the NCA and the FSA may have overlapping interests, is merger cases in the financial sector, which need to be approved by both authorities.

81. In order to facilitate coordination between the NCA and the FSA, a collaboration agreement was entered into in 1996. The agreement stipulates that the authorities will coordinate their proceedings in cases where they have overlapping interests and keep each other informed on relevant cases. If needed, it is possible for the NCA and the FSA to exchange information. This includes confidential information within the legal framework of the Public Administration Act. In accordance with the agreement, the NCA and the FSA have yearly meetings where current issues are discussed.

82. The NCA and the FSA also meet in a forum for competition policy, which was initiated by the Ministry of Finance in 2014. In the forum, the NCA, the FSA and the consumer authorities meet to discuss topics related to competition in the financial sector. The purpose of these meetings is cooperation and exchange of information between entities that have complementary and/or overlapping areas of responsibility. The meetings in the forum for competition policy are held biannually.

83. When new regulations in the financial sector is proposed, it is sent to the NCA for consultation. In recent years, the NCA has submitted responses in different consultation processes. In several instances, the NCA has encouraged the regulatory authority to evaluate the competitive effects of a proposed new regulation before implementation. As

[14] Independent Sector Regulators – Note by Norway, see DAF/COMP/WP2/WD(2019)29.

[15] See https://www.finanstilsynet.no/en/about-finanstilsynet/

regulation may have an impact on competition, potential competitive effects of the regulation should thus be considered. Recent consultations indicate that the FSA has evaluated competitive effects of new regulation to a greater extent.

4.2. Telecom market and relation to the Norwegian Communications Authority (Nkom)

84. Norwegian electronic telecommunications markets are regulated by the Norwegian Communications Authority (Nkom), which is an agency subject to the Ministry of Local Government and Modernisation. Nkom also oversees markets for postal services.

85. Nkom regulates electronic communications markets in accordance with the EU/EEA framework, which means that the regulation of communications markets is aligned with the general EU/EEA competition policy framework. One example is designating and regulating communication providers with strong market positions; this EU/EEA framework explicitly references general EU/EEA competition rules. Arguably, this fact has contributed to a smooth cooperation between the NCA and Nkom over the years.

86. Cooperation between Nkom and the NCA is formally regulated by a cooperation agreement. The agreement specifies, inter alia, situations when the two authorities shall or can consult each other. One example is when Nkom is considering new or renewed regulation of providers with strong market positons. Another example is when the NCA considers intervening in mergers between electronic communication providers.

87. The cooperation agreement further requires the two authorities to take turns hosting a yearly "contact meeting", which is a full-day meeting dedicated to informing about – and freely exchanging views on – cases and issues within electronic (and postal) communications. Furthermore, the cooperation agreement specifies that the two authorities each shall have a designated contact person, who is responsible for ensuring good cooperation along the lines described above.

88. The NCA and Nkom cooperates when Nkom reviews its regulations of telecoms providers with strong market positions. The concept of "strong market position" is itself closely linked to the concept of dominance, and Nkom's market analyses includes relevant market definition, assessing barriers to entry, and assessing whether general competition law may be insufficient for ensuring competition in the market in question, thus warranting specific sectoral regulation.

89. Nkom and the NCA have also arranged ad hoc workshops on specific topics. One example is from 2018, when NCA employees learned about technical issues in relation to communication networks from Nkom engineering staff.

90. The two organizations have had extensive contact when the NCA has handled merger and antitrust cases, with Nkom providing expert advice on technical matters as well as giving input to the competition assessments.

91. On some issues, the NCAs emphasis on competition may also encounter other concerns from Nkom, for example relating to the robustness of the communications networks in emergencies. Often, however, these concerns may be reconciled. One example is when competition concerns and the need for network redundancy in emergencies both point towards maintaining or increasing the number of infrastructure-based providers in the market. Another example is auctions for spectrum licenses, where an issue is whether the spectrum available for each provider should be capped in order to ensure a minimum number of providers, and where large providers may argue with reference to economies of

scale. The NCA's contributions to these processes may bolster Nkom's arguments relating to competition.

5. Concluding comments

92. In the invitation for this roundtable, it is stated that economic regulation and competition policy are interdependent instruments of economic policy. Regulation and competition policy have different but overlapping scopes. Even if they share a common purpose of economic efficiency, tensions can occur. Such tensions can result not only from differences in goal, from but also the means deployed to achieve these goals.

93. This contribution presents the NCA's experiences in this regard. The contribution first presents the legal tools available in the Competition Act to resolve overlapping competencies between regulatory authorities and the NCA. This tool has not been used; a fact that illuminates the importance of good contact and working relations with the regulators in question, so that conflict can be avoided without the need for legal instruments.

94. Furthermore, the contribution focuses on the legal basis in the Act to exempt certain sector or markets from eg. the prohibition regulations of the Act. Such exemptions are based on public policy considerations. However, it is challenging to completely delineate the exempted sector completely from sectors obliged to follow the competition rules. The resulting overlap creates challenges for enforcement, and the contribution presents examples in that regard. Also, the legal possibility to exempt certain forms of cooperation that otherwise would be prohibited from the scope of the law, easily creates a political pressure for additional exemptions. In such cases, the NCA has argued firmly that more direct policy measures to pursue policy goals should be exploited first.

95. Furthermore, the tools at the NCA's disposal to design, implement and eventually remove regulation are presented together with some examples where the tools have been used. In addition, some examples where the NCA have influenced type and extent of regulation are presented.

96. An overriding point in this contribution is that conflict and tensions between competition policy and regulation can be avoided or reduced through good contact on a formal and informal basis between enforcers in the respective areas, by well-designed regulations minimizing the negative impact on competition or using competition in a smart way to achieve regulatory goals, and finally: using targeted policy measures rather than indirect measures involving exemptions from the competition law.