Norway

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Introduction

In this report, we present and discuss the relationship between Norwegian competition law and policy, on the one hand, and the digital economy, on the other. Our report will address the general topics raised in FIDE's background questionnaire, but not all sub-questions are equally relevant from a distinctly Norwegian viewpoint.

One further clarification here concerns the notion of 'the digital economy', which is not defined in FIDE's background questionnaire, and which therefore leaves it open to different interpretations. It may be understood narrowly, for example, as referring to digital service markets. Conversely, it may be broadly understood as referring to fundamental changes in (digital) interaction and communication that affect (almost) all markets and market participants in developed economies. In this report, we attempt to relate Norwegian competition law and policy to the 'the digital economy' in both the narrow and broad sense.

In light of certain national/EEA specificities, a brief overview of Norwegian and EEA competition law and practice should also be provided from the very outset. Norwegian substantive competition law consists of a dual set of rules: the rules of the Norwegian Competition Act[1] and the rules of the European Economic Area Agreement (EEA) between the EFTA states and the EU member states. The Competition Act (2004) brought Norwegian substantive antitrust law into line with EU/EEA competition law by prohibiting anticompetitive agreements/concerted practices (Section 10) and abuse of dominance (Section 11). Case law relating to the corresponding TFEU and the EEA antitrust prohibitions is very important when interpreting the Competition Act. Concerning mergers, the standard of intervention against 'concentrations' in the Competition Act (Section 16)

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1 Act of March 5, 2004 No 12 on competition between undertakings and control of concentrations.

was harmonised with the SIEC-standard in the EU Merger Regulation in 2016. The turnover thresholds for the mandatory and automatic notification obligation for concentrations were raised to their current level (NOK 1000 million (combined) / 100 (individual)) in 2014. The NCA has retained its competence, however, to intervene against concentrations below the thresholds, subject to a voluntary or time-limited order of notification.

The legislative objective of the Competition Act (Section 1) is 'to further competition and thereby contribute to the efficient utilization of society's resources'. Moreover, 'special consideration shall be given to the interests of consumers'. There is arguably a certain conflict between the narrowly defined economic objectives of the Norwegian Competition Act and its substantive provisions linked to its EU/EEA counterparts, which were intended to integrate a European single market. Potential infringements of the Competition Act are monitored, investigated and, if deemed appropriate, sanctioned by the NCA. The NCA is organised in three market-monitoring departments: Finance and Communications; Construction, Industry and Energy; and Food, Trade and Health. The antitrust prohibitions are also subject to private enforcement and litigation.

Under the EEA Agreement, Articles 53 and 54 prohibit anti-competitive coordination and abuse of market dominance. The provisions are equivalent to, and shall be interpreted in the same manner as, Articles 101 and 102 TFEU. The Main Part of the EEA Agreement, including the antitrust prohibitions, is incorporated in Norwegian law through the Norwegian EEA Act (1992).[2] Pursuant to Article 56 EEA, competence to enforce Articles 53 and 54 EEA is divided between ESA and the European Commission. A procedure for decentralised enforcement is set out in the Surveillance and Court Agreement (SCA)[3] and in the Norwegian EEA Competition Act[4], which also empowers the NCA to monitor and enforce Articles 53 and 54 EEA. It is important to note that cross-pillar decentralised enforcement, i.e. the competence of NCAs within the EFTA pillar to enforce Articles 53 and 54 EEA, has not been recognised by the European Commission, which takes the view that Articles 55 and 56 EEA vest public enforcement of Articles 53 and 54 EEA exclusively with ESA and itself. The ongoing process of implementing the Damages Directive of 2014 and the ECN+ Directive of 2019 in the EEA Agreement has brought the debate on decentralised enforcement within the EFTA pillar back to the table, and the EFTA States hope to change the Commission's view on these matters.[5]

2 Act of November 27, 1992 No 109 on the implementation of the main part of the EEA Agreement.

3 Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

4 Act of March 5, 2004 No 11 concerning implementation and enforcement of the competition rules of the EEA Agreement.

5 For more details about decentralised enforcement within the EFTA pillar, see Gjendemsjø R, i Arnesen F et al., Agreement on the European Economin Area. A Commentary, C.H. Beck/Hart/Nomos/Universitetsforlaget, 2018.

The NCA's enforcement practice since the entry into force of the Competition Act in 2004 can be summarised as follows. The NCA has made four infringement decisions on abuse of dominance, one of which was later reversed, two were annulled by the courts and the last is currently pending in the court system. The NCA has moreover decided sixteen infringement cases concerning anti-competitive coordination, all but one of which address horizontal concerns, and a high proportion of which concern collusive tendering. With regard to concentrations, the NCA has intervened in around 47 cases (approx. 40:60 prohibitions: remedy clearances), whereas approximately a third are in retail sectors, where the NCA expressed concern about local anti-competitive effects. As to ESA's antitrust enforcement concerning Norway, two noteworthy decisions were against Norway Post (2010) for abuse of dominance in relation to its 'Post-in-shop' agreements and against ferry operator Color Line (2011) for both abuse of dominance and anti-competitive cooperation relating to its exclusionary relations with a Swedish port.

Sections A-D below present and discuss the four topics in FIDE's background questionnaire from the perspectives of Norwegian and EEA competition law and policy. Thus, in section A, we consider Norwegian competition policy in the digital economy. In section B, we discuss Norwegian case law and practice in relation to market definition and market power in the digital economy. Section C deals with Norwegian case law and practice relating to anti-competitive behaviour in the digital economy. Finally, in section D, we consider the Norwegian experience of regulatory overlaps and enforcement challenges in relation to the digital economy. Our findings can be summarised as follows:

On a general note, there has been limited competition law enforcement in Norway in digital service markets. However, the effects of digitalisation of information and communication in markets for tangible goods and traditional services are regularly considered by the competition authorities when applying Norwegian competition law in such markets.

Digitalisation of the economy has not led to general amendments of Norwegian competition law. As regards competition policy, the Ministry of Trade, Industry and Fisheries, in its annual instruction letter of January 2020, for the first time instructed the Norwegian Competition Authority (NCA) to give particular priority to monitoring the digital economy. The NCA has previously actively enforced the competition rules, *inter alia* in the Norwegian telecom and fintech sectors. The NCA has notably also expressed scepticism about using antitrust law as a means of furthering data protection considerations.

With regard to the use of traditional competition analysis tools, such as market definition and market structure characteristics of digital service markets, the Norwegian practice is limited. In cases concerning the digital economy, the NCA has been reluctant to enforce the Norwegian competition rules in markets that have a broader geographical scope than Norway. Note also that the Norwegian competition authority (NCA) has progressively

applied competition analysis methods other than a conventional market structure approach in other sectors, i.e. brick-and-mortar retail cases.

As to the issue of anticompetitive practices in the digital economy, examples of enforcement in digital services markets in Norway are relatively scarce. As regards abuse of dominance, the NCA and the Competition Appeals Committee's findings against Norwegian telecom incumbent Telenor should be mentioned. On anti-competitive coordination, the arguably too broad interpretation of infringements by 'object' in Norwegian practice may also have a bearing on the digital economy. As to merger control, the NCA's enforcement emphasis has been on horizontal effects in local and national markets. Competition in the Norwegian telecom sector has also been a priority for the NCA.

A Competition policy in the digital economy:a shift in focus?

In this section, we discuss whether and how digitalisation of the economy has affected Norwegian competition policy. Drawing on the sub-questions in FIDE's questionnaire, we address the subject matter from a legislative perspective, an enforcement perspective and from a broader policy perspective, based, among other sources, on public statements from the NCA on issues relating to the digital economy.

1. What are the main cases dealing with the digital economy (focusing on digital businesses or on the competition between digital businesses and incumbent operators) initiated and completed by your competition authority?

On the issue of competition law enforcement in relation to the digitalised economy, the NCA has been relatively active in its merger control enforcement. Thus, the NCA has intervened against several concentrations in the telecom sector (V2005-6 Telenor – Tiscali, V2012-8 Telenor – LOS, V2015-1 Telia – Tele2/NwN), as well as in the IT services sector (V2019-23, Tieto – Evry).

The NCA has also intervened against concentrations in both the vehicle rescue sector (V2006-490 Falck – Viking) and the retail fuel sector (V2015-29 St1 Nordic OY – Smart Fuel) based on coordinated effects theories, whereby market transparency was allegedly enhanced by the internet (price announcements on websites).

In Norwegian concentration cases concerning payment systems (V2018-18 Vipps AS – BankAxept AS/BankID Norge AS), potential competition from global internet giants (Apple (Apple Pay), Google (Google Pay), Facebook (Facebook Pay) and Amazon (Amazon Pay)) has been considered.

In the media sector, Google and Facebook have not been regarded as part of the same advertising market as local newspapers (V2012-11 A-pressen AS – Mecom Europe AS).

In 2008, telephone number searches on the internet were not considered a sufficient substitute for telephone number directory services by SMS (V2008-22 Opplysningen Mobil AS – Aspiro Søk AS).

As to abuse of dominance in the digital economy, in 2018, the NCA imposed a NOK 788 million fine on Telenor (V2018-20 Telenor) for having changed its pricing conditions, when giving Network Norway wholesale access to Telenor's national communication network. This was allegedly an unlawful strategy to reduce Network Norway's incentives to vertically integrate upwards by developing its own national communication network. The NCA's decision has been upheld by the Competition Appeals Committee and it is currently pending in the Norwegian courts. Note that ESA is currently also investigating Telenor for potentially abusive conduct in the form of margin squeeze. ESA is also currently investigating airline operator Widerøe for refusing to supply competitors with its satellite-based approach system receivers, which are used to operate local routes in Norway.

The NCA and ESA's *enforcement of anti-competitive agreements in digital services* has been limited. It is noteworthy, however, that in 2016 ESA initiated an investigation into whether Finance Norway, Bits, BankID, DNB and Nordea had engaged in agreements, decisions or concerted practices aimed at preventing the Swedish payment initiation provider Trustly from entering the e-payments market in Norway. The investigation followed a complaint from Trustly to ESA. It concerned alleged blocking by the Norwegian banking community of Trustly's ability to provide a new e-payments service that enables customers to pay for goods and services online directly from their bank accounts, without needing a credit or debit card. In April 2019, however, ESA announced that it had discontinued its investigation.

2. Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?

On the legislative side, specific concerns about competition in a digital economy have not led to general amendments of the Competition Act or amendment proposals. As to the regulation of specific sectors affected by digitalisation, it is worth mentioning that, in 2018, the Norwegian government proposed retaining the provision exempting coordination of the sale of books from the prohibition on anti-competitive agreements in Section 10 of the Competition Act. The provision does not and cannot exempt the application of Article 53 EEA insofar as trade between EEA states is affected, which may be the case for eBooks.

In relation to the food and groceries sector, in 2018, the Norwegian parliament ordered the government to examine policies to further competition, new market entry and innovation, including a possible sector-specific prohibition on price discrimination for dominant suppliers. The Norwegian grocery sector is also characterised by high entry barriers, and ecommerce/home delivery has a very limited market share.

As regards digital platforms, a government-appointed committee submitted a report on the 'sharing economy' in 2017 (NOU 2017:4 Delingsøkonomien). Among other proposals, a majority of the committee's members argued for deregulation of the taxi sector in order to enhance competition and technological innovation made possible by digital communication. In June 2019, the Norwegian parliament amended the Act on professional transport, thereby partly liberalising the taxi sector.

Regarding policy changes, as noted briefly noted above, the Ministry of Trade, Industry and Fisheries, in its annual instruction letter of 14 January 2020, for the first time instructed the Norwegian Competition Authority (NCA) to give particular priority to monitoring the digital economy. The Ministry pointed out that digitalisation contributes to significant technological development and innovation. While traditional market structures are challenged, leading to increased competition, digitalisation may also lead to market dominance and increase the risk of collusion. The Ministry therefore argues that the NCA should ensure that digitalisation contributes to increased competition in the interest of consumers and the business community. The NCA should also consider the opportunities that digitalisation may provide for detecting and investigating competition law violations.

As to the NCA's express policy concerns, it is notable that many of the issues it has raised in recent years are related to the digital economy. For example, the NCA has opposed the development of a publicly funded internet web portal in the grocery sector that would give consumers access to real-time prices for all goods in Norwegian grocery stores.

The NCA has also expressed opposition to the exemption from Section 10 on coordination of the sale of books, *inter alia* based on concern that the exemption could reduce the number of publications of eBooks. The NCA has publicly voiced concern that Norwegian fintech cooperation should not lead to coordinated exclusion of international market participants.[6]

The NCA has further monitored the use of MFN clauses in the hotel online booking sector, although it has not taken any direct enforcement actions.[7]

The NCA has publicly warned against the competitive risks posed by digital coordination technologies and AI.[8]

Lastly, the NCA's director has publicly expressed scepticism about using antitrust law as a means of furthering data protection considerations, with reference to the German BKA's decision against Facebook.[9]

To summarise our brief account of Norwegian competition policy in the digital economy, what we see is that digitalisation of the economy has not led to amendments to

6 https://konkurransetilsynet.no/kronikk-samarbeidet-i-finansbransjen-ma-ikke-vippe-over-pa-gal-side/.
7 https://konkurransetilsynet.no/kronikk-hotellbooking-pa-nett-er-til-fordel-for-hotellgjestene/.
8 https://konkurransetilsynet.no/kronikk-er-kunstig-intelligens-fremtidens-kartell/.
9 https://konkurransetilsynet.no/kronikk-digital-regulering/.

the Competition Act, nor to a shift in the NCA's enforcement priorities from traditional sectors to new digital service markets. Digital interaction and communication do, however, also affect competition law analyses and enforcement in markets for tangible goods and traditional services. The NCA's stated policy concerns and 'soft' enforcement practices also reflect a keen interest in the development of the digital economy in Norway.

B Market definition and market power in the digital economy

In this section, we discuss interrelations between the digital economy, the market definition process and the assessment of market power from the perspective of Norwegian competition law and practice. On this topic, FIDE's questionnaire specifically mentions online platforms and, *inter alia,* points to challenges related to two-sided markets and to other parameters for measuring market power than market shares.

As already noted, there are few enforcement decisions by the Norwegian competition authorities on digital service markets in the narrow sense. We will therefore take a broader view and address some issues raised by Norwegian competition practice as regards market definition and market power in general, and relate them to digitalisation of the economy.

4. How does your competition authority define the market with regard to digital economy players?

To define relevant markets, both the NCA and ESA will generally apply the guidance provided by ESA's Notice on the definition of relevant market, which is equivalent to the European Commission's notice on the same issue. In concrete cases, the NCA and ESA will generally also look to the European Commission's decisional practice for guidance as to how various markets have been delineated in terms of their product and geographical scope. In telecom cases, the NCA also looks to the Norwegian Communications Authority's practice for defining relevant markets.

As to potential concerns about parts of the tech industry that compile and use personal data in their business models, it is noteworthy that the NCA rarely enforces competition rules in markets that have a broader scope than Norway. Since 2004, this has only happened on one occasion (V2005-11 NOW – Varco (offshore drilling)). In some cases, however, the NCA has intervened without finding it necessary to conclude firmly on the geographic scope of the relevant market (see V2019-23, Tieto – Evry). In response to, and perhaps in contrast to, the enforcement practice of the German BKA, the NCA's stated policy in response to concerns about global tech-giants and their compilation of user data has been

that it is important that national competition authorities in the EU/EEA, including Norway, act in unison under the direction of the European Commission.[10]

5. How is market power established in the practice of your competition authority in cases relating to digital economy players?

With regard to digital platforms, there are no enforcement decisions from NCA or ESA. In relation to the taxi sector, the NCA has been a vocal advocate of deregulation and of new business models that use digital platforms to connect drivers and customers (e.g. Uber). However, the risk that digital platforms may lead to price coordination between independent service providers has not been on the NCA's agenda in this sector. In relation to hotel booking platforms, the NCA's stated policy is to await further recommendations from the European Commission.[11]

The NCA and ESA's practice is also limited as regards two-sided markets. A notable exception is the NCA's intervention against a media concentration. In V2012-11 A-pressen AS – Mecom Europe AS, the NCA found qualifying anti-competitive effects in the narrowly defined markets for printed news in the county of Telemark and for advertising in printed newspapers in the town of Fredrikstad. The NCA defined separate markets for the different customer groups (readers and advertisers). However, the NCA did address the two-sidedness of the service in its competitive assessment by discussing whether network effects could offset the impact of reduced competition in the separate individual markets. The concentration was accepted subject to conditions.

The general trend, however, is reflected in the NCA's increased reliance on other competition analysis methods than market structure and concentration indicators, especially in merger cases. From the first enactment of the NCA's competence to intervene in mergers and acquisitions in 1988 until around 2011, the NCA invariably relied on traditional market structure analyses. From 2011 to 2016, however, the NCA increasingly based its decisions (albeit predominantly in horizontal cases concerning unilateral effects and differentiated products) on assessments of closeness of competition, diversion ratios (often based on customer surveys) and price pressure indexes. Among other sources, the NCA drew inspiration from US economic theory and UK merger practice. From a legal dogmatic point of view, the NCA's departure from the structuralist approach was arguably made possible by the previous distinctly Norwegian standard of intervention. From 1 July 2016, the standard was harmonised with the SIEC standard from the EUMR. Accordingly, the NCA is now obliged to take the CJEU's analytical approach into account in its merger control enforcement.

10 https://www.tek.no/artikler/facebook-palagt-store-begrensninger/457500.

11 https://konkurransetilsynet.no/kronikk-hotellbooking-pa-nett-er-til-fordel-for-hotellgjestene/.

6. Can you notice a difference in ex post assessments (abuse of dominance cases) and ex ante assessments (concentration merger control cases), both in relation to defining markets and conceptualizing market power?

As regards whether there may be a difference in the NCA's practice in relation to market definition / market power in antitrust and concentration cases, its enforcement practice in the grocery sector is a notable example. In 2014, the NCA issued a reasoned opinion that it intended to prohibit a cooperation agreement between the grocery chain Norgesgruppen and ICA on joint purchasing and distribution. The NCA analysed the concentration from a national perspective, without detailed assessments of identified local markets. The cooperation plans were subsequently abandoned by the parties. The year after, a concentration between the grocery chain COOP and ICA was notified and analysed by the NCA. In its conditional clearance decision (V2015-14 COOP – ICA), the NCA this time focused its competition analysis on identified local markets where the undertakings had an overlapping market presence.

C Anti-competitive behaviour in the digital economy

There have not been many cases concerning anti-competitive behaviour in the digital economy in Norway. There are a few cases that are worth mentioning, however. These cases are not of the same nature as the *Eturas* case referred to in the questionnaire, since none of them concerned collusion through a digital service platform as such. Hence, the cases presented in the following rely on the wider meaning of the term 'digital economy', as explained in the introduction to this report.

7. Which practices in digital markets or involving digital businesses have been analysed in the decision-making practices or case law of your jurisdiction?

8. What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?

9. Have you witnessed the emergence of specific theories of harm tailored to digital markets?

One case worth mentioning concerning restrictions of competition by object is the Norwegian bid-rigging *Ski/Follo Taxi* case.[12] The case itself perhaps does not fit the label

12 Judgment of 22 December 2016 in case E-3/16, Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v The Norwegian Government, represented by the Competition Authority, EFTA Ct. Rep. 1000.

'digital economy' very well, but the Norwegian Supreme Court's ruling on the understanding of restrictions of competition 'by object' will most likely have an impact on anti-competitive practices in the digital economy in future. The case provides insight into how the rules on establishing a competition restriction by object are to be understood according to the EFTA Court, with reference to relevant case law from the ECJ, thereby ensuring homogeneity between the EU and EFTA pillars.[13]

The case concerned the issue of whether two local taxi companies in the Eastern parts of Norway, Ski Taxi and Follo Taxi, had participated in illegal bid rigging when jointly participating in a public tender procedure announced in 2010 by Oslo University Hospital. The tender was submitted through a joint venture, SFD. The NCA had decided that the companies had restricted the competition *by object* pursuant to Section 10 (1) of the Norwegian Competition Act, since they did not deliver separate, competing tenders when they could have done so. This further meant that the NCA decided not to proceed with any further analyses of whether the joint tender had any restrictive *effects* pursuant to the same provision. Lastly, the NCA decided that there were no justifying exceptions pursuant to Section 10 (3) of the Norwegian Competition Act, which mirrors Article 101 TFEU (3).

The main issue in the case was defining the legal test for determining whether an agreement between competitors restricts competition 'by object'. The case went all the way to the Norwegian Supreme Court and is a rare example of a request from the Norwegian Supreme Court for an Advisory Opinion from the EFTA Court.[14] Article 34 SCA does not mirror Article 267 (3) TFEU, and, in principle, the EFTA states are under no obligation to refer questions about the understanding of EEA law to the EFTA Court. Statistics from Norway also illustrate this. Before the *Holship* case in 2015,[15] more than 12 years had elapsed since the last time a question was sent from the Norwegian Supreme Court to the EFTA Court.[16]

In the *Ski/Follo Taxi* case, the Norwegian Supreme Court submitted the following specific questions for a preliminary ruling:

> '1. What is the legal test when determining whether an agreement between undertakings has a competition-restricting object within the meaning of Article 53 EEA?

13 Ibid., para 90.

14 For an overview of the Norwegian cases up until 2011, see HH Fredriksen, *EU/EØS-rett i norske domstoler [EU/EEA law in Norwegian Courts]*, Report commissioned by the Norwegian EEA Review Committee, Oslo 2011, pp. 57-59.

15 Judgment of 19 April 2016 in case E-14/15, Holship Norge AS v Norsk Transportarbeiderforbund, EFTA Ct. Rep. 238.

16 For more about the relationship between the EFTA Court and the highest courts of the EFTA States, see Franklin C and Fredriksen HH, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On', Common Market Law Review, Vol. 52, No.3, 2015, pp. 629–684, pp. 671-676.

a. In this context, is it sufficient in order to be able to categorise a form of conduct as an infringement by object pursuant to Article 53 EEA, that the cooperation is capable of restricting competition?

2. What is the legal significance for the consideration of whether a form of conduct constitutes an infringement by object, that such cooperation took place openly vis-à-vis the procuring authority?

3. What legal criteria must in particular be emphasised when considering whether cooperation that takes the form of two competing companies submitting a joint tender through a joint venture, and where the two undertakings are to be subcontractors to the joint venture, should be deemed to constitute an infringement by object?'[17]

When answering these questions, the EFTA Court emphasised that the restriction by object criterion is objective, and that the parties' intentions are therefore not decisive. This meant that, although openly submitting a joint tender may reveal a lack of anti-competitive intention, this is in itself not a prerequisite for determining whether an agreement restricts competition by its object.

The EFTA Court further emphasised that it is not sufficient to establish that the agreement is capable of restricting competition, having regard to the specific legal and economic context. In order to qualify as a restriction by object, the agreement must entail a sufficient degree of harm to competition that there is no need to examine its effects. Account must also be taken of '*the substance of the cooperation, its objectives and the economic and legal context of which it forms part*'.[18] This means that, in order to establish whether the criterion is fulfilled, an assessment of the circumstances of each case is necessary, but only to the extent that the agreement's harmful nature is '*easily identifiable*'.[19]

The Norwegian Supreme Court upheld the Norwegian NCA's findings and ruled that the agreement between Ski Taxi and Follo Taxi to submit a joint bid through SFT caused sufficient harm to competition and thus had a competition-restricting object pursuant to Section 10 (1) of the Norwegian Competition Act. The Supreme Court ruled that, even if one of the companies would most likely have refrained from submitting a tender on its own, this was of little importance, since the decisive element was *the possibility* of a competing offer.[20] Joint bidding by undertakings that have the capacity to submit individual tenders was considered particularly harmful, since it reduces the number of tenderers and

17 Case E-3/16, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v The Norwegian Government, represented by the Competition Authority*, n 13, para. 24.

18 Ibid., paras. 101-102.

19 Ibid., para. 61.

20 Ski Taxi SA Follo Taxi SA Ski Follo Taxidrift AS mot Staten v/Konkurransetilsynet, HR-2017-1229-A, para. 44.

eliminates potential competition between the parties submitting the joint tender. Ski Taxi and Follo Taxi had cooperated on price, quality and capacity in a way that is similar to horizontal price fixing, which is expressly prohibited and highly likely to amount to an object restriction of competition pursuant to Section 10 (1) of the Norwegian Competition Act, and Article 53 1) EEA. There were some efficiency gains, such as increased car capacity and better utilisation of cars, which would not have been achieved with separate tenders, but these were not considered sufficient to outweigh the harm to competition pursuant to Section 10 (3)) of the Norwegian Competition Act.

The Telenor case on abuse of a dominant position is an example of the NCA's efforts to promote competition in the telecom sector. This case concerned whether, pursuant to Section 11 of the Norwegian Competition Act and Article 54 EEA, both of which mirror Article 102 TFEU, Telenor abused its dominant position between 2010 and 2014 by preventing the establishment of a third mobile network in Norway. During this period, Telenor and Telia were the only two mobile operators with a mobile network infrastructure that covered all of Norway. When a third actor, Network Norway, tried to establish a third national mobile network, Telenor arguably prevented this from happening by changing its pricing structure for Network Norway, which rented access to Telenor's network.

Access to Telenor's infrastructure was a precondition for Network Norway being able to establish a network of its own. The new terms from 2010 included a fixed monthly 'SIM fee' that Network Norway had to pay Telenor for each of Network Norway's subscribers. The SIM fee was independent of Network Norway's actual data traffic passing through Telenor's network. The new terms allegedly reduced Network Norway's incentives to continue work on establishing its own network. Network Norway was incentivised to merely continue as a service provider in the downstream market. Telenor thus arguably hindered more competition in the upstream market by preventing the establishment of a third network. In 2018, the NCA fined Telenor NOK 788 million for this behaviour, pursuant to the Norwegian Competition Act Section 29, seen together with Article 6 of the EEA Competition Act.[21] This is the highest fine ever imposed for an infringement of the competition rules in Norway. The NCA's decision has been upheld by the Competition Appeals Committee and is currently pending before the Norwegian courts.

It is interesting to note in connection with this case that the changed pricing structure was actually found to increase competition in the downstream market, for example providing Network Norway with more customers. However, the improvements in the downstream market were not found to outweigh the negative impact that the new terms had on competition in the upstream market, discouraging the establishment of a third mobile network. The Competition Appeals Committee found in particular that the changed pricing structure was not reconcilable with the fundamental responsibility a dominant

21 Case V2018-20 Telenor.

operator, i.e. Telenor, has for not disturbing competition in a market. The behaviour was therefore found to be in breach of Section 11 of the Norwegian Competition Act, and of Article 54 EEA as the cross-border dimension was found to be fulfilled.

10. What kind of remedies have been employed in cases relating to digital markets. Do you see any differences to remedies in other markets?

As mentioned earlier, promoting competition in the telecom sector has been an enforcement priority for the Norwegian Competition Authority. This is seen, for instance, in concentration control of the telecom sector, in which the NCA has intervened several times.[22] A common denominator in all these concentration cases is that the concentrations were in principle found to have qualified anti-competitive effects. Under the Norwegian Competition Act, however, undertakings can propose modifying commitments in order to avoid the harm caused to the competition in markets otherwise affected by the concentration. In the cases referred to in this report, the NCA authorised all the concentrations after accepting the proposed modifying commitments. Note that, as under EU law, the modifying commitments are subject to a proportionality test, meaning that the commitments must not go further than is necessary to address the significant competitive restraints caused by the concentration.

D Regulatory overlaps and enforcement challenges

In this section, we present regulatory overlaps and possible enforcement challenges in the digital economy in Norway. As in the previous sections, there is not much to present that is related to the digital economy in the narrow sense, but there are some cases of regulatory overlaps and policy disagreements between different agencies that are related to the digitalisation of the economy.

11. Has there been any overlap in practice between ex ante regulation aimed at controlling market behaviour – such as, but not limited to, consumer protection legislation, the proposed platform Regulation, the GDPR, the geo-blocking Regulation, the ePrivacy Directive and/or proposed ePrivacy Regulation, or similar national instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?

12. Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction?

22 Case V2005-6 Telenor – Tiscali, Case V2012-8 Telenor – LOS, Case V2015-1 Telia – Tele2/NwN.

The GDPR, protection of privacy and the collection of data are a concern in digital markets. In Norway, enforcement of the GDPR and protection of privacy more generally, are tasks assigned to the Norwegian Data Protection Authority. As mentioned above, the NCA has not focused on big data issues in its competition policy. Instead, it wishes to follow the EU Commission's lead on these issues. There is no direct overlap between the competences of the NCA and the data protection authority. Nor is there any example of their decisions leading to conflicting interests.

Responsibility for ensuring effective competition in the telecom market is shared between the NCA and the National Communication Authority. This is probably the best example from Norway of shared regulatory competence in the digital economy. The agencies' respective competences are mostly complementary and not overlapping. The Communications Authority primarily regulates the market *ex ante* through general regulations and by imposing obligations on undertakings, while the NCA enforces the prohibitions on abuse of dominance and anti-competitive agreements. In addition, as mentioned in earlier, the NCA has intervened against several concentrations in the telecom sector. The communications authority may impose certain obligations on undertakings found to have a dominant position in the telecom sector and it has done so in relation to Telenor. The obligations imposed on Telenor are an obligation to offer service providers and MVNOs access to their network on non-discriminatory terms and not to engage in margin squeezes. As mentioned, there is an ongoing case concerning possible abuse of dominance by Telenor. This case illustrates that the obligations imposed by the communications authority do not prevent the NCA from enforcing the prohibition on abuse of dominance, and that their competences are complementary.

As we briefly mentioned in section A, the Norwegian Consumer Agency developed an internet web portal that was supposed to show real-time prices of groceries. This was done on behalf of the Government. The purpose was, among other things, to increase consumer information about prices. The NCA was highly critical of the portal, because it would lead to increased market transparency in an oligopolistic market, increasing the risk of collusion.[23] In this case, neither the NCA nor the Consumer Agency had power of decision. It was the Government that had the final say, and hence would resolve the disagreement. In the end, development of the portal was terminated in May 2018.

Another example of the NCA opposing regulation of a market, partly because of the negative effects it would have on digital services, is the regulation of the Norwegian book market. The Government recently prolonged a regulation exempting what is known as

23 The Norwegian Competition Authority's consultation submission of 30 November 2011 concerning NOU 2011:4 https://www.regjeringen.no/contentassets/02bc298627934c308f572be0efeae981/026-konkurransetilsynet.pdf?uid=Konkurransetilsynet; https://konkurransetilsynet.no/forskning-viser-prisportaler-kan-gi-hoyere-priser/.

'the book agreement' from Section 10 of the Norwegian Competition Act (the prohibition on anti-competitive agreements).[24] The book agreement is an agreement between the publishers' association and the bookstores' association. The agreement allows publishers to set a fixed price for new books, which the bookstores must comply with (RPM). The NCA opposed the regulation because of the risk of it leading to high prices and its possible negative effects on the sale of eBooks and on subscription services for audio books.[25] An important aspect of this case is that the Government's competence is limited to adopting exemptions from the Norwegian Competition Act. It cannot adopt exemptions from the EEA competition rules. Both the NCA and ESA can enforce the EEA competition provisions in relation to the book agreement if the agreement is found to have an effect on interstate trade. So far, the agencies appear to be uncertain about whether the agreement has an appreciable effect on interstate trade. The agreement only covers books in the Norwegian language, limiting the extent of the effect on interstate trade. The digitalisation of the book market may increase the effect on interstate trade, however. Foreign companies trying to offer a subscription service for Norwegian audio books in Norway are a recent example. They find it difficult to include new books in their library because of the fixed-price clause in the book agreement. Furthermore, international providers of eBooks find it difficult to offer new Norwegian books because the fixed prices are well above the prices these undertakings normally offer. This development related to digital books could tip the effect on interstate trade towards being appreciable, and possibly lead to the NCA or ESA intervening.

24 https://lovdata.no/dokument/SF/forskrift/2014-12-19-1716?q=FOR-2014-12-19-1716.

25 See file://general.uib.no/JURHOME$/jprrg/Downloads/2016-0440-2-svar-pa-horing-forslag-til-endring-i-forskrift-om-unntak-fra-konkurranseloven-10-ved-omsetning-av-boker.pdf and https://konkurransetilsynet.no/bor-bokbransjens-unntak-fra-konkurransereglene-viderefores/.