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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN NORWAY**

-- 2004 --

*This report is submitted by the Norwegian Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19 and 20 October 2005.*

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## EXECUTIVE SUMMARY

1. This report provides a brief summary of some of the more important activities of the Norwegian Competition Authority (NCA) in 2004. It contains a description of some important cases handled by the NCA, and some markets and areas that the NCA has paid special attention to.
2. In 2004, the NCA intervened in five merger and acquisition cases.
3. The NCA made four interventions against anti-competitive practises during 2004. This included an intervention against loyalty rebates on cheese, and the prohibition of pharmacies' exclusivity agreements.
4. The NCA carried out four dawn raids in 2004. One case was reported to the public prosecuting authority with a request for criminal investigation and prosecution.
5. During the period, the NCA handled numerous cases regarding shaping and implementation of other policies. For example, The NCA focused on regional airline routes, local bus policy, and mortgage registration fee.
6. The NCA continued to be active in international networks and organisations. During the period the NCA has had a special focus on the modernisation process in the EU and the EEA, but has also participated actively in meetings with the other Nordic competition authorities and in the OECD.
7. A new Competition Act entered into force on 1 May 2004. The new Act is to a large extent harmonised with the EU/EEA competition rules and provides the basis for a more ambitious competition policy in Norway.
8. The Parliament has decided that the NCA shall move from Oslo to Bergen before the end of 2006. By the end of 2004, 25 employees had their work place in Bergen.

### **I. Legislation and strengthening of Competition Policy**

#### ***I.1 Strengthening of Competition Policy***

9. Through its action plan of 2001 for enhanced competition, the Government has expressed its intention to improve the resource allocation. Special focus is put on the public sector. The NCA has actively followed up the five main elements of the action plan, which are:
  - To strengthen the competition authorities.
  - To review public regulations and measures that may restrict competition.
  - To ensure that public procurement enhances competition and facilitates market access.
  - To ensure that privatisation of public enterprises does not restrict competition or create monopolies.
  - To ensure that the public sector is organised and operates in a manner promoting competition.
10. To achieve this, the NCA has, over the last two years, made a database of public regulations and measures that may restrict competition. Entry regulations, taxes, and unfair competition between private and public entities are the most frequent subjects addressed. In the autumn of 2004 this database was

updated, and the new information was reported to the Ministry of Modernisation. The Ministry of Modernisation has used this information for an interministerial working group of public regulations.

## ***I.2 Adoption of a new Competition Act***

11. The new Competition Act entered into force 1 May 2004. The new Act harmonises Norwegian competition law in several areas with EU/EEA competition law and strengthens the NCA's possibility to sanction anti-competitive agreements and abuse of a dominant position.

### *EU/EEA harmonisation*

12. The new Act contains a prohibition against anti-competitive agreements and concerted practices and a prohibition against abuse of dominance. The prohibitions are, apart from the absence of the affect on trade criteria, identical to the prohibitions in Articles 81 and 82 of the EC Treaty and Articles 53 and 54 of the EEA Agreement. Case law under EU/EEA competition rules has become a key legal source for the NCA's enforcement of the prohibitions against anti-competitive agreements and abuse of a dominant market position.

### *Investigation and sanctions*

13. The new Competition Act maintains the extensive investigative powers of the Competition Authority and the possibility of imposing criminal sanctions on individuals and undertakings in violation of the Act. The Act also provides the Competition Authority with the power to impose administrative fines on companies in breach of the prohibitions. The aim of the Act is to have a similar level of fines to that of the EU. The Act also provides the basis for a transparent leniency programme.

### *Merger control*

14. The new Act introduces a mandatory notification system for concentrations. The concept of concentration is identical to that of EU/EEA merger control. Concentrations where the undertakings concerned have a combined annual turnover in Norway exceeding NOK 20 million (approximately USD 3.1 million), must be notified to the NCA by way of a standardized notification. If only one of the undertakings concerned have a annual turnover in Norway above NOK 5 million, notification is not required.

15. The NCA may order the undertakings to provide a more detailed notification in the form of a complete notification. Undertakings may not implement the concentration during the first phase of the procedures following an order to submit a complete notification.

16. The Competition Act also provides a strict procedural timetable for the handling of merger cases. Moreover, it retains the Substantial Lessening of Competition (SLC) test as the relevant merger test.

### *Internal training*

17. The NCA has devoted considerable resources to internal training to prepare the staff for the transition to the new Competition Act. In addition, the NCA has established staff groups specialising in the different parts of the new Act to assure a solid and up-to-date knowledge of the different parts of the Act. Each group is led by a senior legal advisor.

*External informasjon*

18. The NCA has also devoted considerable resources to external information about the new Competition Act. This has been done inter alia through brochures and newspaper advertisements. In addition, the NCA has organised several conferences on the new Competition Act and different topics covered by the new act.

**II. Enforcement of competition law and policies**

19. This section deals with the issues of illegal collusion, block exemptions, interventions against anti-competitive practices and merger control. Enforcement was based on the now repealed Competition Act of 1993 up to May 1, and the new Competition Act after that date.

**II.1 Illegal collusion**

**Sections 3-1 to 3-4** of the Competition Act of 1993 contained explicit prohibitions against:

- Collaboration and influence on *prices, mark-ups and discounts*.
- Collaboration and influence on *tenders*.
- Collaboration on, or use of influence to achieve, *market sharing*.

**Section 10** of the Competition Act of 2004 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.

20. In 2004, the NCA dealt with several cases concerning the prohibitions on price fixing, collusion in tenders and market sharing. One case was referred to Økokrim, the public prosecuting authority for economic crimes, with a request for criminal investigation and prosecution.

21. In cases involving possible serious breaches of the prohibitions of the Competition Act, the NCA usually carries out inspections at the premises of the companies. In order to carry out such inspections and secure evidence, the NCA must obtain an authorisation by the Courts. In 2004, the NCA carried out inspections in four cases.

22. In addition, the NCA was successful in two milestone court cases. In the first case, the court ruled that the NCA had the right to make comprehensive copies of electronically stored information during an inspection at the pharmaceutical company NMD. In the second case, the court allowed the NCA to confiscate correspondence with an external economic advisor during an inspection at the premises of the airline company SAS Braathens. The company claimed the documents in question were protected by legal privilege.

*Selection of cases*

## Dismissal of proceedings against tire importer

23. In February 2004, the NCA submitted a Norwegian importer of car tires for prosecution for illegally influencing prices. The matter did not reach the courts. The prosecuting authority established that a punishable violation had taken place; thus, although they were in accord with the NCA's decision that the Competition Act had been violated, they chose not to pursue the case further.

### Multimillion lawsuit against four transportation companies

24. The NCA filed a NOK 10 million lawsuit against Norway's four largest cargo transportation companies in 2004. The lawsuit was initiated because Linjegods, Nor-Cargo, Tollpost Glabe, and Danzas ASG Eurocargo refused to pay the amount after the NCA had issued writs giving an option of relinquishment of gain. The writs were issued for illegal cooperation on pallet charges.

### Court ruling on electronically stored information

25. In a lawsuit concerning an inspection at the pharmaceutical company Norsk Medisinaldepot (NMD) the court ruled that the NCA was within its rights when it made a copy of electronically stored information. The ruling is of large importance since companies store more and more information electronically. NMD argued that a consequence of copying all electronically stored information would be that the NCA copied more information than the court's approval allows, e.g. lawyer-client correspondence and privat documents. It was however the court's opinion, that it would be impossible to sort out surplus information during the inspection. To ensure effective investigation of cartels in the future, the court ruled in favor of the NCA.

### Court ruling on the use of external economic advisor

26. In a lawsuit concerning an inspection at the premises of the airline company SAS Braathens the court allowed the NCA to confiscate correspondence with an external economic advisor. SAS Braathens argued that the correspondence between the external economic advisor and SAS was privileged, in the same way as lawyer-client correspondence is, because the external economic advisor had been consulted to give advice on the competition law issues. This argument was not accepted by the court.

## ***II.2 Block exemptions***

It is stated in section 10 (3) of the Competition Act of 2004 that the provisions of the first paragraph are inapplicable in the case of agreements, decisions by associations of undertakings, or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The King may by regulation issue detailed rules as to what is covered by the third paragraph (block exemptions). The Competition Authority may decide that a block exemption is not applicable in relation to specific undertakings to the extent that agreements, decisions or concerted practices have effects that are not in conformity with the third paragraph.

27. In 2004 several block exemptions were issued:

- block exemption on research and development agreements;
- block exemption on specialisation agreements;
- block exemption on vertical agreements and concerted practices;
- block exemption on vertical agreements and concerted practices in the motor vehicle sector.

### *II.3 Anti-competitive practices*

28. In 2004 the NCA intervened in four cases of anti-competitive practices.

Based on Section 3-10 of the Competition Act of 1993, the NCA could intervene against anti-competitive practices, including anti-competitive behaviour by dominant companies.

Based on Section 12 of the Competition Act of 2004, the NCA may order undertakings or associations of undertakings that are in violation of the prohibitions of Section 10 (prohibition on anti-competitive agreements) and Section 11 (prohibition on abuse of dominance) to bring the infringement to an end.

#### *Selection of cases*

##### *No more loyalty rebates on cheese*

29. In March 2004 the NCA intervened against Tine BA, the leading Norwegian producer of dairy products. The company was no longer allowed to offer a loyalty rebate scheme to industrial customers that purchase Tine's semi-soft white cheeses for making processed cheese, pizza, and baguette products. The NCA also imposed a reporting obligation in order to ensure that Tine does not introduce any anti-competition exclusivity requirements. Such terms can bind customers to a particular vendor, as do loyalty rebates.

##### *Prohibition against pharmacies' exclusivity agreements*

30. In April 2004, the NCA prohibited pharmacies in Norway from having agreements that prevented the sale of nose sprays and analgesics through alternative sales channels, such as retail food stores. At the time of the NCA's intervention, sales channels other than pharmacies had been allowed to sell non-prescription pharmaceuticals. The NCA decided to prohibit such exclusivity agreements as a preventive measure to ensure that the industry did not in practice reintroduce the former restrictions. If pharmacies were to have an exclusive right on selling well known, brand name non-prescription pharmaceuticals, it would restrict competition and hinder market entry of alternative sales outlets.

##### *Bans on fee favouring own real estate broker*

31. In March 2004, the NCA prohibited Bodø Boligbyggelag's charging higher fees from sellers of private estates who use real estate brokers other than the brokerage owned by the housing cooperative. Bodø Boligbyggelag annually sells about 400 homes and previously had 80 percent market share for sale of housing coop shares in the housing cooperatives associated with Bodø Boligbyggelag. The cooperative charged a fee of NOK 5 788 for clarification of pre-emptive purchase rights; sellers with an external real estate brokers had to pay an additional NOK 7 235. Such a surcharge distorted competition, and it was therefore prohibited.

##### *Intervention against TrioVing*

32. In May 2004, the NCA intervened against TrioVing, who is the dominant supplier in the Norwegian market for key and lock systems both upstream and downstream. Most lock systems in use in Norway are manufactured by TrioVing, and sales and services are done mainly by dealers associated with TrioVing. The NCA decided that TrioVing should change its rebate schemes so as not to discriminate against independent dealers or dealers who stock lock systems from alternative vendors. To ensure that all locksmiths are able to upgrade and maintain lock systems, TrioVing was prohibited from unduly influencing its dealers to restrict access to lock cylinder codes.

## **II.4 Control with mergers and acquisitions**

Section 3-11 of the Competition Act of 1993 gave the NCA power to intervene in merger and acquisitions cases that would significantly restrict competition. Intervention could take the form of issuing prohibitions, giving orders, or granting consents subject to certain conditions.

Section 16 of the Competition Act of 2004 gives the NCA power to intervene against mergers and acquisitions that will create or strengthen a significant restriction of competition contrary to the purpose of the Act.

33. Under the new Competition Act, mergers and acquisitions have become subject to a mandatory notification requirement.

34. In 2004, the NCA intervened in five mergers and acquisitions cases.

### *Selection of cases*

#### Prohibition of acquisition in the distribution of kiosk goods

35. In April 2004 the NCA prohibited NorgesGruppen's wholesale company, Joh-System AS, from acquiring its competitor Engrospartner AS. Engrospartner is Reitangruppen's wholesale goods distributor to convenience stores – kiosks and petrol stations – across Norway. The aggregate market share of the two companies would have been 99 percent. The NCA believed the proposed acquisition would have resulted in higher prices.

#### Ministry of Modernisation approves acquisition of electric heating unit manufacturer

36. In October 2004 the Norway's Ministry of Modernisation overruled the NCA's decision and approved the acquisition of Siemens Electrical Heating (now Dimplex AS) by Nobø Electro AS. The NCA's main argument for prohibiting the acquisition was that it would have an anti-competitive effect. The Ministry did support the NCA's concern that the acquisition could have an anti-competitive effect. However, the Ministry paid special attention to Nobø's export potential, and that the acquisition could promote industrial development in the counties of Trøndelag.

#### NorBetong ordered to sell two facilities

37. In March 2004, the NCA approved NorBetong AS' acquisition of the ready-mix concrete businesses of NCC located in Oslo, Vestfold, and Telemark counties. Because ready-mix concrete is a perishable product associated with high transportation costs, markets in this industry are local. The NCA found that competition would be restricted as a result of the acquisition, particularly in Vestfold and Southern Telemark. Thus, the NCA decided that NorBetong had to sell two of its ready-mix concrete plants: one plant is located in Vestfold county and the other in Telemark county.

## **III. Role in formulation and implementation of other policies**

In accordance with Section 2-2 d of the Competition Act of 1993, and Section 9 e of the Competition Act of 2004, the NCA has a duty to point out anti-competitive effects of public measures. In order to do this, the NCA can issue submissions specifying factors restricting competition.

38. The NCA is increasingly being used as a hearing body by other public authorities. This provides an opportunity to influence the decision process and include the competition aspect when considering the adoption of new public measures. The NCA made substantive remarks in 81 cases in 2004.

39. On its own initiative the NCA pointed out the unfortunate effects of public measures initiated by other public authorities in 10 cases.

*Selection of cases*

Recommends cutting mortgage registration fee to NOK 400

40. As of 1 July 2004, the public registration fee on private home mortgages was raised from NOK 1 850 to NOK 2 112. In August 2004, the NCA pointed out that by reducing the fee to about NOK 400, competition in the market for loans to private customers would be strengthened. High registration fees often make it unprofitable to switch lenders, thereby dampening competition. Consequently, the NCA submitted a request to The Ministry of Justice and the Police to consider reducing the fee.

Requests change in pricing policy by alarm service

41. In November 2004, the NCA proposed that the 110-Telemark alarm service introduce separate pricing of its fire alarm and personal safety alarm service. 110-Telemark, a cooperation among municipalities in the southern Telemark county, provides legally mandated fire alarm services as well as safety alarm services; the latter are exposed to competition. Currently, the services carry a single charge; therefore Telemark municipalities must pay the same amount whether or not they opt to make use of 110-Telemark personal safety alarm services.

Regional airline routes need rules promoting competition

42. In August 2004, the NCA proposed to soften rules governing aircraft size in the granting of licences of domestic airline routes, and cutting down the size of designated regions. This would make it easier for smaller airlines to successfully bid on routes. Accordingly, the NCA asked the Ministry of Transport and Communications to facilitate the participation of more companies in allocation bidding rounds for routes subject to public service obligations.

Local bus policy must ensure competition

43. In February 2004, the NCA pointed out that the way local bus traffic in Aust-Agder county is organized provides a competitive advantage to the bus operator Nettbuss on the Oslo-Kristiansand express bus route. The NCA asked the Aust-Agder county administration to organise local public transportation in a manner that would strengthen competition.

**IV. Resources available to the Competition Authority**

44. The Parliament has decided that the NCA, as one of several government supervisory authorities, is to be moved from Oslo. The relocation of the NCA to Bergen is to be completed by 1 January 2007. The reorganisation process was a high priority in 2004.

45. By the spring of 2004, several employees were working from a temporary office building in Bergen. By June, reallocation to a permanent office building started. At the time less than ten full-time staff members was associated with the new office. By year-end the number of employees in Bergen had reached 25.

**Budget**

	Employees	Budget expenditure in NOK 1000	Budget expenditure in USD 1000
2004	125	69 009	10 685
2003	121	65 110	9408
2002	107	69 878	10 099
2001	97	66 700	9 640

**Employees - profession**

	2003	2004
Economists	44	50
Lawyers	32	37
Other professionals	20	10
Support staff	25	28
All staff combined:	121	125

**V. New reports and studies on competition policy issues****V.I Who will price books?**

46. In April 2004, the NCA presented its views on publishing-industry regulations related to books in its report "Who will price books?" In the report, the Authority demonstrates that the book agreement of 1998 has severely restricted sales, value creation, and innovation in publishing and sales of books. Further, the agreement was not particularly well suited to achieve the goals set for it, nor overall policy objectives regarding literature, as expressed, for example, in the national government's white paper on culture. Thus, the NCA believes the agreement should not be continued in its present form.

47. In its report, the NCA highlights the following three issues in the book agreement: 1) the fixed-price agreement, 2) the monopoly on school books, and 3) the rules pertaining to book clubs. The fixed price agreement implies that book stores and other distribution channels are unable to compete on prices, which is generally the most important competitive parameter. They are thus unable to attract customers through low prices. Consequently, the fixed-price agreement serves to inhibit the development of new and more efficient book distribution channels.

*Competition concerns related to recycling in Norway*

48. A key principle in Norway's environmental policy is that those who pollute should be responsible for the environmental costs associated with pollution by their products or materials. The Ministry of the Environment has entered into agreements with a number of industry associations for expanded producer responsibility, under which business and industry assume responsibility for collecting and recycling waste resulting from their own products.

49. Such agreements are in force for packaging, electrical and electronic products, refrigeration gases, batteries with environmentally harmful contents, cars, and tires. Pursuant to these agreements, participants in various industries have established collection and recycling companies to serve entire

industries. In reality, each recycling company has a monopoly for collection and recycling of products in its industry.

50. Today's recycling systems – featuring industry-wide recycling companies – raise concerns about market competition:

- Norway's current recycling systems can facilitate coordinated market conduct in which participants raise the price of their products by an amount that corresponds to the "environmental fee." Thus, all cost associated with the recycling system are passed on to consumers, instead of cost being shared by consumers and producers, as is common for other increased costs.
- Several recycling companies have expanded their activities into fields beyond collection and recycling, such as providing information services about the participating companies' environmental efforts. Coordination of marketing to consumers may lead to reduced competition to offer the most environmentally friendly products.
- The boards of directors of most recycling companies comprise only representatives of company's owners and recycling system participants. This way of structuring recycling companies is associated with the risk that exchange of information among members can negatively impact market competition.
- Comprehensive industry-wide cooperation raises entry barriers for new market participants. To ensure competition in the market, it is vital that there are few or low barriers to entry.
- The monopoly positions enjoyed by recycling companies pose a risk of abuse of a dominant market position vis-à-vis subcontractors, which in a longer-term perspective may result in even greater market concentration in recycling markets.

*Other reports released in 2004:*

- The Norwegian Competition Authority's tenth anniversary commemorative book 2004.
- Regulation of international payment card issuer commissions. Published by a project group comprising members from the Norwegian Banking, Insurance and Securities Commission, Bank of Norway, and the NCA, October 2004.
- Telecompetition – Towards a single Nordic market for telecommunication services? Report No. 1/2004, prepared by Nordic competition authorities. September 2004.

## **VI. International co-operation**

51. The NCA is actively involved in international cooperation, more so than ever in 2004. Cases related to the European Economic Area are, as before, a top priority, but cooperation through the OECD and within the Nordic countries is also important. It is essential that the NCA, representing a small country outside the increasingly larger European Union, establishes and maintains international contacts. This is achieved through the many networks in which the NCA participates.

### ***The EEA Agreement***

52. Norway is a part of the European Economic Area (EEA) through its membership in EFTA. The EEA encompasses the 25 EU States and the 3 EFTA States Iceland, Liechtenstein and Norway. The rules and regulations in the EEA Agreement have been incorporated into Norwegian legislation through special acts and regulations.

53. The NCA gives high priority to cooperation with the EFTA Surveillance Authority and with the European Commission, with a view, in particular, to strengthen and improve the enforcement of EEA competition law.

54. From 1 May 2004, there are considerable changes in the procedures regarding enforcement of the prohibitions against anti-competitive practices and abuse of dominant position in the European Union. The notification system is put to an end, except from of mergers and acquisitions. Enforcement will to a certain extent be decentralized to national competition authorities and courts. The NCA has in 2004 worked with the implementation of the new procedural rules of enforcement of Articles 53 and 54 in the EEA-agreement.

55. The NCA participates actively in the European Competition Authorities (ECA), formed by the directors general of the EEA competition authorities.

56. In line with the general globalisation of trade and industry, cross-border competition crimes are becoming even more common. The NCA cooperates with competition authorities in other countries, both bilaterally and through the EEA Agreement.

#### ***Nordic cooperation***

57. The Nordic competition authorities meet regularly and cooperate closely on competition policy, analyses, and enforcement. Joint studies turn the differences in powers and experience into an asset. This cooperation contributes to a more efficient enforcement in the Nordic countries and gives the Nordic countries stronger say in international networks. In 2004 the Nordic competition authorities prepared reports concerning competition in the telecom market.

58. The Scandinavian countries and Iceland are all part in a cooperation agreement where exchange of confidential information is included. The agreement has proved helpful in the enforcement of national competition law.

#### ***OECD***

59. In 2004, the NCA made several written and oral contributions during the meetings of the Competition Committee. The contributions covered topics such as remedies in agriculture, intellectual property rights, merger control, procedures for exchange of information in hard core cartel cases, and predatory pricing in the airline market.

60. The OECD evaluates the performance of the Norwegian economy annually. These evaluations are presented to the OECD's Committee of Economic Development and Regulatory Reforms.