Global Forum on Competition

CRISIS CARTELS

Contribution from Norway

-- Session III --

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1. Government policies towards cartels during crises: Assessment and evolution

1.1 Norwegian competition law

1. The Norwegian Competition Authority’s (the NCA hereafter) main task is to enforce the competition law. The primary enforcement tools of the Norwegian Competition Act of 2004 are sections 10 and 11 (equivalent to Article 53 and 54 of the EEA agreement and Article 101 and 102 TFEU) and section 16 concerning merger controls (similar to Article 57 in the EEA agreement).

2. It can also be mentioned that according to Section 14 of the Act, the competition authorities may, if it is considered necessary, promote competition in the national markets, intervene by regulation against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act. The purpose of the Act is to further enhance competition and thereby contribute to the efficient utilization of society's resources. The NCA shall also, according to Section 9e, supervise competition in the various markets, among other things by calling attention to any restrictive effects on competition of public measures and, where appropriate, submit proposals aimed at further enhancing competition and facilitating market access by new competitors.

3. The Ministry provides the framework for the NCA’s activities. The Minister has the overall responsibility for the sector crossing instruments in the government’s competition policy. This includes competition law and regulations for businesses, regulations on public support and regulations on public procurement.

4. However, the NCA enforces the competition law independently from the Ministry. The Ministry is the appellate body of the NCA’s merger decisions and prohibitions not involving fines. The courts are the appellate body of decisions according to the prohibition regulations involving fines.

5. Furthermore, undertakings operating in Norway are obliged to comply with two sets of competition legislation: The Norwegian Competition Act and the competition rules applicable to undertakings of the EEA Agreement. Thus, the EEA Agreement will for border-crossing cases act as an institutional constraint with respect to competition policy.

1.2 Treatment of cartels during severe economic downturns

6. The Norwegian competition law does not allow for different treatment of cartels during severe economic downturns. On the contrary, during the financial crisis, the NCA repeatedly advocated that competition and its enforcement should not be relaxed with reference to the crisis. The competition policy should stand firm.
1.3 Have cartels or cartel-like arrangements been permitted previously? Experiences from the Great Depression in Norway

7. The great depression hit Norway with full force in 1931. That year, Norway left the gold standard, a move that was followed by an increase in the key policy rate to 8 per cent to prevent capital flight. Moreover, Norway had for some time experienced massive labour market unrest, and high and rising unemployment, and the gold standard move coincided with one of the most encompassing labour market conflicts in the 1930ies. Thus, when the Wall Street crash of ’29 hit Europe and Norway, with its bank failures and bankruptcies, the result was a GDP falling with more than 8 per cent from 1930 to 1931.

8. Norway did not however experience the same bank and currency crisis as many other countries in this period. Following the acute liquidity crises in the major banks, Norges Bank (Norway’s central bank) approved a three months moratorium and provided credit to the banks worst hit, providing a shield against collapse. The fiscal policy to counteract the crisis was Keynesian in nature, generating purchasing power through public spending.

9. What is interesting from a competition policy point of view is the wilful suspension of competition in important sectors. Actually, Norway got a Trust law in 1926, but this was not really an anti-trust law: The law was practiced in a way that it accepted agreements restricting competition insofar as they were considered beneficial from a socio-economic perspective. According to Nordvik (1995), the Director General of the Trust Control Authority was rather trust friendly, and, in practice, it was he who decided which agreements were beneficial.

10. As in the U.S., the depression led to an impaired belief in markets and competition. Thus, to counteract the crisis, several special laws were introduced suspending competition and cartelising important industries, in particular in the primary sectors of fishing and farming. Forced cartels were implemented in e.g. primary fish trading, exports of salted and dried cod and canned herring. Cartels created in the 1890s were revitalised, together with the creation of new cartels within production of margarine, painting, canned food and tin can production, as well as tobacco. Minimum prices and measures to secure a certain profit were introduced for many products, often at the expense of consumers.

11. Norwegian industry did also participate in many international cartels, e.g. pulpwood, shipping, timber and steel. This was accompanied by protectionist policies with e.g. trade barriers regulating imports through tariffs and preferential treatment of Norwegian firms. All this was approved, and even encouraged by the Trust Control Authority. The Director General of the Trust Control Authority even suggested implementing a paragraph in the Trust law giving the office powers authority to force cartel creation, if considered necessary. Based on the recommendations from a committee led by the Director, the government put forward a proposition to Storting. However, the Committee for Justice advised against dealing with it both in 1937 and 1938, and in 1939 the motion was withdrawn.

12. US experience from the great depression and the measures undertaken, e.g. the National Industrial Recovery Act (the NIRA Act) in 1933, indicate that it did not contribute to the restoration of the US economy; rather, on the contrary, it made the situation significantly worse and counteracted any

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1 This section is based on the joint report from the Nordic competition authorities „Competition Policy and Financial Crises“ from 2009, available for download from www.kt.no.

progress.³ It has been pointed out that after the enactment of the Act, the cost of doing business in the United States increased on average by 40 per cent and industrial production contracted by one quarter.⁴ Studies by economists at the University of California point in the same direction. The research states that the NIRA Act and the policy of the US government against competition prolonged the Great Depression by seven years.⁵ The US economy was on the brink of a recovery but the NIRA Act and the restriction of competition resulting from this Act counteracted the recovery and the reconstruction of the industrial sector.

13. Two important lessons can be learned from these experiences. One is that suspending competition can actually prolong the crisis. Furthermore, in Norway, as mentioned above, several special laws were introduced suspending competition and cartelising important industries to counteract the severe effects of the great depression. To what extent these measures actually prolonged the crisis in Norway remains to be clarified. Nevertheless, many of the cartels and a host of agreements restricting competition existed (and were registered in the “Cartel register”) until the approvals started to be withdrawn in the late 1970s, and the belief in competition was again revitalised in Norway.

14. Thus, another lesson to be learned is that such exemptions from competition tend to be long lived, and are hard to reverse.

1.4 Current position on policies towards cartels during severe economic downturns

15. The Norwegian competition authority’s current position on policies towards cartels during severe economic downturns is reflected well in the joint report from the Nordic competition authorities “Competition Policy and Financial Crises” published in 2009.⁶

16. As in a large part of the world, the Nordic countries experienced a serious economic downturn in the wake of the financial crisis. Businesses struggled to keep their operations going and to preserve their assets in a climate where financing was hard to come by. Important markets have seen and will probably see a further reduction in the numbers of companies because of bankruptcies.

17. There is a clear rationale for the Nordic countries to share a common view on the role and importance of competition and active competition policy in the present economic crisis. Being relatively small and open economies, the international competitiveness of our economies is vital to protect and sustain the Nordic welfare model. This competitiveness is preserved or improved, when we both allow and provide incentives for mechanisms that increase both productivity and innovation in our economies. There is enough evidence for us to say, that protection of competition is a proper means to serve these ends.

³ See, for example, Wallace, S. W. (2004). “The Antitrust Legacy of Thurman Arnold”, St. Johns Law Review, vol. 78 no.3: “The goal of the NIRA was to restrict production, raise price, create profits, and restart business investment. Not surprisingly, to the extent prices were increased, the increase further limited production, employment, and the purchasing power of consumer, leaving the country in even worse straits than at the beginning of the Great Depression. Over time, consumer interests, labour groups, smaller producers, antitrusters, and government purchasers became increasingly concerned with higher prices and began to vocally oppose the National Recovery Administration (NRA) and its codes.” See also article by Clive Crook in the Financial Times from 8 November 2008: “The NRA slowed the recovery”.

⁴ See, for example, Reed, L. W. (2005). “Great Myths of the Great Depression”, Mackinac Center

⁵ Cole & Ohanian (2004), op.cit. See also the announcement by the UCLA because the publishing of this paper, dated 8 August 2004: “FDR’s policies prolonged Depression by 7 years, UCLA economists calculate”.

18. This report substantiated why, during the global economic crisis, continued and watchful competition enforcement was important to boost recovery from the crisis. The crisis is global and the report underlined that the solution is not to limit or distort competition or trade. Protectionist measures will only prolong the crisis, and state aid initiatives must comply fully with EU/EEA rules and guidelines. The result: A sound competitive environment with efficient firms well suited to compete in global markets can only be achieved if we actually succeed in facilitating competition through vigilant enforcement and advocacy of competition.

19. The report points out that there is nothing to suggest that competition in itself has caused or contributed to the crisis. On the contrary, academics who have assessed other economic crises have pointed to the importance of competition for the speedy economic recovery of the state in question.\(^7\) The impetus for rationalisation and innovation that comes with the discipline of competition is considered to be of great importance.\(^8\) In this respect one may also take into account the emphasis the EU Commission has placed on the importance of competition and competition codes in view of the economic difficulties that the European nations are now faced with.

20. Consequently, the Nordic competition authorities unanimously stressed that effective competition is important to boost the recovery from the crisis, and create a better basis for employment and long-term growth. Firm competition policy is an important and integral part of the solution to this problem.\(^9\)

2. **Enforcement record on cartels during the recent crisis**

21. Even though the crisis does not alter the rationale for competition policy as such, it alters the economic realities in which competition policy works. Here, two issues will be addressed, i.e. the change in cartel-related enforcement priorities as well as the change in merger activity following the crisis.

2.1 **Change in cartel-related enforcement priorities**

22. The NCA expected early that an area where the crisis could have potential consequences for enforcement was illegal cooperation, e.g. in relation to the various fiscal stimuli measures introduced by government.

23. An overall fiscal stimulus in 2009 amounting to 55 bill NOK or 3.0 per cent of mainland, non-oil GDP from 2008 to 2009, consisting of i.e. an increase in the communications budget, increases in municipal budgets as well as many new major construction projects, will obviously imply challenges both relating to potential bid rigging as well as public procurement.

24. As an effective competitive process in markets in general and tenders in particular, is a prerequisite for efficient use of the crisis measures and means, the NCA budget was increased

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\(^8\) In this respect you can take into consideration that Porter a.o. have pointed out that in the wake of the economic difficulties in Japan only those industries in Japan that were confronted with domestic competition have been able to compete in the international market. See Porter, Takeuchi & Sakakibara, *Can Japan Compete?*, MacMillan Press 2000.

\(^9\) See the speech made by Neelie Kroes EU Commissioner for competition policies, In defence of competition policy, 13. October 2008: “As we face the uncertainty of this financial crisis, we are fortunate to know that competition policy not only has a proven track record, but is proving to be part of the solution. … In the clearest possible terms I say that competition policy is here for consumers, here for jobs, here for growth and here to stay.”
extraordinarily by almost 3 MNOK in 2009 in order to intensify the fight against cartels. This increase resulted in increased investigating capacity, intensified market surveillance as well as information campaigns. This extra funding supplemented the more than 4 MNOK allocated extraordinarily in 2008.

25. The NCA had a strong commitment to ensure that the Government's package of measures could have the intended impact on production and employment without competition crime reducing its impact.

26. The results of the investigative projects into the building and construction trades have provided the basis for new projects in 2010.

27. The authority has in the first nine months of 2010 conducted 3 dawnraids in 17 different locations. In the same period, 5 leniency applications have been received, of which three are granted. These ongoing cases draw heavily on the authority’s resources.

2.2 The role of merger review procedures in the recent crisis

28. The financial crisis affected economic activity, and this can be seen in the Competition Authority's statistics. During the crisis there was a substantial reduction in the number of notifications of company mergers: down from 440 in 2008 to 293 in 2009. The implementation ban was challenged on several occasions, even though the Competition Act provides for dispensation if circumstances so dictate.

29. Based on the dramatic changes relating to major international banks and finance institutions since 2007, it was actually expected an increase in merger and acquisition activity in this sector also in Norway. This did not happen. As Figure 1 clearly shows, the number of merger notifications has been significantly reduced throughout 2008, but the decline seems to have stopped somewhat in 2009.

Figure 1. Merger notifications in Norway, monthly running average\(^{10}\)

Source: Konkurransetilsynet

\(^{10}\) Running average over three months. The significant drop between 2006 and 2007 is due to a change in notification rules effective from January 1\(^{st}\), 2007.
30. As the crisis evolved and deepened, the NCA expected to be challenged on two specific merger related issues:

   i) the failing firm defence and
   ii) the implementation prohibition in section 19.  

31. The failing firm defence has so far not been invoked. Apart from the Glitnir collapse which led to Glitnir ASA being bought by banks in the Sparebank 1-alliance, and that RS Platou ASA took over Glitnir Securities AS in 2008, no notified mergers in the financial sector can be clearly related to the financial crisis. It can be mentioned however, that even though none of the above mentioned cases were challenged by the NCA as such, or the failing firm defence invoked, an infringement fine was imposed on a firm for infringing the implementation prohibition in section 19 in the Norwegian Competition Act. The firm argued that a fast implementation of the acquisition was necessary to avoid bankruptcy. Furthermore, the company claimed that it was not aware that NCA actually could grant exemptions from the implementation prohibition in individual cases on its own initiative, in this case within the time limits necessary to avoid further uncertainty relating to the continued operations of the acquired firm. Thus, the firm chose to implement the transaction and immediately notify the NCA that the transaction was implemented in breach of section 19.

32. However, the same section in the Competition Act also state that the Competition Authority can make exemptions from the prohibition against implementation in individual cases. Exemptions have been granted in a few cases in the first part of 2009, which illustrates that the NCA has the necessary tools to act expedient in merger control in times of crisis.

33. The increase in bankruptcies led banks to enforce its security interests in different companies. This was, however, not something that so far has happened to a worrying degree, neither did it seem to lead to an increase in concentration creating or strengthening a significant restriction of competition.

3. International cooperation on cartels

34. The crisis did not affect the quantum and nature of cross-border cooperation with other competition authorities on cartel-related matters in any significant way.

4. Competition advocacy on cartel-related matters

35. An important advocacy initiative was undertaken jointly by the Nordic competition authorities, as referred to above. The Directors General of the Nordic competition authorities acknowledged the need to substantiate why competition policy is important for fast economic recovery from the crisis. This resulted in the report “Competition Policy and Financial Crises”.

36. The conclusion and the recommendations in the report were clear: Our competition legislation was well equipped to meet the financial crisis and its effects, and more importantly, competition policy should remain in place: Too much competition was not the cause of the crisis, but healthy competition was certainly a part of the solution.

37. An important point in this regard is that a joint report from the Nordic competition authorities, containing clear advices against policies implying more lax enforcement in times of crises or allowing crisis-cartels, has a much stronger political impetus than a report prepared in isolation.

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11 This section states that concentrations not can be implemented before the deadline to order submission of a complete notification has expired. If an order to submit a complete notification is received by the parties, or a complete notification is submitted, the concentration can not be implemented until the Competition Authority has processed the case.