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Independent Sector Regulators – Note by Norway

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

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Norway

1. Introduction

1. The last three decades, major sectors of the Norwegian economy have undergone major deregulatory reform; the electricity market, the financial market, the telecommunication market, the market for pharmaceuticals, and the media market being some notable examples. These reforms have implied new challenges for sector regulators as well as for competition policy and enforcement.

2. In the process towards deregulation, where incumbent operators developed their strategies to compete with newcomer in a new reality, old regulators got new or altered tasks and new regulators were created. The regulators were entrusted with important tasks advising on policy and developing and enforcing what in many cases was a completely new regulatory framework designed to safeguard continued important interests for society.

3. In this very new landscape, the competition authority has been a watchdog for the competitive processes and pushing for a competition friendly environment *ia.* allowing entrants to challenge the incumbents. Notwithstanding, also the authority itself experienced a transformation in this changed environment; from mainly being a 'price authority' to become a 'competition authority' entrusted with new and changed tasks, and equipped with new tools in the form of a modern competition law better suited to the new landscape.

4. During and in the wake of such transformations, close contact between sector regulators and the competition authority became important to exchange information and views of relevance to respective tasks. But close and frequent contact is not the least instrumental in striking the right balance between regulation and regulatory goals and competition. From the Competition Authority's point of view, this includes *ia.* 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.

5. In this contribution to the WP2 Roundtable on Independent Sector Regulators and their relationship with Competition Authorities, the Norwegian Competition Authority (NCA hereafter) will first present its specific legal responsibilities that are directly linked to sector-specific regulation. Thereafter, the most relevant relations with sector regulators where contact is pertinent to fulfill enforcement tasks according to the law as well as our related strategic goals will be presented. To set the context, the NCA and its tasks are presented first.

2. About the NCA

6. The Norwegian Competition Act entered into force on May 1, 2004. The purpose of the Act is to promote competition in those cases where it contributes to efficient utilization of society's resources to the benefits of consumers. The Competition Act is to a large extent harmonized with EU competition rules and includes prohibitions against cartels and abuse of dominance.

7. The NCA is an independent regulatory agency whose main task is to enforce the Competition Act, supervise competition in the various markets, prevent and deter

competition crime and affect market structure in a direction that promotes healthy competition. More specifically, the NCA's tasks follow from the law:

- ensure adherence to the prohibitions and orders of the Act;
- intervene where necessary against concentrations;
- implement measures to promote market transparency;
- enforce Articles 53 and 54 of the EEA Agreement; and
- 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. If the NCA so requires, a response from the public body responsible for the measure must be made within the deadline specified by the NCA.

8. The NCA is also obliged to provide guidance to undertakings as to the interpretation of the Act, its scope and its application in individual cases.

9. The Norwegian Ministry of Trade, Industry and Fisheries provides the framework for the Competition Authority's work. This is done through ia. the annual Letter of assignment and regular agency management meetings. It is important to note that the NCA also is a directorate ie. a government administrative body assigned with tasks where in its professional capacity develops, manages and disseminates knowledge related to competition, enforcement and competition policy. Furthermore, as a directorate, the NCA can be assigned particular responsibilities and tasks, and be asked to undertake certain activities by the Ministry.

3. Specific legal responsibilities

10. The NCA's main task is to enforce the competition law. However, the NCA also has some specific legal responsibilities that are linked to sector-specific regulation. These will be briefly alluded to below.

3.1. The Patent Act

11. The NCA is responsible for enforcing some specific aspects of the Norwegian Patents Act; more specifically the provisions relating to compulsory licencing in section 50 a. of the Act.

12. A compulsory license is a public authority's permission to use a patented invention without the consent of the proprietor.

13. Under these provision, a party can submit a request to the NCA for a compulsory licence if efforts to obtain a licence on reasonable business terms by agreement, without achieving it in reasonable time, not has succeed – provided the party may be presumed able to exploit the invention in a manner which is acceptable and which is in compliance with the terms of the licence.

14. The Norwegian Industrial Property Office, Board of Plant Varieties, or any other public agency shall, upon request from the Norwegian Competition Authority or the Board of Appeal, provide an opinion on the case within 6 weeks from the date of the request.

15. The NCA's responsibilities in this regard has not been called upon more than once the last 10 years.

16. In 2009, the NCA decided to decline Pharmaq AS' request for a compulsory license to use a patent belonging to Intervet International B.V. - a patent for the production and sale of a vaccine against the disease pancreatic disease (PD), which affects farmed salmon.

17. After an overall assessment, the NCA concluded that the conditions for compulsory licensing were not met in this case. The decision was appealed to the Ministry, which decided to uphold the decision.

3.2. Price Policy Act (Pristiltaksloven)

18. The Price Policy Act (1993, no. 58) authorizes price control in very general terms when “necessary in order to promote socially justifiable price developments.” According to the Act, the government may set maximum or minimum prices, impose a price freeze, mandate means of computing prices, set discounts or maximum mark-ups, and regulate delivery and payment terms and other provisions about prices, margins, and terms, or it may simply require notification of changes about these items (Price Policy Act, Sec. 1).

19. The Price Policy Act also sets rules about pricing and terms of dealing that apply even if overt controls are not in effect. It is prohibited “to take, demand or agree on prices that are unreasonable.” More generally, it is prohibited to demand, agree, or maintain terms of business that have an “unreasonable effect” on another party or that “obviously conflict with the general interest” (Price Policy Act, Sec. 2).

20. The motivation for the law was to control inflation and to protect consumers. The NCA is charged with supervising compliance with the orders given according to the law. However, the enforcement processes of the Price Policy Act have never been invoked formally.

21. Today, the Act must be considered as a “sleeping” law. As such, the Act and the NCA's responsibilities in that regard, has admittedly a weak link to sector-specific regulation.

22. Regardless, its applicability was considered by the government appointed committee that considered measures to avoid unfair trading in the groceries chain (NOU 2013: 6). However, the committee recommended that a separate law on fair trading principles was enacted instead.¹

3.3. Taxi industry regulations

23. The Norwegian taxi industry is prominent example where the NCA has some specific legal responsibilities directly linked sector-specific regulation.

24. The industry must comply with a comprehensive regulatory framework and several different regulatory authorities. Taxi licensing authority is allocated to the 18 counties where the respective *county governments* are assigned the responsibility of managing the taxi market in their respective geographic area. The number of taxi licences available in each licence district is limited. New licences are awarded subject to a “needs test”, which means that the competent authority in a licence district limits the number of taxi licences

¹ The government's proposal for a new groceries law was sent on a public hearing in April 2019.

to a number corresponding to the (assumed) demand in the respective district. Thus, new licences are only granted if and when an existing licence becomes available (due to death or retirement), or when a new licence is issued by the authority.

25. The *local police* issue a professional driver permit.

26. The Ministry of Transport and Communications has the responsibility for the overall regulatory framework for the taxi services. In addition, the Ministry of Trade, Industry and Fisheries is responsible for the regulations on taximeters. Taximeters must be approved by the *Norwegian Metrology Service* (NMS) before use.

27. Taxi prices in rural parts of the country are subject to maximum price control. The Norwegian Competition Authority has the responsibility for regulating maximum fares through the Regulation of Fare Determination and of Maximum Prices for Taxi Transport. The regulations have some general provisions applicable for all areas, on eg. methodology for calculating fares and obligation to offer customers a choice between a price offer, a fixed price for the distance and the fare calculated by the taximeter, in addition to more specific provisions relating to maximum prices for price regulated areas.

28. There are two major reasons for the price control regime. Firstly, in many rural areas, there has traditionally only been one dispatch centre (DC), effectively creating a local monopoly. In addition, and even if there is more than one DC, complex price structures and limited availability of comparable price information for a given ride has made price comparison difficult - especially in key submarkets such as the ride-hail market. In taxi-ranks the taxi-customers can - in principle - search for the cheapest alternative among the different providers in the rank, but this is not customary. In other words, for customers, there are significant costs to search for and find the cheapest provider. This information asymmetry has historically added to the argument for price regulation.

29. The legal basis for this regulation is the Norwegian Price Regulation Act of 1993, section 1 which gives the Government authority to regulate prices when it is necessary in order to further a reasonable price trend. The provision is generally rarely used, but it has been considered necessary to regulate prices in the taxi service industry. Notably, the NCA regulates prices *apart* from in the major urban areas, where prices became liberalised from year 2000 provided the existence of competing dispatch services and that the conditions in general provide a basis for competition. The NCA has the responsibility to evaluate candidate markets for maximum fare exemption.

30. The main argument for the regulation is the market access restrictions imposed by the county governments. Restricting the supply in a given market can give rise to local monopolies and excessive pricing. Another motivation for the regulation is that Norway faces certain distinct geographic challenges, in particular low population density outside the major urban areas. As such, it is less likely that effective competition is possible outside urban areas and other densely populated areas.

31. Finally, it can also be added that taxi DCs' are exempted from the competition law by regulation in that the DC can determine prices and price structure as well as submit tenders on behalf of the members (ie. taxi drivers with a license) of the dispatch central.² This exemption is necessary as each licensee is considered as a separate legal economic entity.

² See Forskrift om dispensasjon fra konkurranseloven § 3-1 og § 3-2 for drosjesentraler.

32. Notably, major changes in the framework for the taxi industry has been enacted. Effective from mid-2020, implying an effective deregulation of the industry. Taxi licensing authority will still be allocated respective *county governments*, but no longer subject to a “needs test”, but objective and proportionate criteria for licensing.

33. The NCA will still have the responsibility for the Regulation of Maximum Prices for Taxi Transport, determining maximum prices for those areas which do not qualify for free price determination.

4. Relations to other regulators

34. In general, the NCA has three types of contact with sector regulators:

- Informal contact, ad hoc meetings
- Informal contact, regular meetings
- Formal contact, institutionalized through cooperation agreements and regular meetings

35. Below, we will allude to our relation to some specific sector regulators.

4.1. Media market and relation to the Norwegian Media Authority (NMA)

36. The NMA works to ensure that everyone has access to a diversity of television, radio and newspapers across the country. The Authority conducts audits under the current legislation for broadcasting, film and media ownership. It also has the task to guide all sectors of the population to increase media literacy.

37. Among several tasks, the NMA assists the NCA in media merger cases. Mergers in media markets will be investigated by the NCA according to the merger regulation rules. The NMA provides the NCA with a reasoned opinion in these merger cases on whether the transaction will lead to a reduction of the media diversity in the relevant media market.

38. The Norwegian Media Authority works to ensure that everyone has access to a diversity of television, radio and newspapers across the country.

39. Before 2016, mergers in the media industry had to be approved by the Norwegian Media Authority as well as by the NCA. The rules about media ownership were intended to preserve competition among points of view, more than economic competition between providers. The Media Ownership Act permitted intervention against the acquisition of an ownership interest in a newspaper or broadcasting enterprise if the person acquiring the interest has, or gains (by itself, or with others) a significant ownership position in a national, regional, or local media market, “contrary to the act’s purposes”. Those purposes were to promote freedom of expression, opportunity to express opinion, and a comprehensive range of media outlets.

40. In 2016, the NCA became the only authority that controls mergers in the media industry, the Media Ownership Act was repealed. The changes were done in parallel with introducing a more EU harmonized merger control regime, moving from a total welfare to a consumer welfare standard. However, the change enhanced to need to have a close contact between the authorities in order to utilize the specialist knowledge of the Media Authority on the media landscape in the competition analysis of mergers in the media sector.

4.2. Agriculture and relation to the Norwegian Agriculture Agency (NAA)

41. The NCA has an established cooperation with the Norwegian Agriculture Agency (NAA). NAA is an agency of the Norwegian Ministry of Agriculture that administrate and controls all schemes and regulations in the agricultural sector.

42. NAA administrate all agricultural markets in Norway, markets that are in general heavily regulated. Regulations in agricultural markets encompass a large variety of measures like production quotas, limiting production, export of surplus production, seasonal storage etc. Many of these regulations are administrated by the largest production cooperatives that act as market regulators.

43. Agricultural markets in Norway have an extensive exemption from the Competition Act. Article 3 in the Competition Act give exemption from Sections 10 and 11 (corresponding to TFEU articles 101 and 102) for fisheries and agriculture. The aim is to improve and stabilize income for farmers. The exemption is formulated widely as it allows farmers to make any kind of agreements, e.g. to fix prices and volume, and to abuse a dominant position. The market behaviour has to be in accordance with law, regulation or the yearly agreement between the farmers association and the government. The exemption is however limited as the anti-competetitive actions has to be in accordance with the agricultural policy or agricultural regulations. It is mostly the farmers cooperatives that are allowed to regulate volume and prices but they are not allowed to cooperate with their competitors.

44. Despite the fact that agricultural markets to a large extent has an exemption from the competition act, the NAA and NCA have a common interest in maintaining and increasing competition between the large cooperatives and their competitors in different agricultural markets.

45. The NAA and NCA normally have a yearly contact meeting. In these meetings the NAA can discuss agricultural markets with competition problems and different competition aspects of regulations in agricultural markets. The yearly contact meeting are also useful to discuss competition in agricultural markets in general and to exchange information and opinions on regulations in the agricultural markets. The NAA and NCA may in addition to the yearly meeting organize formal or informal meetings to discuss cases under investigations.

46. The market for slaughtering of rain deers is one example where the NAA wanted to discuss and get advice on both how to maintain and strengthen competition in a highly concentrated market. Another example of close contact with the NAA in handling concrete cases are discussions on possible anti-competetive practices in auctions of import quotas of agricultural products and how these actions should be designed and organized.

47. The NCA and NAA have on several occasions discussed the limits of the exemption from competition law, both in terms of what market players that can be covered by the exemption and how far down the value chain the exemption is valid.

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

48. Nkom is an autonomous agency of the Ministry of Local Government and Modernisation. The agency supervises providers of post and telecommunications services, manages frequencies and numbering resources, investigates ex ante competition problems

in the electronic communications markets and makes decisions pursuant to the Electronic Communications Act and the Norwegian Postal Services Act. Nkom also manages the duty of confidentiality in electronic communications and works on security and readiness.

49. Although the NCA and Nkom manage different regulations, there is to some degree corresponding competence as both agencies oversee the postal and electronic communications markets. As a result, the NCA and Nkom have a very good relationship, especially with respect to the telecommunication markets.

50. The principles for the collaboration have been manifested in a written cooperation agreement. It follows from the agreement that the collaboration shall strive for *expedient*, *efficient*, and *satisfactory* handling of cases where the two agencies have overlapping authority and responsibility. It appears further from the agreement that unnecessary dual processing of cases is sought to be avoided, and that the forms of cooperation should be flexible and mutually binding. The agreement also emphasizes that there should be an adequate information flow between the agencies to ensure that the respective agencies have all relevant facts when handling cases. To that respect, a section presenting specific legal grounds that allows sharing of confidential information is included in the agreement.

51. The cooperation agreement also contains certain responsibilities related to the specific tasks that the two bodies carry out. In its work with market analyzes and decisions on specific obligations for providers with significant market power, Nkom sends the NCA a draft of the documents before a public hearing is held. In accordance with the agreement, Nkom shall take due account of the remarks that the NCA provides to such drafts.

52. An example of close cooperation to this respect is Nkoms work with designating undertakings with significant market power and imposing specific obligations in the market for access and call origination on public mobile telephone networks. The NCA, on the other hand, shall inform Nkom when examining a concentration in the postal and electronic communications markets. In many circumstances, the NCA also will consult with Nkom to get their opinion of such transactions and assessment of specific market conditions.

53. As part of ensuring a steady and efficient cooperation, each of the two governmental bodies has appointed a contact person that is responsible for, amongst other things, arranging an annual meeting between the two agencies.

4.4. Financial market and relation between the NCA and the Financial Supervisory Authority of Norway (FSA)

54. 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.

55. The FSA is an independent government agency that builds on laws and decisions emanating from the Parliament, the Government and the Ministry of Finance and on international standards for financial supervision and regulation.

56. Through its supervision of enterprises and markets, 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. 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.

57. 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.

58. 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.

59. In accordance with the agreement, the NCA and the FSA have yearly meetings where current issues are discussed.

60. 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.

61. 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 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.

62. In addition, mid-2019, the Ministry of Finance gave the FSA the task of establishing a "regulatory sandbox" in Norway. In that regard, the NCA has been asked to give input to the FSA's proposal.

4.5. The Pharmaceuticals market and relation to the Norwegian Medicines Agency (NOMA)

63. The Norwegian Medicines Agency (NOMA, "Statens Legemiddelverk") has a mandate which includes governance, supervision and surveillance of the production, distribution, sale and marketing of pharmaceuticals in Norway. The objective of NOMA is to provide good quality pharmaceuticals at the lowest possible costs. NOMA shall ensure that the public receives equal and efficient access to effective pharmaceuticals, facilitate research and innovation, and manage the regulations on medical devices.

64. In relation to the competition in the market for pharmaceuticals (hereunder wholesale and retail sale of pharmaceuticals), NOMA has two main functions:

65. NOMA fixes prices for certain pharmaceuticals through a system of maximum prices and a system of step-pricing, and

66. NOMA has the authority to grant licenses to retail sale of pharmaceuticals. There are a number of conditions for such license, and NOMA cannot grant a license to an applicant if this would be contrary to an effective competition in the pharmacy market and the owner of the pharmacy has a combined turnover of more than 40 per cent.

67. NOMA thus has the authority to, indirectly, reject concentrations in the market for retail sale of pharmaceuticals through its obligation to refuse license to applicants with a high market share and where such license would be contrary to an effective competition in the market.

68. Even though NOMA has the authority to reject concentrations in the market, the authority is based on the refusal of licenses and not related to the concentration as such. Furthermore, there are no limitations on the NCA's competence relating to merger control, and NOMA has no formal right to influence how the NCA applies the Norwegian Competition Act on concentrations in the pharmaceutical market. In a recent letter, the NCA has called for the conditions for a license relating to the competition review to be removed and that such reviews should be based solely on the Norwegian Competition Act Section 16 ff. The Norwegian Ministry of Health has agreed to the approach from the NCA and an amendment to the regulation on licenses in the pharmaceutical retail market is expected.

69. There are informal meetings between the NCA and NOMA on an annual basis. No formal arrangements or agreement exists between NOMA and the NCA, and NOMA does not have any influence over the NCA or its processes. As a governmental agency, NOMA has the ability to request comments from the NCA on formal and informal basis for use in its own internal processes.

70. An example of the cooperation between the NCA and NOMA, is the proposal from the NCA regarding proposed amendments to the wholesale regulation in Norway. The wholesale regulation for the pharmaceutical market originally contained a requirement that any wholesaler in Norway had to be able to deliver all pharmaceuticals, requested on the Norwegian market. Based on proposals from inter alia the NCA, the NOMA was tasked with the preparation of a proposal for amendments to the regulation to revoke the mentioned requirement. The amendment was put into effect in January 2015.

4.6. Energy market and relation to the Norwegian Water Resources and Energy Directorate

71. The NCA is working alongside the NVE (The Norwegian Water Resources and Energy Directorate) in overseeing/monitoring and enforcing the competition law in the electricity sector in Norway. Established in 1921, the NVE's mandate is to ensure that the development of Norwegian hydropower is both environmentally friendly, as well as beneficial to the Norwegian society at large.

72. The NCA, NVE and Finanstilsynet (The Financial Supervisory Authority of Norway) ("the authorities") signed the current cooperation agreement regarding the electricity market in 2012. The aim of the agreement is to facilitate cooperation and exchange information between the authorities to enhance effective resource allocation, coordinate regulations and avoid double regulation and double treatment in the electricity sector.

73. According to the cooperation agreement the authorities can, when expedient, exchange information, consult the other authorities and coordinate and/or cooperate on specific cases. Furthermore, the agreement states that the authorities shall work together in the process of updating or working on new rules and regulations. The agreement states that there should be held meetings at least twice a year, and that the respective directors should meet on a yearly basis.

74. In their role as the market regulator NVE regularly collects and analyses market data. The NCA has regular meetings with NVE where they present observations NVE has flagged as relevant for the NCA in their analysis of the data. The NCA and NVE will discuss possible explanations for the patterns identified. In theory, a case regarding a possible abuse of dominance or collusion can be informed or started based on these meetings.

75. Recently, REMIT has contributed to overlap in legal responsibilities between the NCA and NVE, but it is too soon to tell how this will affect regulatory decision making and competition law enforcement.

4.7. Petroleum production and relation to the Petroleum Safety Authority Norway

76. The PSA is a government supervisory and administrative agency with regulatory responsibility for safety, the working environment, emergency preparedness and security in the petroleum sector. The PSA is also responsible for determining parameters for the oil and gas industry and for safeguarding that activities in this sector are pursued in a prudent manner.

77. The NCA has consulted Petroleumstilsynet (Petroleum Safety Authority Norway, "the PSA") in the recent Prosafe SE – Floatel International Limited merger case regarding specific rules and regulations which affected the merging parties in their activities on the Norwegian continental shelf. The NCA will consider the need to consult the PSA on a case-by-case basis.

5. Concluding comments

78. In many areas, sector regulators pursue objectives and make decisions that directly impact conditions for competition in markets.

79. This contribution has illuminated the NCA's extensive contact with sector regulators for major markets. The contact ranges from informal regular meetings, ad hoc meetings based on specific issues, to formal regular contact, institutionalized through cooperation agreements and regular meetings.

80. The background for the relationships varies. In some cases, the contact is based on specific information needs of the NCA related to its enforcement 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.