Regulatory Reform in Norway

The Role of Competition Policy in Regulatory Reform

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LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Norway. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Norway* published in 2003. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Norway. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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SUMMARY

Competition policy in Norway is not yet fully integrated into the general policy framework for regulation. Norway has moved, carefully, from regulation toward competition in many areas. Market-based reforms in infrastructure, notably electric power and telecoms, established or followed what have become international models. In this process, though, Norway has typically retained a measure of public control, through ownership if not through regulation. Prospects for further integration of competition into regulation are mixed, reflecting the mixture of values and interests at stake, as well as the less-than-doctrinaire commitment to the principle of market competition. Public sector involvement in the economy has been the pattern in Norway for a long time. Issues of equity and regional support have been as important as efficiency and competitiveness. This is most obvious in the protections and exemptions for agricultural production. Other areas where entry and competition are controlled or even prevented range from buses and taxicabs to movie theatres and liquor sales.

Norway's efficiency-based conception of competition policy would support a broad program of pro-competitive reform. In early 2002, the government backed a five-point competition policy program, calling a review of existing regulations to eliminate unnecessary restraints and also for reforms concerning procurement practices, competition in providing government services, reducing state ownership, and strengthening competition law enforcement. Most are proceeding, although little change is expected in the extent of state ownership.

Enforcement has been constrained, although there have been some notable recent actions, particularly about abuse of dominance. Enforcement depends on criminal processes to impose sanctions against serious violations. Significant sanctions have rarely been imposed. The institutional setting pits competition principles against other interests, as most decisions of the enforcement body, the Norwegian Competition Authority (NCA), can be appealed to the Minister. The Minister has called for changing this process and establishing an independent, non-political avenue of appeal. The Minister appointed a committee of experts to prepare revisions to the law. In addition to this issue, the committee report, due in April 2003, also addressed harmonisation of substantive standards with European prohibitions.

BOX 1: COMPETITION POLICY'S ROLES IN REGULATORY REFORM

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Competition policy foundations

Norway's reform record shows steady but cautious movement toward greater reliance on markets and competition. Results have generally been consistent with competition, although the process has not relied strongly on competition as a driving principle. Yet Norway was the first country in Europe to debate, enact, and maintain a comprehensive competition law and enforcement institutions. After a period when a revived competition policy was engaged chiefly in supervising prices, competition policy based on efficiency is now promoted to support further reforms. Appeals to efficiency may be received sceptically, though, for policy and process in Norway, as in its Nordic neighbours, are affected strongly by traditions of community responsibility and concerns about equity.

Context

The Norwegian economy's competitive challenges and opportunities have been shaped by natural resources and geography. The long, complex sea coast made fishing an important industry. Some characteristics of that traditional industry illustrate persistent issues in competition policy, such as a combination of small-scale, local production with large-scale, co-ordinated management and marketing. Moreover, the operation and regulation of markets must also consider effects on long-run resource conservation and environmental values as well as national interests as a supplier to international markets. Similar concerns about international competitive conditions affect another traditional sea-based industry, shipping and shipbuilding, as well as a relatively new one, offshore oil and gas production. The income from this under-the-sea resource now supports an enviable freedom of policy choices—as well as a not-so-enviable level of consumer prices. An abundant onshore resource, hydropower, makes possible a decentralised system of producing electric power, which in turn made it realistic to expect there would be competition in a restructured electric power system.

The geographic setting has also influenced how government and industry are organised, to balance and support local and larger-scale values and needs. The country is large, but the population is small and widely dispersed. Norway is among the least urbanised countries in Europe. Many aspects of policy recognize, support, and maintain this pattern of living. A prime example is agriculture and agro-food production, which is heavily subsidised and regulated, in part to sustain the rural population. Extensive public services are typically provided locally or in ways that are responsible to local oversight. Aspects of regulation, including some with implications about competition, are delegated to local government. Co-operative structures are important in many productive sectors, notably agriculture, forestry, food-processing, and fisheries, and they are also used to a lesser extent in housing and distribution. In many industries with national importance, the state's interests are represented through direct ownership.

Government holdings, especially in telecoms and oil, account for about 40% of the share capital on the Oslo stock exchange (as of January, 2002, not accounting for cross-holdings). In the post-WWII era, an even larger proportion of the economy had been subject to public ownership.

Over the last 20 years, Norway has taken a number of significant steps away from that historic pattern of control. Regulation of retail prices and of the credit, currency, and housing sale and rental markets was removed or relaxed in the 1980s. The Energy Act of 1990 created a competitive market environment for electric power. This fundamental reform has led to others, such as the revision of hydropower taxes in 1997 to base them on resource rent and improve fiscal neutrality. In telecoms, the historic monopoly provider's exclusive rights ended formally in 1998. Even in fisheries, reforms have increased reliance on market incentives, as subsidies were reduced and some quotas were made transferable. The state's direct role in the economy has declined, as some functions have been corporatised and interests divested to private ownership. State holdings in major banks, due to the banking crisis of the early 1990s, have been reduced, and shares in the state telecoms firm, Telenor, and the state petroleum firm, Statoil, have been sold to the public. These moves have been motivated by a desire to improve efficiency through market discipline and to obtain access to wider capital markets. Unlike many other countries that privatise major assets, Norway has not needed sale proceeds to balance its budget.

These changes have been cautious, rather than doctrinaire. A principal reason for caution and delay, and a source of resistance to change, is concern about the rights and interests of employees in job security and pension rights. The ownership function for some of the remaining state shareholdings has been shifted from sectoral ministries to the Ministry of Trade and Industry, although not for holdings in the major petroleum company Statoil. Some foreign take-over efforts have been resisted, most notably Finnish Sampo's failed effort to buy Norway's largest insurer, Storebrand. The legislature has set limits. By decision of the Storting, the state must retain 2/3 ownership of Statoil (it now holds over 80%) and 1/3 ownership of Telenor (it now holds nearly 80%). A government white paper in April 2002 argued that state-owned businesses should be privatised unless there are particular policy-based reasons to retain government ownership. The state would get out of conventional industries such as quarries, manufacturing, and catering. But the state would retain holdings, perhaps at a reduced level, in network and utility industries such as electric power transmission, railways, postal service, and telecoms, and in natural resource industries such as oil and hydropower. It would also maintain its interests in the railroad and postal services, as well as in some other operations with a public interest or security component such as the lottery, broadcast programming, and defence production. And it would keep the state monopoly of liquor retailing. (see OECD (2002) Despite these concessions, the legislature received the white paper with some scepticism, and major changes are unlikely. These issues are discussed in more detail in ch. 5.

Other aspects of the government's involvement in markets are more likely objects of reform in the near future. For example, new technologies and consumer demands are producing alternatives to the traditional provision of services by government entities. These alternatives should have the opportunity to compete on equal terms with public entities. These issues are also discussed in more detail in ch. 5.

Development of competition policy

Norway was a pioneer in European competition policy. Current reform proposals revisit choices about policies and institutions which Norway has considered several times over the last 80 years. Should competition policy focus on prices and direct impacts on consumers, or should it protect the competitive process? Should the entities that apply the policy be part of the government or independent of it? Political officials or judges? An administrator or a board? Norway reached one set of answers to these questions in the 1920s, and another in the 1950s. Many of the questions are being put again today, in a new round of consultation and debate about the shape of Norway's competition policy.

BOX 2. NORWAY'S PIONEERING COMPETITION POLICY REGIME

Many countries in central and northern Europe were considering how to control cartels at the turn of the 20th century. In Norway, proposals to ban them led to a government study commission in 1916, followed by ten years of often contentious debate. A principal goal after the war was to control inflation. Thus, the Price Directorate was an active participant in this process. Rudiments of a competition policy system were already in place by 1920. Rules required restrictive agreements and dominant firms to register and authorised investigations of abuses of economic power.

Stronger competition legislation was a priority of the parties on the left. Their increasing strength led to enactment in 1926 of a recognizably modern competition law, the Law on Control of Restraints of Competition and Price Abuse (*Trustloven*). Unlike the emergency regulation that had been adopted in Germany during the inflation crisis of 1923, Norway's law was carefully drafted and fully debated in parliament. It resembled reform proposals of the same date that were being put forward by the German SPD. But the SPD, unlike its Norwegian counterparts, was not politically in a position to enact them into law.

Norway's 1926 law created two institutions. The Control Office (*Kontrollkontoret*), which replaced the Price Directorate, accepted registrations, investigated cases, and made recommendations for actions. The 5-member Control Council (*Kontrollrådet*) had final decision authority, in some cases on appeal from decisions of the Control Office. Both institutions were independent of the government. The system was based on a registration requirement for restrictive agreements and dominant firms. The Control Office could also investigate abuses.

The price-control tradition remained, in competition law rules against prices that were "undue." In addition, there were rules against price discrimination, exclusive dealing, and boycotts, which depended on showing actual harm to the "public interest." Most matters were resolved by negotiation with the Control Office, but the Control Council had power to set prices, terminate cartels, and dissolve dominant firms. Compliance was also enforced by criminal penalties, at least in theory. The stronger powers were rarely used, though. Application of the law lapsed with WWII, but in the meantime about 800 cases were decided.

This first fully functioning example of an operating competition law system, on the model that later became familiar throughout Europe, was formally replaced in 1953. (Gerber 1998)

Developments after WWII paralleled what had happened after WWI. Both times, institutions for price control were succeeded by a general competition policy regime. Norway's 1948 price and rationing laws[1] evolved by 1953 into a law that also controlled profits and restraints on competition.[2] The new institutional structure tracked the setup under the 1926 law, too. There was an executive body, the Price Directorate, which administered the law and reached decision on some kinds of cases, which could be appealed to the Minister. For other kinds of cases, the Price Directorate prepared the case, and the independent Price Council was the ultimate decision-maker. This Council, unlike its inter-war predecessor, had a representative structure.[3] Controlling price levels was the principal task, though, and protecting competition was secondary. Over the following decades, elements were added to strengthen the law's control over anti-competitive restraints. In 1957, an order banned resale price maintenance. In 1960, another order banned horizontal price fixing and collusive tendering. And in 1988, merger control power was added.

By then, the Price Directorate and others were calling for modernising the law more thoroughly. Price levels were still a policy concern. But ideas about how to address this issue were changing. In the early 1980s, the Ministry of Finance proposed to fight inflation with more competition. The Price Directorate supported putting the norms about price fixing into primary legislation and making the law one based on competition rather than economic regulation. The current general competition law[4] was adopted in 1993, effective 1 January 1994. It retains the "abuse" approach of the 1953 and 1926 laws, supplemented by explicit, enforceable prohibitions that are evidently based on the 1957 and 1960 decrees, with some additions such as a ban on market division. The shift in emphasis from price control to competition is reflected in the redesign of the enforcement system. The Price Directorate became the Norwegian Competition Authority (NCA), and the separate decision-making Council was eliminated.

Efficiency is the goal of competition policy under the 1993 Competition Act. This is made explicit in the statute's statement of purpose, "to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition" (Sec. 1-1). The context of the debate shows that "efficiency" here means allocative efficiency in an economic sense, as a condition from which reallocation will reduce net output. (Norway, 2002) The background paper of the Competition Act shows that dynamic efficiency is also to be considered. The efficiency goal may be directly relevant to some applications of the law, notably mergers, exemptions from the prohibitions, and so-called "interventions" under the general provision of the statute. It was decided not to include other objectives in the statutory statement of purpose. Among the possibilities that were considered and rejected were healthy market conditions, employment, income distribution, and even consumer welfare. Such other goals may be relevant to competition policy actions, such as the exercise of discretion in granting an exemption, in intervention, or in challenging a merger. The potential to consider other objectives is implied in the institutional design: enforcement decisions by the NCA (other than referrals to the prosecutor or orders to relinquish gains from violation) may be appealed to the Minister of Labour and Government Administration, who may decide the appeal on grounds other than competition policy goals.

Embracing efficiency and protection of the competitive process marks a significant change from Norway's historic practice. Competition law before 1993 was an adjunct of price control. The law still retains several features of traditional practices, notably an "abuse" approach to most issues other than naked collusion. A market-liberal basis for competition policy is a novelty in Norway. As such, there may be doubts about its staying power in the political culture. But the government is continuing to advance further reforms that are motivated by a conception of competition as a promoter of efficiency and consumer welfare.

Competition policy reform proposals

As the first part of the government's January 2002 programme for modernisation of the public service, a plan for strengthening competition policy was launched in November 2001. The plan announced the intention to give a higher priority to competition policy, in order to use society's resources more efficiently and to strengthen the position of consumers. The programme incorporates the principle that regulations, existing and future, should not impede competition more than necessary. There are 5 aspects of the plan that directly involve improving competition policy. (Norway, 2002)

The competition policy institutions themselves will be made stronger and more independent. A committee of experts to study and propose revisions of the Competition Act, which was appointed in November 2000, issued its final report in April 2003. It has examined both substantive rules and institutional design. One goal is to harmonise Norway's law with the competition rules of the EEA and EU. Another is to improve the process of applying those rules. The committee report called for empowering the NCA to issue fines against companies that violate prohibitions and to adopt a leniency program, as well as for a merger notification system. And it called for creating an independent body, rather than the Minister, to decide appeals from decisions by the NCA. This would reduce the potential for political intervention in particular decisions. (NCA, 2001, p. 7) It would also resemble the system Norway used before 1993, and the systems used in other Nordic countries, in which there is a separate competition council or court to decide appeals or, in some cases, to serve as the first-instance decision-maker.[5] In the meantime, the Ministry will give more weight to competition arguments in considering appeals from NCA actions. In January 2003, a government white paper on the organisation of public authorities supported creating an independent appeal body for competition matters and removing the Minister's power of instruction in particular cases, while providing for a government power to override a decision based on "weighty social considerations." It also discussed how to apportion responsibility for competition issues between the NCA and the sectoral regulators.

Regulations that can restrict competition will be reviewed carefully. The NCA will make this a higher priority task. To give the NCA's role force, the Committee preparing the new competition law considered a provision instructing authorities that propose regulations to respond, by a set deadline, to questions and concerns that the NCA raises about their effect on competition. Meanwhile a review of existing regulations, organised by the Ministry of Labour and Government Administration, is underway. This review is divided into three stages. In the first stage, competition-distorting regulations should be identified. In the second stage, the information collected in the first stage is analysed. And in the third stage, the Ministry of Labour and Government Administration, in co-operation with the ministries, will make concrete proposals. The first stage of this review was completed in November 2002. Three sources were used: individual ministries, bodies outside the government (such as private firms, research institutions, universities, professional and industrial groups, and labour unions), and the NCA's cases from the last 3 years. The ministries were to submit their information by September 2002. The NCA organised the information-gathering from parties outside the government, and completed that task in September 2002. By November, about 30% of the external bodies contacted by NCA had responded, and the review by 14 ministries (out of 17) had been forwarded to the NCA. The NCA has gone through this information and set it up in a searchable database. The NCA informed the Ministry of Labour and Government Administration about its work in a report submitted 12 November 2002, and updated the database with the latest cases at the end of the year. Norway has undertaken similar reviews in the past, notably in 1986. New areas of regulation have developed, such as environmental regulation, that were not previously examined through such a comprehensive process.

Government procurement actions will be reviewed to ensure that they enhance competition and stimulate new entry. The NCA has been asked to examine the effects on access to the market of programs that consolidate procurements, such as public corporate discount schemes and framework agreements. Agencies are to seek advice about such programs from the NCA. The NCA may try to encourage dividing procurements into smaller parts, to give smaller firms a better opportunity to participate.

In general, the operations of public entities will be reviewed in order to enhance efficiency and competition. One feature would be encouraging competition between public entities, by measures such as letting patients choose among public hospitals. Another would be ensuring fair competition between public and private entities by curbing cross-subsidisation. (Norway, 2002)

Disposition of interests in state-owned companies will be managed in order not to restrict competition by creating or strengthening dominant positions. To avoid those outcomes, the NCA should have an opportunity to review these transactions under merger control procedures. The extent of further dispositions in the near future may be modest, though, because of legislative resistance.

Substantive issues: content of the competition law

Norway's law combines prohibitions, subject to potential criminal enforcement, with provisions for more discretionary intervention through a forward-looking, administrative process. But neither approach appears very effective now. It is difficult to impose significant criminal penalties against prohibited conduct, while the method for dealing with other issues probably under-deters the most serious problems.

BOX 3. THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

Horizontal agreements

The most serious restrictive agreements are the object of explicit prohibitions. These are price fixing (and resale price maintenance) (Sec. 3-1), collusive tendering (Sec. 3-2), and market division (Sec. 3-3). This treatment pre-dates the Competition Act, as price fixing and collusive tendering had already been prohibited by decree, in terms identical to Sec. 3-1 and Sec. 3-2, issued in 1960 under the 1953 law. Each of these prohibitions is phrased broadly, to cover any agreement, concerted practice, or other conduct that is liable to influence competition. These are treated virtually as *per se* violations, for the statute does not require a showing that the agreement actually influenced competition, but only that it was liable to. The price-fixing ban is phrased generally, to cover efforts to influence prices, mark-ups, or discounts. The collusive tendering ban covers collective action about price levels, terms, allocation, or participation. (Firms may, however, collaborate on a bid, if their collaboration is clearly disclosed. Sec. 3-5). The market division ban itemises prohibited bases for sharing, to include area, customer, quota, specialisation, or quantity. All three prohibitions extend both to binding arrangements and to "guidelines" and recommendations. Associations may not achieve for their members what the prohibitions prevent them from doing by agreement among themselves. The "association" rule extends to board members, member representatives, and association employees. That is, it cannot be evaded by using the association as a vehicle but stopping short of a formal act by the organisation (Sec. 3-4).

The other major substantive provision of the Competition Act might also be used against anticompetitive horizontal agreements. The NCA may "intervene" against "terms of business, agreements or actions" that have the purpose or effect of restricting or are liable to restrict competition contrary to the purpose of the Competition Act (Sec. 3-10). The result of such an intervention could be an order to cease the offending conduct. An example where this approach might be needed would be an agreement among buyers to suppress purchase prices. The text of Sec. 3-1 prohibits agreements about sales, but not about purchases. Thus, an agreement to achieve monopsony buying power might not be prohibited. The NCA might be able to "intervene" and issue an order against such an agreement under Sec. 3-10, though.

Consistent with the statute's economic-efficiency goal, the sanctions that can be applied against horizontal collusion appear strong. Hard-core violations are to be reported to the prosecutor and treated as crimes. Intentional or even negligent infringement of the prohibitions is subject to fine and imprisonment up to 3 years (and even 6 years, if there are aggravating circumstances) (Sec. 6-6). Cases are handled by the National Authority for the Investigation and Prosecution of Economic and Environmental Crime, Økokrim. In practice, strong sanctions have rarely been applied, although the sanctions have been stronger than those applied in other areas of criminal enforcement in Norway.

Exemption from the prohibitions can be granted in particular cases. There are four independent criteria: the restraint will actually increase competition; the restraint will increase efficiency (and the increase more than offsets the reduction due to loss of competition); the restraint has little competitive significance; or "special circumstances," that is, the public interest. These exemptions may be granted subject to conditions. (Norway, 2002) These criteria are not quite identical to those under the EC treaty, for under Norway's Competition Act, it is not necessary to show that consumers obtain a fair share of the benefits. (Norway, 2002) In theory, then, the NCA could grant an exemption to an agreement that increased and redistributed producers' surplus but that did not lead to lower consumer prices.

The NCA is wary about granting an exemption based solely on "efficiency," even though that is the basic policy goal. Exemption on this basis is usually granted only if the restraint is of minor significance in any event. An example is the exemption for standardised terms of delivery, to correct for or protect against the risk of significant market changes during the course of a transaction (Norway, 2002). The "public interest" criterion too is rarely applied. But not never: A general agreement on wholesale and retail prices among publishers' and book dealers' associations has been exempted, to protect small bookstores from price competition and to stimulate the production of non-commercial literature. (Norway, 2002)

There is no formal or general *de minimis* exemption. The third criterion for exemption, that the restraint has little competitive significance, states the principle, which can be applied in particular cases. The NCA will exempt a small-scale agreement without requiring the applicants to show that it will increase competition or efficiency. (Norway, 2002) In addition, exemption might be possible under the first criterion even if the pro-competitive effect is not very significant, but such an exemption is unlikely if the parties' market share exceeds 40%. (Norway, 2002)

A curious proviso permits joint action concerning the level of "normal cash discounts." It even seems to set a "focal point" of 3% as the accepted standard; at least, a discount for payment in cash or within 30 days of over 3 per cent "shall in no case be regarded as a normal cash discount" (Sec. 3-1). The motivation for this proviso is obscure. It probably ratifies normal trade practice; however, it also discourages deeper discounts that vary from it.

The strongest reported enforcement action was taken under the pre-1993 legislation. It involved a pattern that is commonly encountered in a system based upon formal exemptions: an industry whose system of co-ordination had been approved tried to maintain those practices after the permission expired. Here, corrugated cardboard manufacturers had obtained an exemption permitting them to use a standardised method for quoting prices and requiring approval from the Price Authority before increasing price levels. The exemption was withdrawn in 1983, but the industry continued to use the method, implementing regular, co-ordinated price increases without notification or approval. The case against the industry was supported by direct evidence obtained in dawn raids as well as testimony from customers, executives, and experts. The companies were required to relinquish the gains, of about €900,000. The fines against the firms and their chief executives totalled €1.75 million.

Cases of documented persistence of formal cartel behaviour may have been relatively easy to prove convincingly. The NCA is now turning to more the more challenging problem of enforcement against cartels that are being more careful to destroy the evidence of what they are doing. It is uncovering problems in construction-related business and non-traded services. The NCA found a long-standing agreement among wholesalers of electrical equipment. The matter was sent to the prosecutor in April 2001; it is still pending prosecution. The NCA is pursuing several other matters involving construction-related markets in which collusion is often found in other jurisdictions. And the NCA has pursued hotels in Stavanger and Bergen for collaborating on rates; these cases too have been sent to the prosecutor's office.

Two completed cases show how the prohibition can be applied in the contexts of trade associations and network industries. In 2000, the Norwegian Association of Impresarios agreed to pay a fine of NOK 100,000, for trying to fix commissions and preventing its members from sharing jobs with non-member agencies. (NCA, 2001, p. 26) And in one of the most prominent recent actions, ABB and Siemens were fined a total of NOK 20 million (€2.5 million) in 1999 for price fixing, market sharing, and bid rigging in supplying equipment to hydropower stations.

Enforcement through criminal prosecution may, paradoxically, result in sanctions that are too weak to deter effectively. In the ABB-Siemens case, the fine that the companies agreed to pay was a small fraction of their economic interests in the conduct. The firms' turnover in the market at issue during the course of the conspiracy (NOK 1.5 billion (€188 million)) was 75 times greater than the fine. Moreover, in negotiating this fine against the companies (which was admittedly the highest ever imposed in Norway for an economic violation), the prosecutor agreed to drop charges against 5 individuals. The NCA has tried to call attention to the need for more effective deterrence through stronger sanctions. A recent NCA review of EU fining practices showed that, even after considering the much larger size of the companies subject to EU enforcement action, the EU's sanctions were considerably stiffer. An NCA report in 2001 discussed the theory of optimal sanctions, the computation of benefits and losses from cartels, the potential use of civil sanctions, leniency, and institutional issues. (Norway, 2002) The report was mostly theoretical, though,

perhaps because actual experience in Norway has been limited. Yet not all of that experience is discouraging to effective deterrence. In the corrugated carton case from the early 1990s, the fine was about 2 times the gain from the violation, which the parties also had to relinquish. That ratio is consistent with deterrence models of optimal sanctions.

Effective enforcement through judicial process requires judges and prosecutors who understand competition policy issues, which in turn requires thorough case preparation, not only to persuade, but to educate. Until the judges understand the problems more clearly, odd results will appear. For example, the NCA once challenged an effort by an industry association to co-ordinate a price increase by recommending a minimum price level. The court imposed only a small fine on the association (NOK 10,000), and refused to punish the head of the association on the grounds that his communication to the members, through a trade paper, was protected free speech. Judges may be viewing competition matters sceptically, and setting high thresholds of proof. When the NCA challenged a plastic pipe cartel in the mid 1990s, the trial revealed gaps in the evidence, and the court criticised the NCA's investigative methods. Judicial scepticism, if not overcome by solid case preparation, may make the prosecutor reluctant to press matters. The electrical supplies cartel matter has been awaiting action at the prosecutor's office since April 2001.

BOX 4. THE EU COMPETITION LAW TOOLKIT

The law of Norway does not follow the framework of the EU. One effect of current reform proposals would be to conform the text of Norway's law to the EEA competition principles (Art. 53 and 54), which are identical to those of the EU Treaty of Amsterdam:

- **Agreements**: Article 81 (EEA Art. 53) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.
- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance**: Article 82 (EEA Art. 54) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.
- **Reforms in administration**: Recent reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria will apply directly in decisions applying the law, and these decisions will increasingly become the responsibility of national competition authorities.

Vertical agreements

The same provisions of the statute prohibit vertical and horizontal restraints. Some of the terms are aimed specifically at vertical issues. A separate sub-paragraph prohibits agreements about customers' prices, discounts, or mark-ups, while another exempts a supplier's recommendations about resale prices, if they are clearly disclosed as such (Sec. 3-1). After a loophole-closing amendment was adopted in 2000, the prohibition against resale price maintenance covers agreements about both goods and services. *Per se* violations draw substantial penalties. The largest fine imposed in 2002 was for resale price maintenance of furniture. The prohibition against market-sharing agreements is used to control exclusive supply arrangements. The NCA has occasionally ordered suppliers to deal with customers that had been cut off from access to essential inputs. The market-sharing prohibition is subject to a proviso: a supplier may decide how to allocate its sales to its own customers. This proviso is intended to permit exclusive distribution agreements, that is, those in which the recipient agrees not to sell other lines.

The prohibition's reach is moderated by exemptions, particularly for retail co-operatives and franchises. Nearly half of the exemption applications in 2001 (44 out of 97) concerned retail chains, in franchise or co-operative structures. Common grounds for exemption are that the agreements increase competition or are not significant. Agreements about resale prices are usually permitted only to set maximum prices, though, and the parties must be free to compete below that level. (Norway, 2002) The NCA recognises concerns about "free riding," and on one occasion permitted minimum resale price maintenance in order to maintain a traditional retail outlet in the face of mail-order discount competition. (Norway, 2002)

In addition to the prohibitions, the statute authorises intervention against anticompetitive non-price vertical restraints. This prospective, non-criminal approach is particularly well suited to dealing with conduct whose net effect is ambiguous. Intervention could be appropriate against vertical agreements that restrict customer choices, make production, distribution or sales more expensive, bar competitors, or prevent dealing with or membership in associations. This section can be applied to refusals to deal in order to enforce contract or other demands. Because the competitive effect often depends on the market power of the entity involved, application of this section is closely related to control of abuse of dominance.

Abuse of dominance

Norway's Competition Act does not prohibit abuse of dominance. Rather, anti-competitive conduct that could maintain or strengthen a dominant position is subject to control through intervention under Sec. 3-10. That is, the NCA makes case-by-case rule-of-reason determinations whether conduct on balance impairs economic efficiency. The law does not use the terms "abuse" or "dominance." Although market power is an element of the NCA's analysis, there is no statutory requirement to demonstrate a dominant

position. The result of an NCA intervention can be an order prohibiting the conduct in the future. Where the conduct is exploitation of a monopoly position, the order might regulate prices. In intervention matters, the NCA itself does not usually consider policies other than competition. The substantive criterion is, in effect, the statutory purpose set out in Sec. 1-1. If the parties appeal to the Ministry, other policies may taken into account (Norway, 2002).

One recent NCA intervention required banks to relax an exclusivity agreement in order to make possible competition in internet invoicing systems. Another tried to prevent a duopoly in distribution of pesticides, by ordering a major manufacturer to supply the third-ranking distributor in Norway on the same terms that applied to the top 2 firms. (NCA, 2002, p. 20) There have been relatively few interventions concerning network monopoly problems in telecoms and electric power, though. The NCA has intervened recently against Telenor,'s loyalty bonus programmes in the mobile telephone market, and inquiries are under way about access to broadband networks and price discrimination. (Norway, 2002)

A prohibition-based rule about dominance is available through the EEA. For conduct that may affect trade between the member states, EEA Art. 54 prohibits abuse of dominance in terms that correspond to those of EU Art. 82. In some respects, the prohibition-based EEA enforcement system may look more effective to parties. Complaints about network infrastructure access and related issues may be addressed to the EFTA Surveillance Authority (ESA), rather than the NCA, because a prohibition finding would open up the possibility of a claim for damages. The ESA's competition oversight concentrates on Norway, no doubt because the other jurisdictions subject to it, Iceland and Liechtenstein, are quite small in comparison. In telecoms, ESA has examined pricing conditions and technical access terms, third party access to subscriber data, and roaming rates. ESA concluded that roaming rates in Norway were relatively high. In electric power, the ESA investigated whether the major Norwegian power company, Statkraft, was distorting inter-market trade by controlling the Denmark-Norway cable. Other ESA matters have examined the conduct of performance rights societies, restraints affecting teller machines, an exclusive-distribution agreement affecting direct-to-home television transmission, claims of cross-subsidisation by Norway's postal service, and changes in the ownership structure of Statoil. An ESA investigation of exclusive-dealing agreements between Norway's former state wholesale pharmacy monopoly and retailers was done in conjunction with the NCA.

Resort to the ESA may be seen an implicit criticism of intervention under the Competition Act. Most of the ESA investigations of complaints involving Norway were closed without orders or sanctions. But the potential application of those sanctions probably has a greater impact on business behaviour than the risk of an intervention from the NCA. A prohibition rule and the threat of significant sanctions against abuse should be more effective deterrents. Some might consider that combination to be over-deterrence; however, it is becoming the standard approach in the rest of Europe. To make enforcement of the Competition Act credible in Norway, it will probably be necessary to revise the Competition Act to prohibit abuse of dominance. To be sure, intervention has potential advantages, of familiarity, flexibility, direct connection to statutory purposes, and potentially faster processes (because the stakes are not as high). Thus, it could be useful to retain the intervention process as a supplement to the prohibition approach.

Mergers

Anticompetitive mergers may be controlled or prohibited. The standard for merger control is similar to the standard for intervention under Sec. 3-10. It does not depend on dominance. Rather, a transaction is subject to control if it "will create, or strengthen, a significant restriction of competition contrary to the purpose of Sec. 1-1" (Sec. 3-11). The phrase is similar to the EU merger regulation, but the substitution of the term "significant restriction of competition" shows that it is in fact close to the North American "substantial lessening of competition" test than it is to the EU's dominance-based test.

As in other matters, the NCA decides about mergers based upon considerations of competition policy. If parties appeal an NCA merger decision, the Minister may decide based upon other policy goals. In 1997, the Ministry overruled the NCA's objection to a merger of meat-cutters, in order to prevent closure of a plant. Failing-firm arguments have been received sympathetically in a few cases. (Norway, 2002) One that received considerable media attention was the decision to permit SAS to acquire Braathens ASA, because the smaller airline's failure was inevitable and it was unlikely that any airline other than SAS would have picked up its business, so liquidation would not have improved competition. (NCA, 2002, p. 22) Under the previous law, the Price Council permitted a merger between major bottlers, despite the Price Directorate's objections, because the Price Council did not believe the acquired firm could survive as an independent company, even though it was not failing at the time of the transaction.

In an effort to incorporate dynamic considerations into merger analysis, the NCA has considered using a "mobility index." It tries to measure the extent and speed of changes in firms' relative market positions. The index number is the sum of the absolute values of the percentage changes in market share of members of an industry from year to year, divided by 2. It would range from 0 (no changes) to 100 (every firm exits and is replaced every year). (NCA, 2000) In December, 2002 a working group of the Nordic countries' competition authorities completed a recommended common standard for the data and calculation of this index.

Notification is voluntary. If parties notify the NCA of their final merger agreement, then the NCA must indicate within 3 months whether it might intervene. The NCA must intervene within 6 months after the parties' acquisition agreement. If there are "special grounds, "which are not defined, that period can be extended to 1 year. The NCA has power to stay an acquisition pending the completion of its own process, where necessary to ensure that it can implement its final order. As is common in most jurisdictions, few mergers call for intervention, and the intervention is most often a condition, such as a partial divestiture, rather than outright prohibition.

The NCA has tried to prevent acquisitions that could undermine reform, though. In March 2002, the NCA prohibited Statkraft, the leading, state-owned electric power firm, from acquiring dominating interests in 2 other producers, Agder Energi (45.5%) and Trondheim Energiverk (100%). The parties appealed those decisions to the Ministry. The Ministry accepted the appeal and permitted the Agder acquisition, but conditioned that on Statkraft's sale of other generating capacity. (Norway, 2002) The Ministry rejected the appeal about the Trondheim acquisition. The NCA had concluded that the acquisitions could reduce competition for wholesale electric power in southern Norway (for Agder) and mid- and northern Norway (for Trondheim), during the periods when those would be the relevant markets. That conclusion rested primarily on the firms' post-acquisition market shares. The NCA did not prevent Telenor from buying 50% of Canal Digital, a provider of satellite TV service. Telenor already had a dominant position in transmission, including cable TV service, and it was involved in vertically related activities from content to set-top boxes. On the other hand, Telenor already owned 50% of Canal Digital. NCA concluded that the incremental effect of buying the rest was not significant, and intervention to stop the acquisition would have had no effect either. Moreover, the NCA reserves the power to intervene against post-acquisition abuse under Sec. 3-10. (Norway, 2002) The NCA imposed conditions on the dominant dairy co-operative, TINE, to improve conditions for its competitors, when permitting it to restructure its relationship with its subsidiaries.

It is not clear how privatisation transactions are covered by merger control. In theory, where the legislature has issued instructions about disposing of state assets, those instructions might override merger control considerations. In fact, though, privatisation transactions are usually subject to merger review. When the pharmaceutical wholesaler was sold, the minister approached the NCA informally, before the disposition plan was public, to check out the situation, and when the matter got to the legislature, the ministry made clear that it should be checked by the NCA. When Statkraft was recapitalised, the debate

and the white paper assumed that NCA should review particular acquisitions. The general policy appears to be that legislation about privatisation is to provide a means for NCA participation in reviewing the actual transaction. (Norway, 2002) The Competition Act might be clarified to be sure this happens. (Norway, 2002)

State aids and procurement

Surveillance of subsidy and procurement policies that might undermine competition is done principally through the EEA. The Act on Public Support requires EFTA (ESA) approval of new support measures, and EEA rules about public procurement apply in Norway. One of the reforms being implemented in Norway would address some devices that have combined government procurement actions and perhaps shut out some potential suppliers. These "corporate discount schemes" and "framework agreements" may lead to lower prices, at least for the powerful buyer on the government side. But they also tend to concentrate purchases among a few large suppliers, so smaller suppliers complain that they cannot compete for this market.

The NCA has had some experience assessing the market effects of subsidy programmes, in examining claims about how they might support private industry strategies that discourage entry. (NCA, 2001)

Unfair competition and consumer protection

The link between competition and consumer policies is less clear, now that the NCA has shed most of its responsibilities for consumer matters to concentrate on a conception of competition policy in terms of efficiency. Consumer protection laws are administered by the Consumer Ombudsman and the Market Council. (Norway, 2002) The Consumer Ombudsman applies the Marketing Control Act[6] and other consumer protection legislation. It functions independently, not subject to government instruction, although the office is financed by the government. The Market Council, which is involved in unfair competition and consumer rights matters, occupies a position and role somewhat like the previous council for deciding competition matters that was eliminated in 1993. The Market Council is appointed by the government, but positions on the council represent consumer and business interests. There is also a Consumer Council, which is more independent than the Consumer Ombudsman, though it too is funded by the government. The Consumer Council participates actively in the process of consultation on proposed laws and regulations. It may criticise government actions and policies and advance consumer interests in particular market situations, including enforcement. For example, after a Consumer Council complaint, the Market Council rejected contracts tying long term mobile phone service with new phones. There are some other, independent consumer organisations, which have no government ties or support, but they are typically aimed at particular product interests, such as autos.

The Marketing Control Act prohibits misrepresentations that are likely to influence demand or supply. It covers the usual subjects of the law of unfair competition, such as trademark abuse, discounts, comparative advertising, and "free" offers. The Consumer Ombudsman monitors advertising to children, as a consumer protection function, and also oversees what might be considered "social" dimensions of advertising, such as sexist language. The consumer and market rules of the Market Control Act are enforceable by fines, which must be imposed in courts. The Ombudsman and the Market Council can issue cease and desist orders, backed up by the threat of fine; however, if the matter is taken to court, the court will re-examine the entire case, and the orders of the Council or Ombudsman have no presumptive effect. The Consumer Council has a system of informal industry complaint boards, to deal with consumers' problems with firms in investment, banking, insurance, and real estate. Appeal from these bodies can be taken to another informal complaint resolution body in the Council structure, and it can result in a presumptive order, putting the burden on the firm to go to court to avoid a fine.

Some consumer issues about pricing have been covered by competition laws and institutions too. A section of the Competition Act requires transparency of consumer prices (Sec. 4-1). Retailers of goods and providers of services must provide customers with easily-seen price information. The NCA can issue more specific regulations to implement this obligation, and it may require further steps, by prescribing labelling (including unit-pricing standards) or requiring other information about prices, terms, and product qualities. And the NCA may publicise information on terms of business and collaborations that restrict competition (Sec. 4-2). Accordingly, the NCA in the past engaged in extensive price surveys and monitoring to ensure compliance. Now, its chief priorities here are unit labelling, to facilitate customer comparison (and correspond to EU unit-labelling rules as of 2000), and monitoring and surveying prices where rules and conditions are changing. When the VAT for food changed, for example, the NCA monitored to be sure that savings were passed on to the consumer. Similarly, as the electric power market has become competitive, NCA surveys have tried to help overcome the difficulties consumers have had getting useful information in this unfamiliar market setting. In 2000, the NCA did 8 price surveys, 6 of them nationwide (about power, fuel, building materials, car insurance, telecoms services, and groceries). The NCA is still doing some price surveys, about food, gasoline, and electricity. The extent of that activity has declined substantially, though, and with the closure of its regional offices, the NCA is transferring most of it to the Consumer Council (NCA, 2002). But as recently as 2000, the NCA reported nearly 3000 "inspections" and more than 1000 enforcement actions under its price surveillance and related responsibilities.

BOX 5. CONSUMER-MARKET RESPONSIBILITIES OF THE NCA

The historical roots of Norway's competition policy are visible in the Price Policy Act,[7] enacted on the same date as the Competition Act. It authorises price control in very general terms. The legal standard is simply that control "is necessary in order to promote socially justifiable price developments." 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). The NCA would be charged with supervising compliance with these orders. 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). The basis and extent of this potential control over business appears to overlap the scope of the Competition Act, and indeed the NCA deals with complaints about violations of this prohibition. The motivation for the law was to control inflation and also to protect consumers, but commercial interests were also given the power to apply it. Provisions for enforcement and penal sanctions are the same as for the Competition Act. These enforcement processes of the Price Policy Act have never been invoked formally. The NCA has dismissed nearly all complaints, but in a few cases the seller was persuaded to reduce its price.

The NCA has had a number of other consumer-market related tasks. The NCA has been the appeals body under the Rent Restrictions Act. The scope of that Act was narrowed in 2000, and the NCA no longer has the right to intervene in matters. But at one time, it handled over 100 rent control cases per year; by 2001, that number had declined to 17. The Credit Purchase Act standardises the terms for offering credit. It is enforced primarily by monitoring advertising and dealing directly with advertising agencies and media. NCA reports show about 450 inspections per year and about 400 enforcement actions. And NCA staff has given local assistance to the Consumer Ombudsman in enforcing the Marketing Control Act. The number of those matters declined, even before the elimination of the regional offices in 2000, primarily because the number of co-ordinated inspections declined The NCA was commissioned by the Ministry of Labour and Government Administration to prepare semi-annual forecasts of the trend in the consumer price index. In the future, that will be done by Statistics Norway

Source: NCA, 2001, p. 37; NCA, 2002.

Consumer and market-surveillance tasks are being reassigned so the NCA will deal only with competition policy. At one time, competition and consumer matters shared the same ministerial home. The NCA's regional offices also worked for the Consumer Ombudsman. Now, the Consumer Ombudsman is located in the Ministry of Children and Family Affairs, and some of the NCA's regional office staff moved

to the Ombudsman after those offices were closed. Putting the bodies in different ministries probably tends to emphasise differences in their outlook. The Ombudsman's office expresses some concern that the NCA now pays too little attention to market effects on particular consumers. The relationship with consumer laws may be an issue in the upcoming debate about the Competition Act. Consumer representatives, though supporting a stronger Competition Act, would like it to emphasise a policy goal of high quality and low prices for consumers. They would like the NCA to pay more attention to consumers' direct interests and their complaints about high prices.

Institutional issues: enforcement structures and practices

The application of competition policy is complicated, and its impact diluted, by the possibility of appeal on non-competition policy grounds to the Minister, and by the need to resort to criminal law processes to enforce the rules against the most serious restraints.

Competition policy institutions

Overall responsibilities for competition policy and enforcement (except for criminal prosecutions) are in the Ministry of Labour and Government Administration. The Norwegian Competition Authority (NCA), the civil enforcement body, is subordinated to this ministry. The Director-General of the NCA is appointed by the King in Council (that is, the Government), for a fixed term of 6 years, renewable once. The Director-General manages NCA autonomously; in particular, the Director has hiring power. There is no longer a separate, collegiate decision-making or appeal body. (Before the Competition Act came into force, the Price Council made decisions about mergers and refusals to deal). The appellate body for most of the NCA Director-General's decisions and actions under the Competition Act is the Minister.

In this institutional structure, the role of competition policy depends on the position of the Ministry. The Ministry of Labour and Government Administration is not usually considered one of the important forces in shaping economic policy. The NCA's independence of action in enforcement is limited by the Minister's power to override. The Minister can shape competition policy, by deciding appeals from NCA decisions based on competition law. And the appeal process can promote policies not directly related to competition, such as employment and municipal government autonomy. Some ministerial interventions have been explicitly political, notably the action to permit a meatpacking merger in order to keep a plant open. Cultural interests have been invoked to reverse the NCA's decisions against agreements about distribution of books and about distribution and rental of films. (Norway, 2002) This ministerial appeal power is not unique to competition law, but is a consequence of Norway's general administrative law. The use of the appeal function for competition cases had been questioned before, by people outside the process. The current Minister is the first to question it himself. The Minister has not announced that he will follow the NCA until a non-political appeal process is in place, because taking that position would create constitutional complications. In the appeals decisions he has taken so far, he upheld the NCA actions concerning airlines' loyalty discounts and one of the electric power mergers, and while he allowed the appeal of the other electric power merger, he imposed conditions on it.

The Ministry takes the leading role when competition issues appear in the consideration of proposed legislation or regulation. The relevant committee or inter-ministerial working group will include competition policy representatives where that subject is an important part of the work. Most often, these representatives will be from the Ministry, but the NCA may be asked to participate. The Ministry and the NCA may both participate in inter-ministerial hearings on proposals. (Norway, 2002)

Enforcement actions seeking sanctions must rely mainly on the National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim). This unit of the Ministry of Justice, set up in 1989, is the national prosecutor for "white collar" and corporate violations. It started

with 30 people and now has about 120. There are about 10 sections within Økokrim, each with a prosecutor and several investigators. One of these offices handles the competition cases, and also cases about tax compliance. This tax-competition team usually has about 4-5 cases at a time referred from the NCA. (The NCA's referral of a violation to Økokrim is not subject to appeal to the Minister). Investigative assistance may also be sought on occasion from the Oslo police. NCA has been working with Økokrim to develop its own skills and techniques for investigation, such as securing and reviewing electronically stored information. (NCA, 2002)

Competition law enforcement

Application of the Competition Act to particular situations and conduct is normally an administrative process. In cases of "intervention," the NCA issues a warning of its proposed action, to which the parties have a chance to respond. The NCA may then issue a decision, with its reasons. The respondent may file a "complaint" against that decision, by appealing to the Minister. The NCA has an opportunity to amend its decision or respond to the complaint. The process has become more adversary and formal in recent years. The appeal to the Minister is a formal, transparent, on-the-record proceeding. The Minister must issue a public, reasoned decision. That decision is not subject to a deadline, but the Minister has typically set a target (usually 3 months), and has usually met those targets. Not always, though: the Minister's decision on appeal in the recent electric power merger controversy took considerably longer than 3 months.

The NCA's own process is not subject to deadlines, except for merger reviews. Decisions under the Competition Act are subject to sunsetting. Normally, decisions are to expire after 5 years, and in any event they must expire after 10 years. They may, however, be renewed (Sec. 1-6). The NCA maintains a website with public versions of its decisions. When the law was new, NCA issued guidelines as aids to compliance. These dealt with loyalty rebates, refusal to deal, exemptions related to collaborations on prices, mark-ups, and discounts, and mergers. (Norway, 2002)

The NCA's investigative powers are wide, particularly in cases about infringements. The NCA may demand access to business facilities if it has reasonable grounds for believing there has been an infringement. The NCA may take possession of the original evidence found. The NCA must get a court order for a dawn raid, but the order can be obtained *ex parte* in a summary proceeding (Secs. 6-1, 6-2). (Norway, 2002) The order is not stayed pending appeal. Failure to comply with investigative orders is a criminal violation. The law gives the NCA the power to obtain evidence from private homes as well as places of business. (NCA, 2002, p. 17) The breadth of NCA's investigative powers complicates prosecution, as Økokrim must assemble evidence through means that meet stricter criminal procedure standards. One solution to the problem could be to make the NCA's investigative powers meet those standards and recognize those privileges, but that would weaken the NCA's power to gather information for non-criminal matters. To sharpen its investigative techniques, NCA has hired some people who had been in Økokrim, and some NCA staff are being detailed to Økokrim too.

In criminal matters, after the NCA sends a matter to the prosecutor, it is sometimes necessary for Økokrim to engage in additional information gathering. Most often, the reason is not to obtain additional facts, but to create a record that can be used in a criminal proceeding without facing constitutional and human rights challenges based on the means of obtaining the evidence. A defendant has considerable rights to examine the prosecutor's case against it. Criminal enforcement are mutually exclusive alternatives. A Norwegian Supreme Court decision in May 2002, about taxes, enunciated a "double jeopardy" principle to bar the application of civil and criminal sanctions to the same behaviour. The Competition Act already contains similar requirements, preventing criminal prosecution after a final decision is reached about relinquishment of gain (and preventing the latter action, after a criminal prosecution).

The basic non-criminal sanction for violating one of the statutory prohibitions is an order to relinquish the gain from the violation. This amount can be approximated, if it cannot be determined exactly. If the defendant is part of a group, the parent company is secondarily liable to make this payment. In a criminal case, the claim for relinquishment of gain may be included as a claim for confiscation (under Sec. 34 of the Penal Code) (Sec. 6-5). Other criminal penalties, of fines or imprisonment, may be imposed by a prosecutor or by a court for violation of one of the prohibitions or for violation of an NCA order. The NCA has no power to impose fines itself. Only the courts can order imprisonment, while prosecutors or police can impose fines. (Norway, 2002) Organisations may be fined. Individuals, including officers and board members of corporate violators, face fines and, in theory, imprisonment up to 3 years. If there are aggravating circumstances, the sentence could be as long as 6 years. Factors that might be considered aggravating circumstance could include the danger of substantial damage or inconvenience, the gain from the infringement, the extent and duration of the infringement, the degree of guilt, effort to conceal the infringement, and prior convictions of economic violations (Sec. 6-6). The longest potential sentence for a competition law violation, 6 years, is the same as for other serious economic crimes. If a crime is not 'serious', then the sentence could be shorter and courts may choose to impose fines without any imprisonment. The right to a jury trial, in the High Court, applies to crimes for which the sentence could be longer than 6 years.

Serious sanctions have not been applied yet in Norwegian competition cases. As of the 2000 Annual Report (May 2001), no one had been sentenced to imprisonment of any term, and the power to confiscate gains had never been applied. (NCA, 2001, p. 4) Stiff sentences (6-7 years in prison, for example) have sometimes been imposed for other white-collar violations, such as large-scale VAT fraud and corruption in procurement. To be sure, the ABB-Siemens fine (NOK 20 million, or €2.5 million) was the largest fine ever imposed on any kind of economic crime in Norway. But this amount is dwarfed by fines being imposed in a number of other European jurisdictions now for similar behaviour. Relatively low penalties in Norway may be explained in part by the relative lack of judicial experience. Few cases have gone to court judgement (largely because most are settled, as parties decide to pay the fine that the prosecutor sets). In addition, though, the cases may not be getting enough attention and preparation to convince the judges. The decision to seek penal sanctions is up to the prosecutors. They may be reluctant to do so in part because the treatment of the conduct as criminal is still controversial. In addition, resources are a constraint on criminal prosecutions. The Økokrim section responsible for competition matters only has one prosecutor, yet it must also handle tax cases. In Norwegian practice, complex criminal matters should be tried with 2 lawyers in court, which Økokrim now tries to do as a regular practice. Competition cases can take 2 to 3 months to try, and the trial may have to be repeated in the High Court if a prison sentence is sought. The prospect of committing so many resources to trials may persuade the prosecutor's office to settle for fines.

Other enforcement methods

Private lawsuits may supplement public enforcement. There has been some experience with this process in Norway. Customers followed the ABB-Siemens case with claims for damages which were reportedly settled for NOK 55 million (nearly €7 million). (Norway, 2002) A private party may always complain to the NCA, but the NCA is not under any obligation to reach a decision about the complaint, nor to explain itself if it declines to proceed. It usually does make an explanation, though, about requests for intervention under Sec. 3-10 and 3-11, in accordance with general principles of administrative procedure. The NCA's refusal to proceed is not subject to appeal. But an injured private party can bring an independent civil suit. Conduct that violates the Competition Act's prohibitions is legally void (Sec. 5-1). The suit could seek a declaration that the conduct is invalid and claim damages under general tort law principles. The upcoming revision of the Competition Act will oblige the NCA to explain its reasons for deciding not to take action, and that decision will be appealable.

Prior public enforcement action is not a prerequisite to a private lawsuit. Even a penal judgment has no presumptive value in a civil suit. Plaintiffs may be able to get information about matters that were subject to public enforcement action from the NCA or from the prosecutors. To use criminal case documents in a civil case, the plaintiff must apply to the judge, who typically informs the defendant. Private party access to NCA files has been a subject of controversy. In the ABB-Siemens case, after the NCA made information available to the private claimants, the respondents complained to the civil Ombudsmann. The Ombudsmann agreed with the NCA's action under Sec. 4-2 but issued a caution about the process of information sharing. Recently, the trustee of a new entrant airline that went bankrupt after an SAS-Braathens price war tried to get access to the NCA's file about their merger to look for evidence about predatory pricing. The NCA has resisted to preserve confidentiality, and the trustee has appealed the NCA's denial to the Minister. The relevant provision of the Competition Act about confidential information was not designed for the purpose of dealing with private claimants, and it may be clarified in the upcoming revision of the legislation. Costs and delays are not major impediments to private actions. Courts in Norway are considered efficient, disposing of smaller private cases within a year. Appeals and complex cases take longer. To equalize resources so that plaintiffs need not bear large up-front costs, lawyers may charge contingent fees (but not fees as a percentage of recovery). To discourage strategic litigation, the usual rule is that the loser pays the other parties' costs and legal fees.

The most important supplement to the NCA's enforcement of the Competition Act is the application of European competition law through the EEA agreement. These rules are effective in Norway concerning conduct that may affect trade between the member states. The EEA rules are applied by the EFTA Surveillance Authority, operating in conjunction with the European Commission. EEA Art. 53 corresponds to EC Art. 81, and conduct that enjoys exemption under EEA Art. 53(3) may not be sanctioned under Norway's Competition Act. EEA Art. 54 corresponds to EU Art. 82, and EEA Art. 57 refers to the EC Merger Regulation. In general Norway is bound by the EEA Agreement to harmonise with EEA law, which governs in the event of conflict. (Norway, 2002). Norway's law is not textually identical with the EC standard terminology yet (see Box 4, above). Thus harmonisation must be achieved now by interpretation of Norway's rules about similar issues. The NCA co-operates with the ESA in the latter's investigations of possible infringements of the EEA agreement.

International trade issues in competition policy and enforcement

In dealing with matters that have an international dimension, Norway recognises an "effects" test. The Competition Act applies to agreements and actions that have effect in Norway, or that are liable to have effect in Norway, regardless of where the agreement or action occurred. Whether there are such effects, the actual scope of markets and the likelihood of foreign entry or supply into Norway are determined case by case as matters of fact to be established. (Norway, 2002) Conduct or agreements with effect only outside of Norway could be subject to the Competition Act, if the government authorised it in a particular case. And the jurisdictional reach could be extended, or limited, by agreement with another country or international organisation (Sec. 1-5). Evidently, there is no presumption that the scope of an economic market is national. Competition issues in trade policy matters are not a significant issue. Norway has not used anti-dumping measures since a 1984 matter involving East German cement. ,The Norwegian Anti-Dumping Commission was abolished in 2000. Concerns about disparate treatment of non-Norwegian firms have not been raised in relation to the competition policy, although there have been complaints about this in other areas. The NCA does not take the nationality of firms into account in reaching enforcement decisions.

Enforcement co-operation is well established, in the EEA context and especially with other Nordic competition agencies. The Competition Act was amended in 2000 to specifically authorise the NCA to furnish information to other competition authorities, as necessary to promote Norway's own competition rules or those of the other state or organisation, despite the statutory duty of secrecy. Information is to be

furnished only on condition that the information not be passed to other parties without the NCA's consent, and only for purposes covered by that consent (Sec. 1-8). The NCA works with the European Commission through the EEA agreement and the EFTA Surveillance Authority. Norway is a party to the co-operation agreement among the Nordic states, and by agreement exchanges confidential information with Denmark and Iceland. The agreement has proven useful in co-ordinating action about cartels. So far, this agreement does not extend to formal assistance in securing evidence, though. (Norway, 2002) In the Nordic area, Denmark and Norway have been particularly interested in co-ordination, because they both use criminal processes in competition matters.

Agency resources, actions, and implied priorities

From the data, it looks like fewer resources are being devoted to competition matters. But that decline may simply represent refocusing of attention. Total personnel at the NCA have dropped since 1999, while the budget remains at the 1998 level. The principal reason for the change is a major reorganisation initiated by the Minister of Labour and Government Administration in September 2000, to close the regional offices and concentrate the NCA's operation in Oslo. The regional offices' consumer and price-related functions, and many of the personnel, were transferred to other parts of the government. Even after the reductions, the NCA remains somewhat larger than the competition agencies in some similar-sized, similarly-situated countries such as Finland and Denmark. Another organisational change may be coming soon, as the Minister has called for moving the NCA from Oslo to Bergen.

Table 3.1: Trends in Competition Policy Resources

	Person-years	Budget (NOK 1000)
2002	110 (est)	64 200 (budget)
2001	120	66 700 (budget)
2000	135	71 701
1999	146	65 624
1998	139	64 412
1997	132	63 082

Source: Norway, 2002; NCA, 2002

The reorganisation also eliminated the NCA's "surveillance" department. The NCA now has 2 market-monitoring departments, each with industry-specialised sections. The 3 sections of Department 1 deal with groceries and primary industry, finance and consumer goods and services, and energy and intermediate goods. One section of Department 2 deals with transport, construction, and property, and the other deals with media, health, and telecoms. A separate Corporate Investigation Department does the remaining surveillance activities and secures evidence for enforcement matters, doing dawn raids and depositions (NCA, 2002). There is no separate unit for policy or advocacy. Those matters are handled by the section that deals with the sector. (Norway, 2002) A very high proportion of resources has been devoted to advocacy. That proportion has declined, however, from 14% (21 person years) in 1999 to 11% (13 person-years) in 2001. There are also fewer proceedings and actions applying the Competition Act, particularly concerning restrictive agreements. The NCA explains that before the reorganisation, the data include many matters from the regional offices that were not significant. (OECD CLP, 2002)

Table 3.2: Trends in Competition Policy Actions by the NCA

	prohibited agreements[1]	exemptions[2]	abuse dominance[3]	of mergers	price surveillance[4]
2002: matters opened	99	73	79	36	55
enforcement action[5]	4	10			
other resolution[6]	92	63	6	5	48
total sanctions imposed					
2001: matters opened	50	113	66	27	133
enforcement action[5]	3	22			123
other resolution[6]	39	91	4	2	
total sanctions imposed					
2000: matters opened	101	147	74	39	983
enforcement action[5]	4	48			432
other resolution[6]	50	99	7	2	
total sanctions imposed					
1999: matters opened	114	85	69	31	976
enforcement action[5]	1	32			587
other resolution[6]	20	53	4[7]	2	
total sanctions imposed					
1998: matters opened	214	131	52	46	2586
enforcement action[5]	3	61			1075
other resolution[6]	114	70	4	2	
total sanctions imposed					
1997: matters opened	121	129	79	41	2970
enforcement action[5]	1	28			1581
other resolution[6]	81	101	11[8]	3	
total sanctions imposed					
1996: matters opened	189		61	46	2804
enforcement action5	1				1559

	prohibited agreements[1]	exemptions[2]	abuse dominance[3]	of mergers	price surveillance[4]
other resolution[6]	71		3	1	
total sanctions imposed					

1. Matters under Sec. 3-1 (horizontal price agreements and resale price maintenance), Sec. 3-2 (collusive bidding), and Sec. 3-3 (market division).
2. Exemptions from the prohibitions against horizontal and vertical agreements.
3. Matters under Section 3-10.
4. Matters calling for information or surveillance about prices; most of these functions have been transferred now to the Consumer Council or Consumer Ombudsman.
5. For agreements, matters investigated by the NCA Corporate Investigation Department and reported to the prosecutor for legal action; for exemptions, exemptions denied or revoked
6. For agreements and price surveillance, warning or other "soft enforcement) administrative action; for exemptions, applications granted; for abuse of dominance and mergers, intervention resolutions such as conditional approval or prohibition.
7. Including 1 coercive fine, for failure to comply with an NCA decision.
8. Including 1 coercive fine.

Source: NCA, 2001; NCA, 2002; OECD CLP 2002

Limits of competition policy: exemptions and special regulatory regimes

Whether competition policy can provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for general exemptions or special treatment for types of enterprises or actions. The general provisions for derogation from competition principles, and the limits on the role of competition policy in several key sectors, imply that competition policy in Norway is constantly being required to establish its priority.

Economy-wide exemptions or special treatments

Application of competition policy generally defers to other interests in the event of conflict. A rule about regulatory compulsion or authorisation, setting conditions under which the exercise of authority by another government body displaces or overrules competition law, is in the Competition Act: decisions applying the Competition Act "must not conflict with" decisions of the legislature (Sec. 1-4). The general rule also contains a general authorisation for *ad hoc* accommodations. If a matter covered by the Competition Act is also subject to regulation under other legislation, the government "may issue specific provisions for the mutual limitation of jurisdiction of the authorities involved" (Sec. 1-4). Evidently, the government can decide case by case which authority's action will control.

This rule of precedence might raise a problem in privatisation transactions. If the Storting has decided to privatise a state company and passed the necessary legislation, does that mean that the NCA cannot take any merger control action concerning the subsequent disposition of those assets or shares? That is, would an NCA objection to a particular buyer be a "conflict" with the legislature's general instruction to sell the shares to someone? (Norway, 2002) The answer is not obvious. In any event, the April 2002 white paper about state ownership promises that future arrangements for disposition will be organised in a way that makes them subject to NCA review.

Public enterprises and actions by government entities might be subject to the Competition Act. The nature of the application depends on the nature of the activity and the status of the entity involved. The Competition Act governs commercial activity of all kinds, "irrespective of whether it is private or carried out by central or local government authorities" (Sec. 1-3). The statute's definition of "commercial," as "any kind of economic activity, permanent or occasional," does not eliminate much (Sec. 1-2(a)). The activity need not generate direct income. That point was clarified in an amendment in 2000. (Norway,

2002) Government ownership is not a basis for exemption. Although "administrative enterprises" in infrastructure sectors have a special legal status (explained in more detail in Ch. 5 of this study), they appear to be fully subject to the Competition Act, in principle. But if activities by municipal or county governments raise Competition Act issues, decisions about them are taken directly by the Ministry of Labour and Government Administration, not by the NCA (although the NCA will investigate and make a recommendation) (Sec. 3-10, para. 5). The status of the entity involved in the conduct determines which decision-maker is competent. If it has separate legal personality and function, the decision is made by the NCA; if it is part of the (local) government, by the Ministry. Experience suggests that the Ministry may be reluctant to intervene against local governments. For example, the NCA investigated a claim against a public health office, that it was enjoying an unfair municipal subsidy. The office was considered part of the municipality's activities, and not a separate entity, so the Ministry was responsible for decision. The NCA recommended intervention, but the Ministry declined. (Norway, 2002)

Small and medium sized enterprises do not enjoy any general *de minimis* or *bagatelle* exemption. But small businesses may benefit from the application of the usual exemption process (Norway, 2002). One criterion for exemption is that the conduct has an insignificant effect on competition. At one time, the NCA had a rule of thumb that exemption under the "insignificant effect" criterion would not be granted if a firm's market share exceeded 15%. Another exemption permits joint bidding, provided the parties do so openly, by disclosing their identities and the terms of the collaboration in their offer. This exemption is intended to permit small businesses to join forces and participate in larger tenders (Sec. 3-5). (Norway, 2002)

A few other general rules confer exemptions. There is a labour exemption: the Competition Act does not apply to collective action about wages or working conditions. The exemption permits the usual existence and operation of unions (Sec. 1-3, para. 2). Intellectual property licenses may impose restraints on licensees (Sec. 3-7). This exemption is intended to support dynamic efficiency, evidently by encouraging licensing. The exemption is unqualified in its own terms, but presumably it would not shield restraints that extend beyond the use of the licensed technology or design and that purport to control competition in other markets or in ways unrelated to the use of the object of the licence. And where firms are under common control (defined in terms of controlling more than half of the voting rights), agreements or restraints among them are not prohibited (Sec. 3-6).

Sector-specific rules, exclusions, and exemptions

Policies about applying special competition rules in particular sectors are now under review in Norway. The subject is treated in more detail in Ch. 5 of this study. The Minister of Labour and Government Administration is considering how to streamline the responsibilities of state supervisory authorities. One goal is to eliminate ambiguous and conflicting responsibilities, that is, to create single-purpose agencies. This could mean assigning all competition-related responsibilities in all sectors to NCA. Other goals are to improve transparency and to eliminate the possibility of political intervention in particular decisions. Here, an issue that is common to sectoral regulation and to general competition policy is the creation of an appeal path that is independent of political considerations. To ensure co-ordination pending a general reform, the NCA has entered co-operation agreements with the principal sectoral regulators, in telecoms, electricity, and finance and insurance.

Telecommunications

Competition law and sectoral regulation co-exist. The Post and Telecommunications Authority (PT) regulates network operators and service providers. Norway's telecoms law implements current EC directives. Among other things, PT enforces regulations requiring open network access. PT is a directorate reporting to the Ministry of Transport and Communications. PT is a subsidiary body. The Minister has no

instruction power over its decisions, and in that sense PT is considered independent; however, the Minister has some power to be the appellate body, reviewing PT decisions under the telecoms law. When the Ministry also acted as the owner of the incumbent telecoms company (and former monopoly), Telenor, the overlap of ownership and regulatory functions required divided jurisdiction. Appeals from PT decisions that had competition aspects would go to the Ministry of Labour and Government Administration, that is, the competition policy appeal body. The PT's own ministry was the avenue of appeal about cases "of political nature or fundamental importance." Now that ownership responsibility for Telenor has been transferred to the Ministry of Trade and Industry, so ownership is separated from regulatory responsibility, all appeals from PT decisions, including those with implications about competition, go its Ministry. Most are disposed of by the PT's Complaints and Advisory Board, though.

The NCA has a co-operation agreement with PT. The current agreement dates from 1998, after the adoption of a new telecoms act and regulations. The agreement recognises that the general Competition Act has a broader application than the more specific Telecommunication Act, and it can cover most of the same conduct, about access, pricing, and restructuring. (Norway, 2002)

Relations between PT and the NCA are productive. Companies with complaints may approach both agencies, which then discuss and decide how to proceed. The agencies doubt that a formal agreement about jurisdiction is needed any more, because informal co-ordination is working reasonably well. A recent case seeking unbundled access to subscriber services was co-ordinated, as the regulator took the action, supported by an NCA comment. PT and NCA have a joint project to examine ways to improve competition in the sector. NCA has been looking into complaints about Telenor's mobile operation, concerning retail prices, and exclusivity agreements. The telecom regulator has handled many such cases already. Sometimes, the two agencies may look at the same issue, from different perspectives. A prominent example is the relationship between Telenor and a co-op housing organisation, OBOS, about telephone service for urban apartments. OBOS, like many other, similar co-ops has entered a framework agreement with Telenor that virtually rules out competition for "local-loop" hardware connection in the co-op's properties. Several aspects of the agreement raise concerns under the Competition Act, such as an express exclusivity clause and minimum participation requirement. But an NCA order following an intervention might not be enough to help a new entrant if the parties do not want to deal with it. The telecom authority challenged the agreement as discriminatory, because it led to lower prices than Telenor offered to others. Telenor changed the terms, and both agencies are now looking at it again, with PT concerned about cost justification for the discrimination and the NCA concerned about the market share or loyalty proportion obligation.

Developments in telecoms call for further changes to the basic legislation. The Ministry of Transport and Communications is preparing a proposal for a new law on electronic communications, to become effective in July 2003. The new law would make Norway's laws and regulatory structure conform to the new EU regulatory package on electronic communications. It will provide for replacing *ex ante* sector-specific regulation with *ex post* supervision of the general competition law, when market conditions permit. In the meantime, though, it will adopt the EU's structure-based presumptions about where to apply asymmetric regulation. And the draft will propose a new independent appeal body for what will now be called "electronic communications" matters.

Electric power

Norway moved early to reform its electric power system to open it to competition, based on the Energy Act that became effective in 1991. The principal motivation for reform was to increase efficiency, to reduce over-investment in capacity and pricing distortions and improve the operation of the transmission grid. In the following decade, overcapacity has declined, as imprudent investment plans have been shelved. The network, which is still subject to (incentive based) regulation, is more cost-efficient, and prices are

closer to marginal cost. Norway is now a net importer in normal years (but it is a net exporter in "wet" years with abundant rain filling its reservoirs). The marginal plants in the Norwegian market are usually other Scandinavian coal-fired plants. Norway tends to import in low-demand periods and export in high-demand periods. Norwegian generating plants are all hydro-powered. (Concessions for 3 gas-fired plants are unused, because the economics do not justify building them despite the abundant supply of fuel). After the reform, the need for regulation may have increased, though, to police the monopoly in the network, and to set and enforce rules to support an efficient market. But the costs of that regulation are still obviously much lower than the efficiency savings.

The retail market is open for all buyers and sellers of power. Since 1998, households have been able to change supplier without cost. As of December 2002, about 18% of households and 27% of industrial customers were buying power from a supplier other than the locally dominant one. In the first 3 months of 2002, there were a record 113,000 changes of supplier. The switching rate is great enough to give suppliers a reasonable incentive to compete on price. About 20 suppliers offer nationwide contracts, down from nearly 30 a few years ago. Entry barriers are low, as power can be obtained on the exchange, Nord Pool. Nord Pool has separated its financial and physical operations, and they are separately regulated. Performance appears basically competitive. There have been some controversies, to be sure. The NCA investigated claims of profiteering in late 2001, when wholesale prices fell but retail prices did not. The NCA found this was simply a time-lag event, as the retail prices did fall shortly afterwards, while wholesale (spot) prices increased. (NCA, 2002) There have been some complaints about possible manipulation of the wholesale power markets, which are being treated as potential financial and commodity market problems.

The sectoral regulator, NVE (Norwegian Water Resources and Energy Directorate), regulates the transmission network. The Energy Act provides for regulated pricing for the use of transmission networks, to ensure non-discriminatory access and prevent cross-subsidisation distortions of the market for power. (Norway, 2002) The NVE has the power to grant concessions to sell electricity, in order to supervise monopoly. Some issues now arising in transmission regulation include how to cover fixed, sunk costs in transmission tariffs, and whether grid tariffs should be uniform across the country.

Consumer representatives consider the reform to be generally a success. About 480,000 households and industrial customers now buy from someone other than their regional main supplier. Changing suppliers would not affect the part of the price that is due to the regulated charges for transmission and distribution. Consumers can check an NCA website for current information about suppliers' prices, which the NCA requires them to set out in a uniform, comparable format—and when prices are changing, over 100,000 do so every month. A new standard consumer contract for electric power has been worked out with the industry and the Consumer Ombudsman. The need to make provision for the functions that are still regulated can produce outcomes which consumers find unsettling. Because consumers have consumed less than expected, some network owners did not achieve revenue targets in the summer of 2001 and thus the regulated fees for that service had to be increased.

Reform of the market structure was not accompanied by changes in ownership patterns. Privatisation was not part of the reform. The largest energy supplier, Statkraft, is owned by the government. (The government's ownership in the power transmission and distribution grid, organised through Statnett, is separated from its ownership of generation through Statkraft, though). Many power companies are owned or run by local governments. The municipality owners have tended to be cautious. Statkraft, by contrast, has been trying to consolidate and expand. Statkraft contends that it needs to reach a scale commensurate with other major producers in a European market.

Differences in treatment based on differences in ownership have been criticised as deterrents to competitive entry. Generating power in Norway is usually based on access to hydropower resources. For a private firm, a concession to use hydropower resources is limited to 60 years (although that term might be extended). For publicly held firms such as Statkraft and municipal generating firms, by contrast, concessions are unlimited. The government proposed to eliminate the discrimination by putting a fixed term on all such concessions, of 75 years, with expired concessions reverting to the state. (Norway, 2002) This proposal responded in part to pressure from the EFTA Surveillance Authority, which is concerned that the difference in treatment discriminates against private market participants. The change would have to be approved by the Storting, and it may be politically sensitive, because there is strong interest in keeping hydropower resources under national ownership. The government has now decided to send the issue to a working group for advice.

Security of supply is the responsibility of the Ministry of Petroleum and Energy. Statkraft was transferred from this ministry to the Ministry of Trade and Industry as of January 2002, as part of a government policy to separate ownership and regulatory functions and promote transparency and professional management. The Government will consider whether Statkraft should be made into a joint stock company, to put it on the same regulatory footing as others. In the recent white paper on state ownership (Norway, 2002), the government supported Statkraft's continuing to be a strong player in the Nordic area, where co-operation with neighbours about infrastructure is important to Norway, which is now normally a net importer of power. In spring 2001, the Storting provided NOK 6B in capital to Statkraft and authorised NOK 10B in government supported debt to support its strategy of acquiring electric power companies in Norway. (Norway, 2002)[8]

That policy of expansion is encountering resistance from competition policy. In 2002, the NCA prohibited Statkraft from acquiring a 45.5% share of another generating firm, Agder Energi. The parties appealed the NCA decision to the Ministry of Labour and Government Administration. The NCA also prohibited Statkraft's effort to acquire Trondheim Energiverk, because of effects on competition in the middle and northern parts of the country; the parties also appealed that decision. The cases hinged on market definition, and on whether market power could be exercised when transmission constraints limit the scope of potential suppliers. In the Agder case, if constraints limit the market to southern Norway, the NCA contended that the combined firm's share of the market would increase from about 40% to 50%. Statkraft's market position would be even stronger, because it also has a significant share (20%) of what would then be the second-largest supplier, with 10% of the market. Other concerns were that the acquisition would increase the ability to price discriminate between time periods and customers and the incentive to over-fill reservoirs (to withhold supply), with attendant risks to the integrity of the hydro control system. The energy ministry supports the industrial-policy motivation of Statkraft's acquisition program, and it supported the mergers in the appeal process. Power industry interests, that is, the municipal and other private power companies, evidently support the trend toward consolidation in generation, but one of the biggest producers in southern Norway made statements in the Agder merger proceeding indicating its opposition. Consumer and manufacturing industry interests opposed the combination and supported the NCA's challenge. In the event, the Ministry agreed that the Agder acquisition would create or strengthen a significant restriction of competition in the power market; however, it nonetheless permitted the transaction to proceed, on condition that Statkraft sell its interests in two other producers, and undertake to divest other generating assets if import capacity to southern Norway is not increased sufficiently. The Ministry denied the appeal and thus upheld the NCA's decision to prohibit the Trondheim acquisition.

As in telecoms, co-operation between the NCA and the sectoral regulator in electric power appears to be working well. NVE observes the principle that competition issues are handled by NCA in this market. The NCA has a co-operation agreement with NVE. Under an early, informal agreement between NVE and NCA, both agencies dealt with competition issues. This was corrected after the agencies' joint report in 1996 on the delineation of competences. They agreed to meet about any case that required both a

concession under the Energy Act and an exemption under the Competition Act, and they agreed to handle them in parallel to avoid delay, anticipating that the NCA would usually act first. Some overlaps remain. Regulations under the Energy Act limit exclusive sales agreements with concessionaires, and the NCA might also be concerned about such agreements under the Competition Act. For topics such as these, the two agencies agreed to contact each other to identify under which law action should be taken. NCA agreed not to intervene under Sec. 3-10 about operation of transmission grids, and NVE agreed not to include stipulations in concessions about sales of electric power. The agencies agreed to consult each other about the treatment of particular mergers, issuance of regulations and guidelines, and import-export concessions and quotas. The need for co-operation about concession terms and competition issues has arisen in connection with vertical acquisitions, when wholesalers were buying distribution companies. In considering the recent Statkraft-Agder Energi merger, NVE did not take a position. The NCA asked NVE for views about the relevant market, but the regulator did not have enough detailed data to reach a clear conclusion about it. NCA and NVE have also set up a working group with the Banking, Insurance and Securities Commission, to co-ordinate the three regulators' efforts involving electric power markets.

Agriculture, forestry, and fisheries

Prices for food products in Norway are high. Exemptions make it difficult to apply competition policy in agro-food industries, while tariff protections limit import competition in the agricultural sector. Producers and producer associations are exempt from the Competition Act's basic prohibitions against horizontal agreements for their agreements or restraints in connection with sale or supply of agricultural, forestry, or fisheries products. The exemption from the Competition Act only covers Norwegian products, so restraints involving products from other sources are not exempted. And the exemption does not extend to collusive tendering. The NCA believes that it has the power to intervene against any other anti-competitive conduct in these sectors, but that has not been tested in court. The exemption is intended to permit the operation of the price support laws in these sectors.[9] Co-operatives, as associations of primary producers, are the main beneficiaries. Co-operatives dominate sales and supply of fishing, forestry, and agricultural products. These co-operatives can agree on prices and on market divisions, although they cannot try to impose resale price controls. (Norway, 2002)

The NCA has been concerned that competition can be undermined where a marketing co-operative also exercises regulatory responsibilities. In Norway, as in many other countries, the problem appears particularly in the dairy industry. A co-operative, TINE BA, is the largest producer, distributor, and exporter of dairy products. With about 20,000 members, it includes nearly all the dairy farms in the country. Each dairy farmer is constrained by a production quota, linked to the farm. These quotas may be traded within regions, but there are substantial limitations on how much a farmer can trade in these quotas each year. Target prices (that is, ceilings) are determined by annual negotiations between the farmers' associations and the Ministry. TINE has been the market "regulator" to maintain these prices. TINE also has some duties to maintain market stability by buying surpluses, as well as a limited obligation to supply its downstream competitors with unprocessed milk. The net effect of its dual roles is that TINE has considerable advantages over its competitors in access to domestically-produced raw material for processed and manufactured products. A few small manufacturers of milk, yogurt and cheese compete with TINE, but they depend on TINE for supplies of raw material. The price they pay to TINE for the milk is fixed by the Ministry, but the price is influenced by the equalisation regime, set to equalise farmers' incomes regardless of the end-use of their milk, which in turn is affected by TINE's cost-effectiveness and the price TINE gets for its products. In theory, TINE could alter its costs strategically to disadvantage these downstream competitors; there is no evidence it has actually done so, though. (NCA, 2001, pp. 18-20) The NCA has recommended that TINE's market-regulatory functions be assigned to a neutral body, that the price-equalisation regime be abolished, and that TINE's obligation to supply competitors with raw material be unlimited. Some of these recommendations were accomplished through a merger proceeding in 2002. The NCA demanded many of these steps as conditions on its approval of TINE's proposed restructuring,

through which it would become the parent company of several entities of which it had been the subsidiary. TINE accepted these conditions—to expand its obligations to supply other producers, to make the regulations about joining and leaving TINE more flexible, to sell or divest two production facilities, to sell rather than liquidate dairies that TINE shuts down, and to refrain from imposing competition-limiting conditions on those sales.

In the grain market, too, NCA has recommended separating regulatory and marketing functions. A working group of the Ministry of Agriculture considered a new grain market system in 2000. The NCA argued for letting prices find the market level, and thus for setting a broad band for target prices. NCA also suggested that the market should be regulated by a neutral public body, rather than the farmers' own co-operative, Norske Felleskjøp. The working group recommended an auction for import quotas. The NCA supported that recommendation. (Norway, 2002)

Import protections and other regulatory preferences limit competition in these industries. The only import controls that have any effect on competition in Norway are those on agricultural products. They are substantial enough to impair the national reputation for market openness. Local ownership is favoured through terms in concessions for agricultural or forest property that require settlement on the land by the owner. (Norway, 2002) Fishing vessels must be at least 60% owned by Norwegian persons or companies. Licences for fish farming are more likely to be granted to firms that have local connections or that plan to integrate operations with other trade or industry in the area, a criterion that could limit the range of potential entrants. (Norway, 2002) There are substantial conservation and environmental considerations at stake in these settings, to be sure. Rules that tend to preserve existing local ownership structures might be thought to promote those values, on the theory that those who are closest to the situation have the greatest interest in protecting it. But they should be examined carefully, to ensure that the benefit from protecting those values is not outweighed by the cost of impairing competitive entry and innovation.

The program of supporting domestic agriculture, through protection from competition and through direct subsidy and market control, is defended as a means of maintaining the traditional pattern of rural settlement and land use. Norway can maintain these policies in agriculture and fisheries and in trade in these products under the EEA. Norway's complex system of agricultural subsidies is deeply rooted now and hard to change. But the public has not, so far, objected to the high food prices that result strongly enough to change the system. One reason may be that consumers have enough money to pay the prices, because wages and pensions are also high, and costs as a proportion of income are not out of line. In addition, though, the non-economic, cultural and environmental values of maintaining local agricultural production are widely supported. And cross-border trade is increasing significantly, as consumers shop elsewhere for competitive prices.

Financial markets

A series of reforms since the 1980s has tried to encourage competition in financial services. Norway's banking crisis of the early 1990s was not a result of those then-new reforms, but of the conditions from the mid-1980s that were the reasons for reform. Other reforms in insurance are in the works now following the introduction in 2001 of defined-contribution pension plans, offered by insurance companies and others, to improve price transparency and hence competition in life insurance. Competition is greater in the services for which there are more foreign-owned providers, which can counter the inevitable higher concentration typically found in a small country considered in isolation. Through subsidiaries and branches, foreign companies account for 25% percent of the total asset value in banking (including savings banks), 49% of non life insurance (including mutual insurance companies), and 7% of life insurance.

Some provisions of the banking law have competition policy implications or purposes. (OECD CLP, 1998) Management overlaps among potentially competing firms are prevented, because directors or senior officers of one financial institution may not serve as directors of another. A bank merger or acquisition requires a licence, and one criterion for issuing a licence is maintaining a financial market structure that ensures financial stability and effective competition. Collaboration agreements among institutions that are not part of the same group must be approved by the authorities. Banking regulations limit product bundling, that is, offering services conditional on procuring others from the same institution.[10] To ensure that consistent conceptions of competition policy are being applied, the NCA has a formal co-operation agreement with the Norwegian Banking, Insurance and Securities Commission (NBISC). The present agreement was entered in 1998 when the bodies were considering a joint report on the profitability of securities, bonds, and shares. (Norway, 2002) It builds on a previous agreement from December 1996. The 1996 agreement made clear that the NCA and the sectoral regulator retain their separate responsibilities and do not commit to applying the same basis for evaluation. Nevertheless, they did agree to several principles for the performance of their independent roles, such as effective collaboration and elimination of duplication, predictability for market participants, and collaboration in preparing cases for Ministry review. Provisions about exchanging information were detailed. The NBISC undertook to forward applications about mergers and agreement to NCA for information. The NCA would to respond in 2 weeks and indicate then when a final decision would be expected. The NCA would not normally grant an exemption before the Ministry of Finance granted a licence. The agreement includes other commitments to develop common analysis and keep each other apprised of developments in cases. And the directors-general agreed to meet every 6 months to exchange views and oversee implementation. (OECD CLP, 1998) Co-operation between the financial services regulator and the NCA appears to have been working well. Typically, it results in a common analysis of facts. The banking regulator, concerned about system stability and solvency, may see the policy balance somewhat differently than the NCA does. The NCA has had occasion to consult with the financial regulator about enforcement matters, such as a claim that agreements between the banks and the banks' payment centre created obstacles to the entry of other suppliers of a new value-added product, electronic invoices. The decision in the particular case was up to the NCA, though. So far, there have been no disputes between NCA and the regulator about the analysis of particular issues or about the interpretation and application of the sector-specific regulations with competition-policy purposes.

Postal service

A cross-subsidised monopoly affects the potential for competition in postal and related services. Posten Norge AS (Posten) has a legal monopoly over collection, sorting, transport, and delivery of domestic and cross-border mail up to 350 grams. Posten's reserved area is subject to an upper price limit, of 5 times the basic tariff for a domestic 20 gram priority letter. The reserved area is likely to be limited further in 2003, by the implementation the 2002 amendment to the EC postal directive. One reason for the monopoly is to finance the universal services that are commercially unprofitable for Posten. Posten is obliged to deliver priority and non-priority letters up to 2 kg, domestic and cross-border packages up to 20 kg, and newspapers and magazines. Posten enjoys priority on planes and ferries, and it is not subject to some regulations that apply to other providers, about subjects such as resting and driving time. The NCA has been concerned that Posten's lower costs, due to such advantages, may make it difficult for other firms to compete on equal terms in the direct mail market. Posten's priority of ferries is expected to end in 2003.

Bus transport

Competition for long-distance bus service has been limited in order to protect railroad service. The Ministry of Transport and Communications licences express coaches. Licensing responsibility is delegated to the county council level, for lines that do not cross county lines. Similar criteria apply to licensing trucks and buses, concerning financial, education, and reputation considerations. But licenses for regular bus

service, both local and long-distance, are also based on a judgement about demand, or need, in relation to existing service. A licence can evidently be refused if the Ministry believes the route is already adequately served. Even through there is no explicit "needs" test in the law, in practical fact incumbents successfully challenge applicants on that basis. The national railroad owns the major express bus company. (NCA, 2002) The railroad appears in licence proceedings to object to bus licenses, even those for its own subsidiary.

Despite the obstacles, some entry has been allowed in the last few years. In long distance service, there are now 40-50 firms, many of them evidently operating as franchisees. Most are private, and most also operate local bus concessions. The minister is starting to licence parallel, competing routes for long-distance non-subsidised service. As competition begins to develop in bus service, complaints are now arising that capacity constraints impair new entrants' access to terminals.

A government white paper in 2002 argued for giving less consideration to the impact on rail in licensing long-distance service. It also suggested a different remedy for responding to any adverse effects on rail: the railway should be free to reduce or eliminate service on the line affected. Such a policy has been implemented in the central and eastern part of the country, by interpretation and application. A change in law will be needed to achieve truly free entry across the country. The parliament agreed to extend the policy, but has not yet changed the law.

Taxis

Entry into taxi service is still controlled, but the regulatory approach is moving toward greater competition. Licensing is controlled by regional authorities. For regular taxi service, the local decision to issue a licence depends on a demonstration of unmet need. Control is defended to enable licensees to perform their service obligation. The system was debated in the mid-1990s, but no major change resulted. Some licensing areas have expanded to include more participants in the market. And in some areas, additional licenses have been issued to create more than one taxi service in the district. Service competition has been encouraged by giving taxi drivers the ability to choose between alternative dispatchers; before, the dispatch function had been a local monopoly.

Prices for taxi service are controlled under the Competition Act. The NCA had been responsible for setting prices, having taken over that function from the Price Directorate in 1994. The NCA still acts as the price regulator in some taxi markets, applying its power of intervention against abusive practices under Sec. 3-10 of the Competition Act. In 2001, the NCA issued 2 instructions permitting an increase in maximum fares. The NCA justified the action by benchmarking against changes in costs in areas where the taxi companies compete on price. (NCA, 2002, p. 19) Exemptions from Competition Act prohibitions have been granted so that taxi services could co-ordinate dispatching or set common maximum prices. The NCA has been sceptical of requests for exemptions that would permit taxi companies to collaborate on bids to local authorities for publicly-funded contract services such as transporting schoolchildren and patients. But the NCA did grant one such exemption in 2001, as a transition measure, where the local government itself supported the application (after the NCA's initial denial was sustained on appeal to the Ministry). (NCA, 2002)

In 1998, the NCA proposed eliminating price control. The Ministry of Labour and Government Administration decided that price controls could be lifted where there were at least 2 operating taxi services and conditions permitted adequate competition between them. As of mid-2001, the NCA no longer controlled prices in the principal urban areas (Oslo, Akershus, Bergen, Trondheim, Stavanger, Kristiansand, Drammen). Service in other areas is still subject to maximum price restrictions. Consumer authorities are unhappy that prices have gone up since deregulation, and the Consumer Council does not agree that taxi deregulation has worked. Price transparency has declined where competition has increased,

although it appears adequate everywhere except Oslo. Variations in price depending on demand, such as for different times of day, have also increased. The NCA's evaluation has concluded that competition in the principal urban areas is gradually increasing, but that the limited appearance of new competitors shows that the present licensing scheme is still inhibiting competition. The NCA argues that the basis for licensing must be changed, both in these deregulated areas and in the areas where prices are still controlled. The Ministry of Transport and the Ministry of Labour and Government Administration are evaluating whether to replace the present system with a qualification-based scheme, with no limits. That would permit NCA to lift price regulations in the non-urban areas, as new companies enter the market.

Pharmacies

Reforms have eliminated entry controls based on economic factors. Under new legislation, effective in March 2001, there is no longer a means test limiting entry. Before, only a pharmacist could own a pharmacy. Now, the only entities barred from owning a pharmacy are drug companies and doctors. A wholesale pharmaceutical company can own a pharmacy. One owner can own several pharmacies. A separate licence is required to operate a pharmacy, so the manager of the pharmacy must be a licensed pharmacist.

Other means of controlling entry are being resisted. The law permits the Ministry of Health and Social Affairs to limit the number of pharmacy concessions in major cities. The ostensible reason for this limit is to correct for the scarcity of pharmacies outside of these cities, by channelling new entry there. In the event, no cap was actually adopted, though. Instead, the government entered a formal agreement with a wholesaler and a major retail chain to establish a provider-of-last-resort for rural areas that would not otherwise be served.

The scope of the pharmacies' monopoly is somewhat contested. The wholesale level is now private and competitive. Pharmacies can sell other products that are naturally linked to prescription drugs, so that pharmacies also have a monopoly on selling non-prescription drugs. That is about to change, to allow some non-prescription items to be sold in some other shops. Maximum wholesale prices and maximum gross margins are regulated. Because the government pays 75% of prescription drug costs, it has a budgetary interest in controlling the price level. The method of setting price caps could weaken the incentive for a pharmacy to seek lower wholesale prices. The mark-up regulation lets the company keep only 50% of the savings from a better producer-wholesale deal. Awareness of price competition in the public has been increasing. Newspapers have publicised price differences among pharmacies. None of the chains has made a public issue of an intention to compete over price, though.

Professional services

There is no general provision of the Competition Act under which the self-regulatory rules of professional service providers' associations might be exempted. Restraints in professional services have been the object of NCA actions in the past. Recently, the NCA denied an application for exemption for architects' rules against underbidding or taking over another architect's project. The exemption was granted in part. The parties appealed, but the appeal was rejected in December 2002 (NCA, 2002, p. 25). Lawyers, though, may present a special case, because of court supervision and approval of bar rules. A commission recently examined how the lawyers' rules affect competition. A representative of NCA is on this commission, whose chair is the NCA's former Director. The commission's report, in September 2002, evaluated how legal services can be made more affordable and available. It principal suggestion is evidently to make the market more transparent through detailed rules about price information. And a majority of the commission also supported government-imposed rules about quality of service (which could be supplemented by the organised bar's own rules). The commission also addressed entry controls. Some on the commission supported permitting individuals who lack the formal qualifications of law

degree and licence to give legal aid and advice outside the court system. Most agreed with permitting persons who do not have a licence to practice law before the courts to argue matters in specialised areas or before particular decision-making bodies.

Alcoholic beverages

Retail trade in liquor, wine, and higher-alcohol beer is an authorised monopoly, As Vinmonopolet. Until June 2002, Arcus Gruppen ASA (a firm that has been spun off from the monopoly in 1995) also had a legal monopoly over liquor production. Its monopoly over producing wine was ended earlier, but it is still the largest producer in the country. The government sold most of its Arcus shares in 2001, but still owns 33%. Sale of these remaining shares has been authorised. (Norway, 2002) The reason advanced for government control of this sector is a public health concern, to suppress consumption. Control has been attempted through taxes as well as through monopoly. Although the monopoly has little public support, there is little political support for questioning the asserted justification for it. The *de facto* compromise is to permit competition through imports, while maintaining the monopoly at retail. About 40% of consumption is evading the monopoly, through home production or import. A principal source of cross-border competition is the Swedish monopoly.

Retail hours

Competition in retail trade is limited to some extent by controls on opening hours. A national law, effective since 1 January 1999, sets uniform hours. Before, municipal councils could control hours locally. Shops may be open from 6AM to 9PM Monday through Friday, and from 6AM to 6PM on the day before Sundays and holidays. In general, shops must close on Sundays and holidays. These limits apply to retail sales from permanent establishments, but not to services or wholesale trade. The limitations do not apply to "kiosk" shops, outlets under 100 square meters selling consumer products, or to petrol stations up to 150 square meters selling groceries and auto supplies; however, such outlets must mostly sell petrol and auto supplies. These outlets are evolving into self-service operations that compete with supermarkets, but with an advantage of flexibility in their hours of operation. There are many exceptions. Longer hours or weekend and holiday operation are permitted for retail outlets on camping sites, typical tourist areas (as authorised by county governments), sales from places that serve food, auctions, art galleries, exhibitions or trade fairs, stores selling primarily flowers, plants, and garden supplies, and home-made articles and souvenirs. Other special conditions for extended hours may be authorised by county governments. Denial of permission may be appealed to the ministry. A special rule exempts the duty-free stores for international passengers at airports.

The legislative basis and rationale for the controls have changed. In 2001, the government decided to repeal the act on retail opening hours and shift control over hours to the public holidays law. Putting everything in the public holidays law takes it out of the jurisdiction of the Ministry of Children and Family Affairs and gives it to Ministry of Culture and Church Affairs. The rationale for the change is said to be to let services respond to consumer needs and desires, by removing the control of retail opening hours. But not very much will actually change. Opening on Sundays and holidays will still be controlled, reflecting a policy that those should be different from other days, with limited commercial activity. In addition, the law calls for closing on May 1 and May 17 (Constitution Day). And on Easter Eve, Whitsaturday, and Christmas Eve, closing time would be 4 PM. The same exceptions that applied now under the opening hours law apply under the public holidays law. A new exception applies, to sale of goods in connection with places of production, for tourism. The treatment of shops in terminals is achieved through an exemption from the public holidays law. And, an exception from the public holidays act would still permit Sunday afternoon opening (between 2 PM and 8 PM) on the 3 last Sundays before Christmas Eve. County governments can still grant special dispensations, which can be appealed to the ministry. The strongest opponents of the change are labour organisations, concerned about the loss of protections against

exploitation. There is a general rule against working between 9 PM and 6 AM, which could not apply if opening hours on weekdays are unrestricted.

The proposed change in legislative basis and detail might not make very much practical difference. Few outlets are likely to remain open after 9:00 PM. Competitive distortions based on the complex exemptions would still remain. Small differences in coverage based upon products sold and shop area could still give some outlets competitive advantages. The matter is set for action in the parliament in early 2003.

Media ownership

Rules about media ownership are intended to preserve competition among points of view, more than economic competition between providers. The Media Ownership Act permits 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 are to promote freedom of expression, opportunity to express opinion, and a comprehensive range of media outlets. There is a safe harbour for newspaper acquisitions, of a 20% share of national circulation (and the acquisition does not increase ownership concentration in newspaper or broadcasting in a regional or local market). One interest cannot control more than 1/3 of the national press market (measured by copies sold). The extent of the control is related to qualifications to receive press subsidies for newspapers. The Act's ownership limits can be applied to acquisitions in other media, if consistent with the purpose of the Act. For broadcasters, similar ownership limits apply: no single interest may hold more than 1/3 of the shares of a broadcaster. These limits are not set by the Media Ownership Act, though, but by conditions imposed on licences. The licence for the national commercial radio broadcaster still has an ownership condition, which is likely to be discontinued when the licence comes up for renewal in 2004. The ownership limits in the nationwide commercial TV licence have expired. The broadcasting law prevents broadcast-cable combinations, in principle, but it permits exemptions so broad that the prohibition has little effect. In all of these settings, the goal of setting the limits is preventing investor control of content, to promote viewpoint diversity. The limits also provide a means for preventing an acquisition that would lead to a dominating position in Norway.

The system for administering the Media Ownership Act is an example of a non-political avenue for appealing administrative decisions in Norway. The Media Ownership Authority, in the Ministry of Culture and Church Affairs, was set up in 1997. Any appeal from this Authority's decision would be taken to a special non-political appeal body, appointed by the government, and not to the Minister. In this setting, the Norwegian constitution's guarantee of freedom of the press is the reason for a non-political appeal route. A similar decision and appeal structure is used concerning censorship of films and video. A media policy white paper (issued by the previous government) suggested merging the Media Ownership Authority, which only has a total of 4-6 persons including members and staff, into the NCA; the latest white paper on public authorities calls for combining it with the other ones in the media sector dealing with mass media and film.

Cinema

The oddest regulatory constraint on competition in Norway is the municipalities' power to licence movie theatres, which they have used to establish local monopolies. The Cinema Act of 1913 gave municipalities the power to license public exhibitions. Most municipalities issued licences to local theatre operators. The local governments had taken over most of these operators by the 1920s. Movie theatres were run by local councils to secure the income and to censor the contents. Local governments have the power to prevent competition by denying licences, and they have in fact exercised it for that purpose. (Norway, 2002)

The local monopoly system is not linked to support for Norwegian-language movie makers. There is some concern that art movies will lose out if theatres are privately owned, because commercial operators will have no incentive to show them. But support for the local monopoly system seems to be based mostly on regional policy, a belief that small towns should have full service cinemas whether or not they are profitable—despite modern technological alternatives such as video and DVD rental.

There were few private movie theatres until recently. Now, some of the local council theatres are considering privatisation. As movie attendance falls and revenues drop, some localities are trying to sell off their theatres. The Oslo city government is about to sell, or at least commercialise, its movie theatre chain. One reason to turn to the private sector is to raise the funds needed to install digital movie technology. Some buyers are interested in theatres in the larger cities, but few in the smaller towns.

Film distribution operates under a general price-fixing agreement entered in 1953, which was exempted from the pricing law. The industry agreement about pricing covers exhibition rights, not admission charges. The Price Directorate reviewed and sustained the exemption in the 1980s under the previous legislation. The NCA has tried to eliminate the exemption under the Competition Act, but its efforts have been reversed on appeal, in 1997 and again in 1999. (NCA, 2002) Each time, the Minister contended that the industry-wide agreement on prices was necessary to keep small, regional cinemas viable. The current temporary exemption expires 1 May 2003, and awaits a decision by the ESA on a complaint that the agreement violates Art. 53 of the EEA agreement.

Bookselling

Preserving regional businesses is also given as the reason to permit widespread price-fixing for publications. An exemption from the Competition Act permits several restraints in the Trade Agreement on Books between the Norwegian Publishers' Association and the Norwegian Booksellers' Association on behalf of their members. The agreement authorises resale price maintenance, controls discounts, provides for the treatment of returned stock, and mandates retail stocking and supply. Bookstores have a monopoly on selling textbooks, and the agreements' fixed prices for this guaranteed, high volume business is particularly helpful to the small, rural operations. The stated purposes of the agreement are to promote culture, literature, and knowledge, to stimulate reading, to promote the Norwegian language, and to preserve the market structure of booksellers, notably the small bookstores in sparsely populated areas.

The NCA has repeatedly objected to the breadth of the exemption, but it has been repeatedly overruled by ministers. In 1995 and again in 1998, the NCA tried to eliminate the textbook monopoly at least, but the Ministry disagreed. The NCA has failed to persuade the Ministry that there are more efficient ways to subsidise local bookstores and authors. The experience in Sweden, where a similar exemption was removed and bookstores did not disappear (although there were significant changes in the trade as a result) is well known in Norway, but the lesson is rejected. The publishers association has no interest in the internet-distribution alternative. Because the exemption is due to political decisions overriding the judgment of the competition agency about the application of the competition law, it might not survive if a non-political appeal route is established.

Competition advocacy for regulatory reform

The NCA and the Ministry of Labour and Government Administration have been particularly active in promotion of competitive, market methods and outcomes in the policy-making and regulatory processes. This has been a long-standing practice, but it may be even more important under the present Minister, an academic economist with a strong interest in regulatory reform. Recent NCA advocacy has addressed public monopolies, competition between public and private enterprises, subsidies to public enterprises, regulatory barriers to entry, network access, and taxation policy. The high priority of this work is measured by staff time devoted to it: 13 person-years in 2001.

The Competition Act explicitly authorises this advocacy activity. The NCA is to "call attention to the restraining effects on competition of public measures, where appropriate by submitting proposals aimed at increasing competition and facilitating entry for new competitors" (Sec. 2-2(d)). This function of "calling attention" on its own initiative permits the NCA to offer a critique of regulations and decisions of other parts of the government. Other advocacy functions include "hearings," that is, commenting on proposals, participating in working groups and committees, and reports. In 2001, there were over 300 occasions for advocacy or policy advice, and in 2002, nearly 400. The trend is upward, although the NCA has made somewhat less use of its power to "call attention" to problems in existing laws or decisions, compared to a sharp peak in 1998. In submitting comments on proposed rules and actions, the NCA appears on its own behalf, its views being transmitted through the Ministry of Labour and Government Administration.

Table 3.3: Trends in NCA advocacy activity

	2002	2001	2000	1999	1998	1997	1996
Cases handled	261	245	179	182	159	180	154
Comments submitted	103	85	77	78	60	92	64
"Calling attention"	14	11	12	17	51	11	4

Source: Norway, 2002; NCA, 2001

A principal object for advocacy and policy attention now is competition between private enterprises and government service providers. Aspects of this problem are discussed in more detail in Ch. 5 of this study. The issue has come up in driver training, conferences and hospitality, and other services. (Norway, 2002) Other problem areas include weather forecasting data, university institutes, and road construction. A difficult problem in achieving fair competition, particularly for big-ticket operations like construction, is how to set up the balance sheet for an operation that has previously been a government function. For services, such as security, cleaning, and catering, an important issue in achieving fair competition is equal VAT treatment. A preparatory committee's report to the Ministry of Finance in December 2002 proposed VAT compensation for all municipal purchases from private companies, which implies extending the present system with VAT compensation of certain specified services.

Procurement has been a particular concern of the NCA. The NCA has tried to encourage municipalities to integrate competition and efficiency into their procurement operations. A 1993 NCA report on municipal buying practices found little use of tenders and suggested setting up an independent body to handle complaints and resolve conflicts. Another NCA study in 1996 found increased interest in procuring through tenders, no doubt prompted by requirements that followed Norway's entry into the EEA agreement in 1994. In 1999, the NCA initiated a campaign to make municipal purchasing staff aware of the Competition Act's prohibitions against price fixing and collusive tendering. (Norway, 2002) In 2000, in connection with a working group examining the enforcement of procurement rules generally, the NCA supported setting up a new enforcement body and procedure, which would permit a disappointed party to challenge an award before a contract is signed. (Norway, 2002) Such a body was established in January 2003. In 2002, the Minister of Labour and Government Administration called for an examination of centralised procurement agreements and discount schemes, covering such items as hotels, motor vehicles, computers, credit cards, and telephone service. These framework agreements, which are relatively long-

term programs between the government and a small number of suppliers, set terms and availability of common products for all levels of government. Buyers are not bound to use them, but they provide obvious advantages in convenience and price. The NCA produced a preliminary report and advice about the design of these programs in October 2002.

Working groups and committees with ongoing, general responsibilities that have competition policy implications about key sectors and regulatory reform usually include representatives from the NCA or the Ministry of Labour and Government Affairs.

NCA comments and reports have examined the competition policy implications of a wide range of other policies. It recently published a general assessment of policies in the agriculture sector, to provide a foundation for future work about agricultural products and processing, concentrating on the dairy industry. The NCA report concluded that the problem of high prices in Norway would be best met by liberalising imports of food products. Several NCA comments have examined environmental regulations. The NCA criticised a proposal to manage the scrapping of motor vehicles under an exclusive contract between the Ministry of Environment and a consortium of auto companies. This proposal evidently accompanied another proposed change, to make manufacturers responsible for disposing of old cars. The NCA argued that no monopoly was needed to do this, and that the present system, of requiring a wrecking deposit, should continue to work. (Norway, 2002) NCA argued for making greenhouse gas quotas transferable, so the market could find cost-effective solutions. (Norway, 2002). And the NCA rejected an application for exemption for the electrical equipment industry's plan to co-ordinate collection of the recycling tax, because it amounted to agreement on an element of the product price (NCA, 2001). Another ambitious project was a study of the market and competition effects of tax rules. The VAT system was modified in 2001 to include new service areas and set a different rate (12%) for food. The NCA produced a substantial report on the VAT reform and its effects on competition. The NCA argued for a uniform and universal VAT, and against multiple rates and exemptions, because the uniform system is simpler to administer and to comply with, as well as leading to a more efficient use of resources. (Norway, 2002)

Despite the efforts to keep competition and market issues on the agenda, it is not clear how far the ideas have spread in the regulatory decision-making structure. A few years ago, the NCA participated in a working group led by the Ministry of Trade and Industry, which produced a guide about assessing the impact on business of regulations and other public actions. It included a checklist of questions to ask about the effect of a proposal on economic competition (NCA, 2001, p. 35):

- Can increased costs and more stringent requirements for expertise prevent new companies from starting up, or lead to unfair competition?
- Can regulation contribute to certain companies, such as market leaders, being given an advantage because they are asked for advice when the regulation is formulated?
- Will the regulation affect companies competing in the same market differently?
- Will the regulation affect existing, or potential, competitors differently?
- Will the regulation reduce the number of companies in the respective market?
- Will the regulation lead to a change in the general conditions for Norwegian companies, compared to the conditions for foreign companies?
- Does the regulation lead to unfair competition in other municipalities?

But the NCA is unaware that such a checklist for regulatory quality based on competition policy is actually being used, except perhaps at the NCA itself. A formal, government-wide review, to ask questions systematically about all of the regulations on the books that may unnecessarily impede competition, was announced in November 2001. The NCA reported to the Ministry of Labour and Government Administration about this review in November 2002. The scope and timetable of this project are ambitious. But Norway's experience suggests that the project may not be unrealistic. Previous review projects in Norway have been fruitful.

Conclusions and policy options

Norway has moved, carefully, from regulation toward competition in many areas. Notably, it was one of the first to implement market-based reforms in electric power, along with its Nordic neighbours. In this process, though, Norway has typically retained a measure of public control, through ownership if not through regulation. The formal monopoly in telecoms was lifted 4 years ago, but Telenor, the one-time monopoly provider, retains a very large share of important markets—and the state retains a very large share of Telenor. In electric power, the major supplier is another state-controlled entity, Statkraft, which is trying to expand its position. The risk that these firms will continue to dominate liberalised markets calls for continued vigilance to ensure that competition can be sustained. Implicit (or even explicit) public backing for major firms presents a challenge to other market participants that do not enjoy similar support. In transport, the pattern is similar, of reforms in principle accompanied by continued state involvement which affects competition in fact. Competitors have not fared well against partly-state-owned SAS, which was allowed to buy its principal local competitor because it was failing. The state railroad has resisted competitive entry into bus service, even by its own affiliate.

Prospects for further integration of competition into regulation are mixed, reflecting the mixture of values and interests at stake, as well as the less-than-doctrinaire commitment to the principle of market competition. State involvement in the economy has been the pattern in Norway for a long time. Issues of equity and regional support have been as important as efficiency and competitiveness. Moreover, Norway does not face a crisis that demands fundamental change. On the contrary, its resource-based wealth provides insurance against shocks and reinforces the status quo. According to international benchmarking items that are widely cited in the popular media, Norway is the best country in the world to live in. In that setting, it might be considered remarkable that Norway has changed its regulatory approach as much as it has. But policy debate in Norway looks to the long run. Thus, Norway may be receptive to improving the efficiency of public institutions, looking to the day when oil wealth may not be enough to maintain the services that the public demands. One means of doing so could be to encourage market-based methods of delivering those services.

Making the delivery of public services more efficient, and more competitive, is a theme of the program of the Ministry of Labour and Government Administration. This Ministry is widely seen to be the principal driver of further reform in Norway now. Success will depend on developing a broader base of support, in the government and the public at large.

Application of competition law has become more vigorous in the last few years. To promote competition principles, the Ministry and the NCA have challenged national icons such as Statkraft, Telenor, and SAS. But the scope of competition policy is limited by a relatively large set of exemptions and other regulatory measures. The effectiveness of competition policy is undermined by the relatively weak sanctions that have been imposed for non-compliance. Significant sanctions may only be obtained through criminal procedures, which add complications, costs, and delays. Facing those difficulties, the prosecutors may be willing to accept settlements of competition cases in order to focus their attention on matters such as fraud and tax compliance that the courts take more seriously.

One effect of improving the efficiency of competition policy institutions, and concentrating on an efficiency-based conception of competition, has been to weaken the connections with other supporting policies and interests. Reassigning some of the NCA's price and market surveillance functions to others has simplified the NCA's tasks and clarified its policy goals. But it may also have made it more difficult to maintain the link between competition and consumer policies. Recognising the importance of consumer information and support, the NCA has tried to raise its public profile. The number of media appearances about the NCA has increased 70% in recent years. And the NCA has tried to maintain a co-operative working relationship with the Consumer Ombudsmann and the Consumer Council.

The role and nature of the competition policy institutions is now being reviewed. The final Committee report on institutional reforms in April 2003 recommended greater decision-making independence, by providing a non-political avenue of appeal from NCA decisions. Removing the potential to invoke other policy grounds in order to override a decision will be a significant step. It would mark a change in priorities in Norway, for competition, though valued, has not previously been treated as an overriding principle so important that it should be insulated against political intervention.

Policy options for consideration

Reconsider and reduce sectoral protections against entry and competition.

Several remaining regulatory constraints on competition are difficult to justify. The local government monopoly over movie theatres may be collapsing of its own anachronism already, in the face of new digital technologies and modes of distribution. No harm, and some benefit, would come from simply eliminating it. Controlling entry into inherently competitive services such as express buses and taxis need not depend on a demonstration of unmet demand. Experience elsewhere has shown that this method impairs efficiency and competition, and that there may be more efficient ways to ensure service to underserved areas. To be sure, there may be consumer protection problems in these sectors, but they should be addressed directly. In retail trade, Norway has proposed a modest move toward greater freedom of customer choice, by removing some controls on opening hours. Rules controlling which stores may open on holidays will remain in place, though. These may be more important, as a practical matter, than the rules against staying open late on other days.

The broad protections and exemptions covering agriculture, fisheries, and forestry raise more complex issues. Some interests at stake in these sectors are difficult to assess clearly in a conventional efficiency calculus. But that the task is difficult does not mean that it cannot be attempted. Norway does try to identify the other interests, of long-term resource management, environmental preservation, and regional support. Although Norwegian citizens have proven willing to support these values and policies in the national budget, many are "voting with their feet" in the marketplace by shopping for lower food prices in Sweden. The direct costs of programs that are said to promote other values are reasonably clear, in the magnitude of subsidies. The costs due to the distortions of competition should also be considered, in determining whether the total costs are commensurate with the benefits sought.

Encourage competition and market discipline in the public, and publicly-owned, sectors.

The current program to focus attention on how government involvement can distort competition, and on how market methods can improve the efficiency of government services, is important and should be strongly supported. Its goals should be clearly understood. For example, procurement methods that lead to unintended monopolies should of course be reformed. But efficiencies should not be discarded in the process of trying to make more business available to smaller participants. To some extent, aspects of market discipline might be achieved without changing the nature of the providers, by enabling greater consumer choice in areas such as health care and education. For services that involve private sector providers too, the process of reorganising public service providers should not give them inefficient

advantages, or disadvantages. These distortions can result not just from formal or informal preferences in getting business through long-standing relationships, but also from how the new entities are capitalised. The same issue is raised in the debate over the appropriate scope and role of state ownership in other economic sectors. Substantial state holdings in a private firm inevitably raise questions about the extent, and value, of an implicit public commitment to provide further support, which can shift the competitive balance, as well as about the risk that the state might intervene through regulation to forestall threats to its investment. Eliminating the most obvious of those risks by eliminating the state's holdings in business firms that do not have a significant public-interest role is well-advised.

Complete the review of existing regulations to identify constraints on competition.

In many countries, a project like the one announced in early 2002, to perform a government-wide review of the regulations in place, would be a Herculean task. Doing it thoroughly may be more important than doing it quickly, at least in the absence of crisis. Norway has done similar reviews before, though, and thus there may be fewer anti-competitive skeletons in its regulatory closets. At least, they may be easier to.

Reform the decision process, to end political intervention in particular decisions.

Providing for an expert-based appeal body, outside the political system, was a principal task of the Committee examining improvements to the Competition Act. Even though the process of appealing to the Minister is transparent and the Minister's reasoning must be publicly explained, the prospect that decisions can be overridden by political considerations inevitably undermines the coherence and consistency of competition policy. Rules to circumscribe the scope of that discretion by limiting the basis for appeal or decision would likely fail to distinguish the special cases from the ordinary ones consistently. But if an appeal body appears to disregard other policies too much, those policies will reappear through a proliferation of legislated exemptions, which would undermine consistency and coherence too. Independence and long-term consistency with government policies can be balanced through the design of the institution and the appointment process. Norway has models of non-political appeal structures to draw upon, in media and immigration matters. Providing for a collegiate body in the process would be a return to Norway's historic practice in some competition matters (as well as its current practice at the Market Council for unfair competition matters).

To ensure consistency of competition policy, creating an independent body to decide appeals from NCA may not be quite enough. Regulation in sectors such as telecoms involves competition matters too. There are plans to create a non-political appeal route from that regulator. Consistency, as well as efficiency, would be promoted by using the same body for appeals from both regulators. (Another approach might be to revise the sectoral laws and regulations so that sectoral regulators no longer have any power to decide matters involving competition. All such decisions would then be handled by the NCA, subject to the appeal process from the NCA's decisions). There are models and precedents for this approach. In Norway, some have suggested creating an expert court or appeal body to deal with competition in all sectors, intellectual property, and consumer issues. Examples of specialist appellate bodies in other countries that cover sectoral regulators as well as competition law include the Competition Commission in the UK and the Antimonopoly Court in Poland.

Incorporate European prohibitions, but retain flexibility.

Achieving closer substantive harmonisation with European competition law is another task of the Committee. A principal goal is simplification, for business and for the enforcement agency as well. Incorporating the European versions of the prohibitions against restrictive agreements and abuse of dominance would also help prepare for decentralised enforcement. Even before decentralisation becomes a reality, adding a prohibition against abuse of dominance to Norway's law might increase the NCA's workload. Some complaints that are now going first to the ESA, to take advantage of the EEA prohibition, may come to the NCA instead.

In the process of cleaning out the competition rules, it would be advisable to remove the remaining provisions, still left over from the previous era, that imply direct price monitoring and control. Such rules sit uneasily in a competition policy system based on promoting efficiency and an open competitive process. A European rule about abuse of dominance would be sufficient to deal with exploitation by dominant firms. But it may not be necessary to replace all of Norway's current competition rules with the language of EU Art. 81 and 82. The concept of abuse of dominance in European law is more narrowly defined than general, purpose-based provisions such as Sec. 3-10 of Norway's Competition Act, although cases about abuse of dominance typically deal with the same kinds of problems that draw "intervention" from the NCA. The scope of abuse of dominance is narrowly defined, in part because the consequences of violating the prohibition can be severe. A provision like Sec. 3-10 can be more general, in part because the consequences are only an order to correct conduct in the future. Because it appeals directly to the policy purpose of the law, a general rule like Sec. 3-10 can be a resource for dealing with new situations. That process may not often produce concrete enforcement action. But it provides a context for examining new problems and testing the possibility of solutions. It might, for example, be a vehicle for applying competition principles where exposure to market conditions is a novelty, such as the newly commercialised operations of government offices. When Finland adopted the European competition law toolkit, it retained a similar general provision from its previous law, as a resource and a connection with its established practices. To be sure, most enforcement action since then has been taken under the newer prohibitions.

Design enforcement processes that can impose effective sanctions.

Details of the legal context limit the available choices. It appears to be very difficult, though not impossible, to persuade Norwegian courts to impose substantial fines for competition violations. Penalties against individual decision-makers are virtually unknown. Both problems appear to result from the reliance on criminal process for enforcement, and one reason for doing so is that it is a necessary predicate for an order to disgorge the profits from a violation. The threat of disgorgement is rarely carried out either. And that threat alone is not likely to be enough to deter misconduct. A would-be violator might be willing to take the chance that it would not be caught and required to relinquish its gains. The benefits of relying on rarely-imposed criminal penalties are unclear. But there may be no alternatives, unless some means can be devised under Norwegian law to impose significant financial sanctions through civil or administrative processes. Perhaps with increased enforcement attention to hard-core cartels, the NCA and Økokrim will learn how to bring more convincing cases more quickly and the courts will be persuaded to come down harder on serious violations. Increasing the possible fine, by setting criteria such as those used by the EU, would enable, and encourage, the courts to up the ante. Narrowing the scope of criminal liability, to cover only hard-core, clandestine, horizontal collusion might also help persuade the courts to punish them more severely. (Expanding it, to make abuse of dominance a crime, would not be well advised. Some abusive conduct deserves strong response, but most matters involving dominant firm conduct do not, and making the necessary distinctions in the drafting of a criminal law would be very difficult). Private remedies are a supplement, and here Norway can build on an unusual, positive experience. Cases of horizontal collusion have been rare, but one of them was followed by a substantial private recovery.

If it is feasible under Norwegian law, a non-criminal, administrative financial sanction should be seriously considered. Dividing responsibility between the NCA and Økokrim can lead to delay and duplication. Presumably, the NCA itself could handle administrative mattes from start to finish. The NCA's existing powers of financial "sanction", to confiscate the gains from a violation, are almost never used, in part because it is difficult if not impossible to compute those gains precisely. Calculating a sanction to deter, based on turnover and other relevant factors, could be more straightforward, and consistent with common experiences in other European jurisdictions.

Confirm the scope of merger review powers.

The principal uncertainty about merger review is whether it covers dispositions of state holdings through privatisation. In practice, the NCA has had an opportunity to review proposals. But the general language of Sec. 1-4 about legislative authorisation may undermine the NCA's power to take action if a disposition appears to threaten competition. That is not a necessary reading of the statute, but it might be better to make clear that a law providing for disposition of state assets does not amount to legislative "authorisation" overriding the Competition Act. Some other aspects of Norway's merger regime might also be examined, although changes are not necessarily called for. Notification is now voluntary. Mandatory, pre-merger notification might avoid problems in implementing post-merger remedies. But no significant transactions appear to have escaped attention or remedy in Norway yet. Norway's substantive standard, of significant lessening of competition, differs from the EU's dominance-based standard. Norway is not the only European jurisdiction to use a different standard, though, and Norway's standard may have advantages over a dominance-based standard, particularly where the competition problem is oligopoly.

NOTES

[1]. Act. No. 3 of 9 July 1948, on Maintenance of Price and Rationing Regulations.

[2]. Act No. 4 of 26 June 1953, on Control of Prices, Profits and Restraints on Competition.

[3]. Some aspects of the 1953 system remain relevant today, as exemptions granted under that regime still come up for review and annulment or replacement under current legislation. In 1998, actions concerning exemptions under the 1953 legislation amounted to about half of the Norwegian Competition Authority's exemption decisions (60 annulments, out of 131 exemption cases of all kinds). Even in 2001, there were still 16 annulments of old exemptions (among 113 exemption cases of all kinds). (NCA, 2002, p. 23).

[4]. Act No. 65 of 11 June 1993 relating to Competition in Commercial Activity (the Competition Act). Unless otherwise indicated, all parenthetical citations are to the Competition Act.

[5]. In Norway's pre-1993 system, the Price Council was the first-instance decision-maker about mergers and refusals to deal, and its decisions could not be appealed to the Minister. But the Minister was the appellate body for the Price Directorate's decisions about other competition issues.

[6]. Text available at http://www.forbrukerombudet.no/index.db2?id=706.

[7]. Price Policy Act: Act of 11 June 1993, no. 66.

[8]. Because of changes in the law on state enterprises, no new government supported debt will be issued after 1 January 2003.

[9]. Act 10 July 1936 no. 6, about increasing sales and supply of agricultural products, and Act 14 December 1951 no. 3, about sales and supply of raw and crude fish.

[10]. Norway also has a rule limiting ownership of subsidiaries in the financial services sector (to10%, with certain exceptions). The ESA has contended that this limit conflicts with the EEA agreement. An expert group appointed by the Ministry of Finance proposed in 2002 to adopt ownership rules based on the relevant EEA directives. It is not clear that these rules have had either the purpose or net effect of impeding structural changes or resisting foreign acquisitions.

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