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# Norway

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The Norwegian Competition Authority's (NCA) focus on economic analysis or evidence and the recent record fines imposed by the authority have together created an increased demand for advanced economic analysis and economic advice in competition investigations in Norway. Economists and the economic analysis have for many years had a prominent role in relation to the NCA's decisions. Under the direction of Director-General Lars Sørgard, the role of economic analysis has become even more prominent and this seems to be a development that is here to stay. In this article, we discuss the use of competition economics in the Norwegian market. It is based on interviews with the law firms Kvale, Arntzen de Besche, Wiersholm, Thommessen and Wikborg Rein, conducted in June and August 2020.

With the imposition of larger fines for competition law violations, large-scale sectorial investigations and an active media communication, the NCA has introduced an era of stricter competition law enforcement. This development of the competition landscape in Norway has not only led to an increased demand for advanced economic advice in specific cases or in dialogues with the NCA during case investigations, it has also moved the competition questions to the centre of companies' compliance work. Compliance with antitrust rules has hence increased in importance as an advisory service for most of the interviewed law firms.

The Norwegian lawyers generally agree that the NCA's priorities and enforcement of competition law is effective and have had (and seem continually to have) a deterrent effect on companies violating the competition law.

## **Mergers remains the core area for economics**

In many aspects the Norwegian competition landscape has during the past 12 months followed previous years' development. About half of all competition-related questions received by the lawyers interviewed have been related to mergers and merger control. Hence merger-related advice continues to be the core service provided by the law firms.

It is also in merger-related cases that competition economics has its most pronounced role. The lawyers generally agree that a complex merger filing without economists involved is unlikely. In addition, most lawyers see a continued and increasing need for economic analysis and advice in the early preparations of merger cases.

During the past 12-month period, the NCA decided to intervene against four proposed transactions.

- Prosafe's acquisition of Floatel was first prohibited by the NCA. The decision was appealed by the parties, who at a later stage withdrew their appeal.
- The merger between Glommen Skog and Mjøsen Skog was approved by the NCA early during the Phase 2 investigation.
- The merger between Tieto and Evry was conditionally approved by the NCA already during the Phase 1 investigation.
- A merger notification in the laundry industry was withdrawn after the NCA announced a possible intervention.

The NCA also requested a notification for Sector Alarm AS' minority acquisition of Nokas AS alarm (due to limited competition in the industry). Furthermore, the NCA has recently announced that it is considering imposing fines on the grocery chain Norgesgruppen for not announcing its acquisitions of smaller players in the market. The NCA states that players in the grocery trade must report acquisitions even if they fall below the official threshold values, as competition in the industry is particularly limited.

In the beginning of 2020, the covid-19 pandemic started to spread over the world and in March many countries, among them Norway, decided to introduce restrictions on movement, travel bans and other measures that have had a large impact on the Norwegian economy. As a direct consequence of the pandemic, and the new way of life, many ongoing and planned mergers were put on hold. During March, throughout April, and in the beginning of May 2020, merger-related activity was very low in Norway. Nonetheless, at the end of May and during June, merger activity picked up again and quite rapidly has started to approach pre-crisis levels.

## **The NCA has maintained an effective law enforcement also under the current crisis**

The employees of the NCA have, as many others, moved their working place from the authority's premises to their homes. To prevent delays for ongoing and incoming cases, the Norwegian Parliament adopted (17 April) a new temporary law introducing exceptions from procedural rules in the Norwegian Competition Act. The law aims to ensure that the NCA, to the greatest extent possible, can perform its tasks during the pandemic. The temporary act entered into force immediately and applies (at the time of writing this article) until 31 October 2020.

The temporary act extends some of the deadlines for the review of mergers and does also contain an exception from the rules of composition for the Competition Tribunal. In relation to the NCA's deadlines concerning the rules for informing parties that it may intervene against a notified transaction, for issuing a statement of objections, and for adopting decision confirming remedies proposed by parties, these are all extended. In relation to the composition of the Competition Tribunal, the chair of the Tribunal may for certain types of cases decide that decisions shall be adopted by a single member of the Tribunal.

### **The NCA's prioritisations are considered to be both relevant and motivated**

In general, the interviewed lawyers agree that the NCA handles cases well, especially in relation to mergers. Although merger filings have become more complex over the years, the NCA remains both efficient and transparent in its case handling. The NCA is also considered to make the correct prioritisations and quickly make decisions in cases where no indications of concerns can be identified in the proposed transactions. The lawyers also agree that when the merging parties present their own analyses during the pre-notification phase it is generally appreciated by the NCA, typically resulting in an even faster decision. In some cases, however, the lawyers indicate that the NCA could be more efficient and transparent in its case handling.

The main ongoing investigations by the NCA are in the grocery sector and the fuel retail market.

At the end of 2019, the NCA published a report based on its grocery sector inquiry where it had investigated differences in supplier's prices and conditions to the grocery chains. The report revealed significant differences in purchasing prices among the various retailers. The largest grocery chain, Norgesgruppen, was consistently offering lower prices than the two smaller competitors. The NCA concluded that this may be harmful to competition and consumers as large price difference may both inflate prices and hinder market entry.

The NCA has monitored the development of the fuel retail market since 2016. In the beginning 2018, the NCA announced that it had detected price irregularities in the market, and in October 2019, the authority initiated an investigation in the fuel retail market as the competition rules may have been violated.

### **Economic evidence may be treated differently by different judges in courts**

Some of the lawyers raise the issue that economic expertise and economic analysis may be treated differently in court depending on the judge. On the one hand, some judges are very open to economic analysis in competition cases as the competition law is formulated along the lines of economic theory. On the other hand, some judges only see a value in economic analysis when it comes to mere effect estimations, such as quantification of damages.

This disparate view of the judges can be decisive for the outcome of the case, and this may be problematic because the law and judicial order becomes less transparent and predictable. The risk that the economic evidence may be dismissed in the court has to be taken into consideration early in the process, especially if the case is likely to end up in the courtroom.

### **The future: Increased demand for economic advice but it remains a challenge to convince the courts**

Most lawyers see (and have seen for many years) an increasing demand for high-quality economic advice in competition investigations. In some cases, the NCA's prominent focus on competition economics has made the economic advice pivotal in developing the case. Most lawyers believe that this development will continue as long as the NCA maintains its focus.

The lawyers also see that the increasing level of complexity of the NCA's investigations generally require a closer cooperation between economists and lawyers. The NCA has brought the level of complexity of its analyses to the point that legal advice often must be complemented with advanced economic analysis, to give the best possible advice to clients and to withstand the scrutiny of the Authority and the court.

When it comes to decide on economic experts, the lawyers see two factors decisive for their choice. First, relevant experience from the specific sector and specific regulation may be insufficient. Second, language skills, if the economic expert has to go through large quantities of case material, may limit the options to Scandinavian economists. However, actual or perceived high barriers for engaging economists seem still to be the main reason why the use of economic analysis is limited in early stages of a case or when the case is small.



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Dr Henrik Ballebye Okholm is partner at Copenhagen Economics A/S. He has a PhD in agricultural economics from The Royal Veterinary and Agricultural University from 2002. Dr Okholm is an expert in applied microeconomics, especially industrial organisation, contract theory and the economics of cooperatives.

Dr Okholm now uses his expertise on projects regarding competition and regulation. He has been project leader on several projects regarding competition and regulation in many different industries, including the postal sector, professional services, telecommunication, electricity, retailing and the food industry. He has, among others, helped the Danish Bar and Law Society and Association of Danish Law Firms with an assessment of competition and productivity in the Danish legal profession in response to regulative scrutiny.



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Dr Erik Lindén is senior economist at Copenhagen Economics A/S. He has a PhD in economics from Aarhus University. Dr Lindén works closely with clients and their legal advisers, facing or making allegations within the areas of antitrust, follow-on damages, and merger-related issues. He specialises in quantitative economic analysis and has a strong knowledge of industrial organisation, consumption and production theory as well as corporate finance. Dr Lindén has been engaged in a wide range of industries, advising both private and public stakeholders.

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