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Commission II – Kommission II

THE EFFECT OF EUROPEAN AND NATIONAL COMPETITION LAW ON THE AGRICULTURAL SECTOR

L'ECONOMIE AGRICOLE FACE AU DROIT DE LA CONCURRENCE EUROPEEN ET NATIONAL

DIE AGRARWIRTSCHAFT IM LICHTE DES EUROPÄISCHEN UND NATIONALEN WETTBEWERBSRECHTS

National Report – Rapport national – Landesbericht

Norway – la Norvège – Norwegen

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Norwegian report – Rapport norvégien – Norwegischer Berichte

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1. National Competition Law

1.2) Legal foundation of national Competition Law.

The legal basis for the national competition law

Norway's legislation for competition law is laid down in the Norwegian Competition Act.

The purpose of the Act is to achieve efficient utilization of society's resources by providing the necessary conditions for effective competition.

Being based on an intervention principle rather than on a prohibition principle, Norwegian Law does not in general require proof that an act of conduct constitutes abuse of dominant position, in order for the Norwegian Competition Authority to be able to intervene against the practice. It is sufficient for the Norwegian Competition Authority to show that an action is liable to restrict competition, contrary to the purpose of efficient resource utilisation, in order for the Authority to intervene.

The Norwegian Competition Authority is also empowered to evaluate public schemes and regulations, and point out anti-competitive practices on an individual basis.

Norway is a part of the European Economic Area (EEA) through it's membership in EFTA. The rules and regulations in the EEA Agreement have been implemented into Norwegian legislation through special Acts and regulations. For more about this, se section B "National Law and EC Law".

Prohibitions

The Norwegian Competition Act contains prohibitions on collusive pricing, mark-ups and discounts. These prohibitions apply in connection with the sale of services and goods, but not with purchases. All forms of collaboration in connection with tenders are prohibited.

It is forbidden for suppliers to fix or seek to influence recipients' prices. This provision applies to both goods and services. Nevertheless, an individual supplier may provide recommended prices for recipients' sales of goods or services when the prices are clearly specified as recommended.

Furthermore, there are prohibitions on market sharing in the form of area division, customer division, quota distribution, specialisation and limitation of quantity. However, an individual supplier may agree to market sharing with his recipients, or determine market sharing for them, for example in the form of exclusive agreements or selective distribution systems.

Action against harmful restrictions on competition

The Act gives the Competition Authority powers to intervene against agreements, terms of business and activities that may restrict competition. Among other things, the Competition Authority can prohibit practices that maintain or strengthen a dominant position in the market, refusals to deal, the restrictions of customers' choices and restraints that make production, distribution or sales more expensive or which bar competitors from the market. Decisions concerning intervention may involve issuing prohibitions and orders, or granting conditional clearance. Decisions may involve price regulation.

Breach of the Competition Act is punishable. In addition the Act authorizes two types of civil actions, profit relinquishment of gains and coercive fines.

Intentionally or negligently infringements are liable to fines or to imprisonment for up to three years. Under aggravating circumstances imprisonment for up to six years may be imposed. Imprisonment has so far not been applied.

Where a gain has been achieved by an infringement of the Act or decisions pursuant to the Act, the undertaking which has made such a gain may be required wholly or partly to relinquish it. This also applies when the undertaking which makes the gain is different from the offender. Relinquishment of gains is a civil means and an alternative to motion for punishment.

In order to ensure that individual decisions pursuant to the Act are complied with, the Competition Authority may determine that the undertaking against which the decision is directed shall pay a continuous fine to the State until the situation has been rectified. The fine shall not take effect until the time limit for appeal has passed. If the decision is appealed no fine shall take effect until the appeal is decided. Coercive fine can be imposed independently of subjective negligence. It is sufficient that it objectively exists an infringement of an individual decision.

On April 10, 2003, the Competition Law Reform Commission submitted a proposal for a new Norwegian Competition Act. The proposal makes several changes from current legislation. Among other things, it proposes to authorize the Norwegian Competition Authority to issue administrative fines for violations of the prohibitions of the Competition Act. Furthermore, the companies or individuals that cooperate with investigators may have their fines or punishment reduced.

Horizontal and vertical restraints

Horizontal agreements are agreements made between firms at the same level of the production cycle, for instance an agreement between two producers of food grain.

Vertical agreements are agreements made between parties at differing levels of the production process. An example is an agreement between a slaughter, a processing factory and a distributor of meat.

The Norwegian Competition Act does not contain specific provisions on respectively horizontal and vertical restraints, but it holds tree general provisions on specific forms of competition regulations (price control, tender regulation and market sharing). The prohibition of collaboration on, or use of influence to achieve, market sharing, is general in its wording and will therefore be able to embrace a collaboration on differing levels of the production process. However, for the prohibition to apply it is a condition that the participants achieve a mutual protection against competition, and this will only arise if the parties are actual or potential competitors. The vertical agreement must therefore as a starting point contain an element of horizontal collaboration in order for the prohibition against market sharing to apply.

Exceptions and exemptions from the prohibitions of the Act

There are both statutory exceptions and a provision that establishes an admittance to give exemptions from the prohibitions of the Competition Act. None of the exceptions embraces all the prohibitions of the Act. This is partly because it is not wanted and partly because it is not necessary.

Exceptions for collaboration on sales of agricultural, forestry and fisheries products

The prohibitions of collaboration and influence on prices, mark-ups and discounts (Section 3-1), the prohibition of collaboration on, or use of influence to achieve, market sharing (Section 3-3) and the prohibition of associated undertakings determining or encouraging restraints (Section 3-4), shall not prevent collaboration or restraints in connection with the sale or supply of Norwegian agricultural, forestry or fisheries products from producers or producers' organizations in agriculture, forestry or fisheries.

There is a more detailed statement of this exception under section II “Special provisions for agriculture in Competition Law”.

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Exceptions in connection with joint projects
The prohibition of collaboration and influence on prices, mark-ups and discounts (Section 3-1), the prohibition of collaboration and influence on tenders (Section 3-2) and the prohibition of associated undertakings determining or encouraging restraints (Section 3-4), shall not prevent two or more undertakings collaborating on individual projects and submitting a joint tender or offer for joint supply of goods or services.

This exception applies only where it is made clear in the offer what the collaboration involves and who the collaborating parties are.

Exceptions for collaboration between owner and company and companies with common owners
The prohibitions in Sections 3-1, 3-3 and 3-4 shall not prevent collaboration or restraints between owner and company where the owner has more than 50 per cent of stocks, shares or corresponding equity stakes giving voting rights. This exception also applies to collaboration and restraints between companies in the same group of companies.

Exceptions for patent and design licence agreements
The prohibitions in Sections 3-1, 3-3 and 3-4 shall not apply to restraints on competition that are determined between licenser and licensee by an agreement stipulating the licensee's right to utilization of a registered patent or design.

Exemptions from the prohibitions of the Act
The Competition Authority may, through individual decisions or regulations, grant exemption from the prohibitions in Sections 3-1 to 3-4 provided that:

- a) restraints on competition mean that competition in the market concerned will be increased,
- b) increased efficiency must be expected to more than compensate for the loss due to restriction of competition,
- c) restraints on competition have little significance for competition, or
- d) there are special grounds for doing so.

Conditions may be imposed for exemption.

Exemption may be revoked if the conditions for exemption are not fulfilled or the prerequisite for exemption is no longer present.

Intervention against anti-competitive behaviour
The Competition Authority may intervene by individual decision or regulations against terms of business, agreements and actions where the Authority finds that these have the purpose or effect of restricting, or are liable to restrict, competition contrary to the purpose of the Act. This encompasses for example terms of business, agreements and actions that can:

- a) maintain or strengthen a dominant position in a market with the help of anti-competitive methods, or
- b) restrict clients' choices, make production, distribution or sales more expensive, bar competitors, refuse dealing with or deny membership of associations of undertakings.

Refuse dealing includes the situation where an undertaking is only willing to engage in trading activities on specific terms.

Decisions concerning intervention may involve imposing a prohibition or order, as well as granting conditional permission. Moreover, the decision may involve regulation of undertakings' prices. This also applies in the event of market failure as a result of natural monopoly, public controls or other factors.

Regulation of undertakings' prices may be effectuated both against a single undertaking and against groups of traders. Price regulation will normally be a secondary instrument compared to other measures.

The expression "terms of business, agreements and actions" is so extensive that it is hard to imagine types of restrictive practises or unilateral behaviour where it can not be intervened. It can be intervened in situations that is not covered by the prohibition provisions or in agreements covered by the exceptions from the prohibitions.

Under the Competition Authority's competition policy it is found that an act does not restrict competition unless the undertaking that executes the act, has market power. The reasoning is that an undertaking with market power is in the position to act independently of the disciplinary effects of competition. Thus it can find it profitable to maintain prices higher than the marginal costs. The effect of market power can therefore be reduction of socio-economic efficiency. An example of an undertaking with market power is the dairy co-operative in Norway (Tine BA) which purchases 99% of all Norwegian colostrum and has 98 % of the end market of milk. Another example is Prior, also a co-operative, which purchases 89 % of all chickens and has 82% of the end market.

There is no unambiguous definition of market power. Market power is often connected to an undertakings ability to behave independently of its customers and competitors. In the Competition Authority's recent competition policy, market power is described as an undertakings ability to carry out not insignificant price changes with no appreciable effect on turn-over.

The Competition Law Reform Commission proposes that the new Competition Act include prohibitions against agreements restricting competition and abuse of dominant market position. This is a far more comprehensive prohibition than under the current Competition Act and it will make it more important than before that undertakings themselves assess whether their conduct causes problems for the competitive situation in the market. The task of the Competition Authority will focus more on verifying that the prohibitions are adhered to.

Mergers

Both the Competition Act and the EEA Agreement authorizes intervention in mergers that have a negative effect on the competitive situation. The exceptions in the Competition Act for collaboration on sales of agricultural, forestry and fisheries products, do not embrace the Authorities title to intervene against acquisition of enterprises. As regards the EEA Agreement however, it can not be applied on unrefined and a number of more precisely stated refined agricultural products.

The provisions authorizes intervention in both horizontal and vertical mergers. The basic condition for both provisions is that the effect of the concentration is a restriction of competition.

A fundamental partition between the two set of rules, is that there is no notification duty for concentrations regulated by the Competition Act, opposite to the EEA Agreement. In addition, the aim of the EEA Agreement is to contribute to integration within the EEA. The Norwegian Competition Act does not have such an aim. This implies that an assessment of a merger can give different outcome dependent on which of the set of rules that is applicable.

An example where the Competition Authority intervened in a merger in the agricultural sector, is a merger between ten dairy companies. The ten dairies (TINE Meieriene) were separate legal entities, organized in co-operatives where the dairy farmers owned all the shares. There was one central unit (Tine Norske Meierier), owned by these dairies. As a co-operative owned by co-operatives, Tine Norske Meierier was a secondary co-operation. The coordination of prices and production that took place between the dairies was undoubtedly embraced by the prohibitions against collaboration on prices and market sharing. However, they could collaborate with no regard to this, because of the exception in § 3-8 for agricultural products. In April, 2002, the dairies reached a merger agreement. They agreed that Tine Norske Meierier

should acquire the ten dairies' possessions, privileges and liabilities. Tine Norske Meierier changed its name to Tine BA and is no a concern.

The Competition Authority assessed the competitive effects of the merger and found that Tine BAs dominating position, the very limited number of competitors and the fact that there were substantial barriers to entry even before the merger, would restrict competition further and thus strengthen the substantial restriction of competition. The Authority found however, that the merger could be permitted if Tine BA fulfilled certain conditions. Among other things they had to agree to a duty to deliver colostrum to competitors and to sell two of the dairy plants.

There has been corresponding mergers in the meat sector and the white meat and eggs sector. The Competition Authority did not intervene in these mergers, due to the fact that there existed real competition in these markets, as opposed to the dairy market.

Among the suggested changes in the proposal of a new Competition Act, is the introduction of regulations that establish an obligation to notify information about concentrations over a certain size. The content of the proposal is that the regulations only can be applied on mergers that leads to conclusive influence over an undertakings activities. The requirement of control implies an harmonization to the EEA-rules. It will still be a requirement to intervene that the merger has a negative effect on the competitive situation.

Are other aspects than effective competition relevant when applying the Act?
The Competition Acts preamble reads:

> *"The purpose of the Act is to achieve efficient utilization of society's resources by providing the necessary conditions for effective competition."*

According to the preparatory works of the Act, socio-economic efficiency is the basis of the competition policies purpose. Socio-economic efficiency implies no slathers with resources. Even though this is the purpose of the Act, other motives are not excluded from being taken into account when interpreting the Act. For instance is the relation to other motives and areas of policy expressed in specific provisions of the Act. An example of this is the exception from the prohibition provisions for the first-hand trade of Norwegian agricultural, forestry and fisheries products.

Still, balanced against other considerations when assessing the competition act, the purpose of effective competition will normally carry the heaviest weight, unless the specific provision expresses otherwise.

The Competition Law Reform Commission has proposed that the Competition Authority **shall** intervene in mergers when the terms of intervention is present (opposed to today's **can**-provision). The purpose of the change is to make it clearer that the Competition Authority may not put decisive weight to other considerations than competition and efficiency when assessing whether to intervene or not. The Government will, however, be authorized to permit a merger where the Competition Authority has intervened, if public interests makes it desirable.

1.2) Special provisions for agriculture in Competition Law

Extension of farmers' possibilities due to the Competition Act

The exclusionary provision for agriculture in the Competition Act reads as follows:

- "§ 3-8 Exceptions for collaboration on sales of agricultural, forestry and fisheries products

  The prohibitions in Sections 3-1, 3-3 and 3-4 shall not prevent collaboration or restraints in connection with the sale or supply of Norwegian agricultural, forestry or fisheries products from producers or producers' organizations in agriculture, forestry or fisheries."

According to this provision the prohibitions against collaboration on prices, market sharing etc. do not apply for trade with Norwegian agricultural, forestry and fisheries products from producers or producers' organizations. The reasoning for the exception is the need to carry out

the price determinations and regulations that the agricultural policy is based on. There is not made an exception from the prohibition of collaboration and influence on tenders.

For the exception to apply, two conditions must be complied with. First, the regulation must apply to Norwegian agricultural, forestry or fisheries products. This implies that the exception does not apply to collaboration connected to sales of imported products. Secondly, the seller must be a producer or producers' organization within these industries.

It is assumed that the exception applies to all products of primary industries which are object of market regulation in form of quota agreements or price agreements with the Government, or which are part of the Agricultural Agreements between the Government and the farmers unions. There are, however, no demand that such regulations are implemented. In a case where dried grass where used as feed, it was considered as an agricultural product also in absence of market regulation.

The exception applies primary to first-hand sales, but according to the Competition Authority's policy, the exception may also apply to resale from producers' organizations if the organization makes purchases and resales on own account. It does, however, seem unresolved how much processing that is claimable before the exception ceases to be applicable.

A producer is a person who engages in industry within agricultural, forestry or fisheries, and who himself brings the products forward to first-hand sales. A producers' organization is a union or organization of producers within agricultural, forestry or fisheries. The form of business organization is not relevant. The Competition Authority does seem to comprehend that the producers' organizations must be 100% owned by producers, but the question has never come to a head. There was a case where the question was if the exception in § 3-8 applied to a collaboration between Kjøttbransjens Landsforbund, which organizes the private, independent part of the meat industry, and Norsk Kjøtt which is a co-operate owned by farmers. Since Kjøttbransjens Landsforbund not are owned by producers, but is an independent trade association for various meat companies, the exception in § 3-8 did not apply, and the collaboration between Kjøttbransjens Landsforbund and Norsk Kjøtt was not included in the exception.

According to the Competition Authority's policy, the exception do not only apply to producers and wholly-owned producers' organizations, but also companies owned by these.

The range of the exception is of importance for what measures the Competition Authority can effectuate to provide the necessary conditions for effective competition and a more socio-economic efficient resource use in the agricultural industry.

The Agricultural Agreement

Important parts of the agricultural policy, in particular the policy concerning use of economic measures, are laid down in the Agricultural Agreement. The main Agricultural Agreement dates from 1952. Due to this agreement the farmers unions have a right to negotiate with the Government on questions related to product prices and the amount of economic support given to farmers.

The result of the negotiations must be approved by the Parliament. If the negotiating parties do not reach an agreement, the Government proposes to the Parliament that the solution shall be based on the original offer given by the Government. In any case it is the Parliament that decide whether to approve of the negotiated agreement, or to choose another solution.

If the negotiating parties do not reach an agreement, the unions normally undertake themselves to accept the Parliaments decision as if it was an agreement. This is necessary, among other things due to the union's obligations to participate in the market regulations through the co-operation between the unions and the larger co-operative organisations in agricultural trade and processing.

Negotiations as described do only apply to the agriculture and reindeer activity. Forestry is not covered by any similar agreement. This is because forestry in a self-reliant activity and there are little support schemes.

Supervision of the agricultural sector

It is assumed that the Competition Authority may intervene against anti-competitive behaviour, cf. § 3-10, if regulations covered by the exception for agricultural products in § 3-8 have concrete harmful effects in conflict with the purpose of the Act. Still, due to the superior sectoral policies it is reasonable to assume that the Competition Authority will use this access to intervene with prudence.

There are examples where the Competition Authority has used its title to intervene against anti-competitive behaviour in the agricultural sector. Norske Eggsentraler, which is an egg co-operative and the solely slaughterhouse for fowls in major parts of the country, had a policy where the conditions for slaughter of fowls depended on if the supplier of fowls also supplied eggs to the co-operative. Norsk Eggsentraler stated that the reason for this was that slaughtering and sales of fowls is unprofitable and therefore a cost for the co-operative. Therefore, they said, the slaughtering was subsidised by the prices of eggs if the supplier also delivered eggs. If the supplier did not deliver eggs, he had to pay the co-operatives cost by receiving the fowls.

The Competition Authority found that the different conditions for slaughter of fowls only existed in areas where the co-operative met competition on eggs. In addition, the competition in the egg market seemed to be directly affected of Norsk Eggsentralers policy. The Competition Authority banned the policy.

Also the Ministry of Agriculture and the Norwegian Agricultural Authority has important roles in providing the necessary conditions for effective competition in the agricultural sector. It is a political aim to increase the competition for agricultural products to achieve a more cost-effective production, increased diversity and beneficial price developments. The co-operative organizations within the dairy sector, the meat sector, the white meat and eggs sector, the grain sector, the fur-bearing animal sector and the honey sector, all has a dominant position in the market within their respective fields. This position is necessary to be able to regulate the market. It gives them the opportunity to set prices at a level that, through the year, can contribute to a general level of prices according to the Agricultural Agreement.

In order to achieve the political aims as mentioned, the Ministry of Agriculture and the Norwegian Agricultural Authority at present have a thorough appraisal of the regulations within the most important sectors (dairy, meat, white meat and eggs, grain, fruits and greens) in order to improve the external conditions for the independent actors in the markets. As a part of this work the Ministry has proposed changes in the regulations of the market regulators obligations, e.g. an obligation to give the other parties in the market equal access to information about market forecasts, price quotations and regulations activities.

The agricultural administration has so far no legal means to intervene if the co-operatives behave in anti-competitive manners. It does however, have substantial political means to suppress this kind of behaviour through the support schemes given to the farmers through the Agricultural Agreement.

The prospective of the exception in § 3-8

The current exception in § 3-8 for the agricultural sector has made it possible to administrate the prices on agricultural products and to regulate the markets in order to achieve;

- price stability for the farmers all over the country
- steady marketing possibilities
- supplies in all consumption areas to fairly identical prices

- prices as identical as possible with the premises in the Agricultural Agreement, contemporary as the price in the market is held at or under the agreed level.

The Competition Law Reform Commission has proposed to remove the exception in § 3-8 from the Act, and instead establish a statutory authority for the Government to decide if the exception should be continued. Therefore, the Ministry of Agriculture must know assess the need for a continued exception for agricultural products. If the exception is being continued, the question of what products should be embraced of the exception, will be of great interest, since the large agricultural co-operatives continuously stakes on new arenas and products.

Protection of farmers

The Competition Act does not contain any special provision protecting farmers from discriminatory or obstructive practices. However, due to the market regulation scheme the large co-operatives within each sector (dairy, meat, grain, white meat and eggs) are imposed some duties. Among other things, they are obligated to accept all products that are being offered from the producers, at regulated prices (within certain frames). Accordingly, the primary producers are secured sale on their production. If a co-operative should refuse to accept a product, or discriminate on prices, the decision may be brought before the Omsetningsrådet (The Agricultural Marketing Board).

In theory, the farmers are also protected by the general provisions in the Competition Act. However, in practice it is reasonable to assume that the Competition Authority will not consider these cases, but leave it to the Omsetningsrådet and the agricultural administration (the Norwegian Agricultural Authority and the Ministry of Agriculture).

2. National Law and EC Law

Implemented EEA-rules' legal status in Norwegian Law – supremacy?

Norway is not a member of the European Union (EU), but as mentioned we have joined the EEA Agreement. A difficult question during the negotiations was what legal status the EEA-rules should have in national law. The EC claimed that it was unacceptable that the EEA-rules should be less binding than the corresponding EC-rules. For the EFTA countries it was impossible to unite the principle that the EEA Agreement should be international law with supremacy over national law and constitution. The solution was a compromise where the EFTA-states agreed to secure the supremacy of the EEA-rules through national legislation. Norway has accomplished this by Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA) etc. section 2, which reads as follows:

"In the event of conflict, provisions of Acts that serve to fulfil Norway's obligations under the Agreement shall prevail over other provisions governing the same matters. The same applies if regulations that serve to fulfil Norway's obligations under the Agreement conflict with other regulations, or if such regulations conflict with a subsequent Act."

It is only necessary to apply this provision if it is not possible to explain away the conflict, e.g. by interpreting the particular provisions area of application in a way that no actual conflict arises. In addition, there is a presumption principle that says that Norwegian law as far as possible should be interpreted in accordance with international law obligations. This reduces the likelihood of critical conflicts.

The relation between the Norwegian Competition Act and the competition rules in the EEA Agreement

The rules and regulations in the EEA Agreement have been implemented into Norwegian legislation through special Acts and regulations.

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The EEA Agreement includes two general prohibitions against anti-competitive behaviour, while the Norwegian Competition Act prohibits specific forms of conduct that restricts competition. Both set of rules may apply on an agreement or action.

A condition for the EEA Agreements competitions rules to apply is that the trade between the EU and one or more of the EFTA States - or trade between the EFTA States, is to an appreciable extent affected. If this is not the case, there are no problems related to the harmonization of the two set of rules. If, however, both set of rules may be applied to an agreement or action, and the Norwegian Competition Act gives directions on solutions opposed to what follows from the EEA-rules, the Competition Act must be derogated from.

Changes hereafter

The Competition Law Reform Commission has undertaken a wide and thorough appraisal of the competition legislation in Norway and the EU/EEA. The most important changes proposed by the Commission is referred to above; administrative fines, more comprehensive prohibitions against agreements restricting competition and abuse of dominant position, and an obligation to notify concentrations over a certain size.

One of the purposes with the proposed changes, is to bring Norwegian competition legislation in accordance with the development that has taken place in our neighbouring countries. This is connected to the increasingly globalization of the economic life. As the markets are being integrated internationally, there is e.g. an increased extent of mergers involving undertakings from several countries. Simultaneously with the internationalization of the economic life, the enforcement of competition rules will obtain an increasingly stronger international dimension. Viewed against this background, the collaboration between national competition authorities will be more and more important. Further, the question of harmonization of national competition rules will probably achieve increased attention the next years.