

Norway

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1 Introduction ¹

This report presents and discusses the Norwegian competition authorities' role in the digital and data-driven economy. By the Norwegian competition authorities, we mean the Norwegian Competition Authority (the 'NCA') ('*Konkurransetilsynet*'), the Norwegian Competition Appeals Committee ('*Konkurransklagenemnda*') and the Norwegian government, in particular the Ministry of Trade, Industry and Fisheries and its Department of Competition Policy. We also include the EFTA Surveillance Authority ('ESA').

In the report, we take a relatively broad view of the notion of the digital and data-driven economy. Our report is therefore not limited to markets for commercial data and digital services. We will also consider how digital data and communication affect Norwegian competition policy in markets for traditional goods or services.

Formal enforcement of Norwegian competition law is an important, although not exclusive role of the Norwegian competition authorities. We will, of course, present and discuss Norwegian enforcement practice in our digitalised economy. We also aim to consider the competition authorities' priorities, public statements and views on specific sectors, and various public measures related to digital and data-driven sectors.

Norwegian competition policy is implemented within the Norwegian legal context. Norwegian substantive antitrust law consists of the rules of the Norwegian Competition Act² and the rules of the European Economic Area Agreement (EEA) between the EFTA states and the EU member states.³ The substantive antitrust prohibitions in the Norwegian Competition Act and the EEA Agreement correspond to Articles 101 and 102 TFEU and shall, in principle, be interpreted and applied equivalently. The Competition Act (2004) thus contains prohibitions on anticompetitive agreements/concerted practices (Section 10) and abuse of dominance (Section 11). Under the EEA Agreement, Articles 53 and 54 correspond to Articles 101 and 102 TFEU.

With regard to public enforcement, the NCA investigates and sanctions infringements of Section 10 and 11 of the Competition Act, and also of Articles 53 and 54 EEA where there is a cross-border dimension. Administrative appeals against the NCA's infringement decisions are handled by the Competition Appeals Committee, and subsequently by the Norwegian courts of law. The competence to enforce Articles 53 and 54 EEA is further divided between ESA and the European Commission, pursuant to Article 56 EEA.

The digital economy has not led to amendments of the Norwegian Competition Act. In the past, enforcement of Norwegian competition law in digital services markets has also been relatively limited. We do, however, observe

¹ The authors have also written a report on Norwegian competition law and policy and the digital economy for the FIDE XXIX Congress. See I. H. Barlund, R. Gjendemsjø and E. Østerud, Norway, in: D. Mândrescu (ed. Board), *EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution*, Eleven International Publishing 2020, pp. 399–414.

² Act of March 5, 2004, No 12 on competition between undertakings and control of concentrations.

³ All the EU Member States are members of the European Economic Area (EEA), in addition to three of the EFTA States, i.e., Norway, Iceland and Liechtenstein. The EEA Agreement allows the EEA/EFTA States to participate in the internal market of the EU where free movement of goods, capital, services and people creates the world's largest common market for trade. Note that this is not the case for Switzerland, which is not a party to the EEA Agreement, but only a member of EFTA.

that digital developments and communication affect the competition authorities' enforcement priorities as well as competition analyses of markets for tangible goods and services. In 2020, digital platforms and marketplaces have also been high on the NCA's policy agenda.

The Norwegian telecom sector has been a priority for the NCA and has led to active enforcement, especially under the merger control rules. As regards abuse of dominance, the NCA and the Competition Appeals Committee's findings against the Norwegian telecom incumbent Telenor are worth mentioning, in addition to ESA's recent decision against Telenor. As regards anti-competitive coordination, there have to date not been any infringement decisions in the digital sector. In September 2020, however, the NCA issued a statement of objections to four publishing houses and their jointly owned database company. The NCA's preliminary assessment was that the undertakings had exchanged competitively sensitive information concerning *inter alia* future book prices and the timing of book releases, through their joint database company. A preliminary fine totalling NOK 502 million was calculated.

Notably, in September 2020, the NCA in collaboration with the other Nordic competition authorities in Denmark, Finland, Iceland and Sweden issued a joint report on 'Digital platforms and the potential changes to competition law at the European level – The view from the Nordic competition authorities.'⁴ The report discusses opportunities and challenges created by digital platforms, and also makes some recommendations and policy suggestions from a Nordic perspective.

Our Norwegian report is structured as follows: In section 2, we provide an overview and a general perspective on the Norwegian competition authorities' role and policies in the digital economy. In section 3, we consider certain specific issues and topics in more detail. From a Norwegian competition law and policy perspective, we will here discuss: Market definition and market power in the digital economy; Telecom and digital infrastructure; Data protection and privacy; Digital platforms; Online advertising; Content providers, and Comparison portals.

2 Norwegian Competition Law and Policy in the Digital Economy – a General Perspective

The emergence and development of the digital and data-driven economy has not led to amendments of, or proposals to amend, general, substantive Norwegian competition law. The 'pillars' of substantive Norwegian competition law (the prohibitions on anti-competitive agreements and abuse of dominance, and the standard of intervention against concentrations) are harmonised with EU competition law.

Due to certain particular features of Norwegian competition law, some concerns raised in the discourse on the digital economy may be less urgent. Pursuant to the Norwegian Competition Act, the NCA is competent to intervene both against concentrations below the general turnover thresholds for mandatory notification (NOK 1 billion / NOK 100 million) and also against acquisitions of non-controlling shareholdings. The NCA is thus equipped with *ex ante* enforcement tools to handle potential competition concerns caused by *inter alia* 'killer acquisitions' of start-ups and cross-shareholdings, also in the digital sector. In 2019, the NCA notably intervened against Sector Alarm's acquisition of 49.99% of the shares in Nokas (non-controlling interest) and against Sector Alarm's acquisition of Nokas Small Systems (below the general turnover thresholds) in markets for alarm systems.⁵ In 2020, the NCA ordered a notification of an acquisition of a majority shareholding in an online marketplace for used cars, which was below the general turnover-based notification thresholds.⁶ On 30 September 2020, the NCA arrived at the preliminary conclusion that the concentration would result in significant impediment of competition in the online market for the sale of used cars.

Under section 14 of the Competition Act, the Ministry of Trade, Industry and Fisheries may, if necessary to promote competition in the markets, issue regulations intervening against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act. In 2009, the Ministry enacted a regulation that requires internet portals that offer residential property advertisements to provide general access to the advertisement service to everyone on non-discriminatory conditions.⁷ The NCA held the view that access to

⁴ Digital platforms and the potential changes to competition law at the European level – The view from the Nordic competition authorities (2020), available at <https://konkurransetilsynet.no/nordic-competition-authorities-release-joint-memorandum-on-digital-platforms-and-the-future-of-european-policy/?lang=en>. Accessed 14 October 2020.

⁵ V2019-17, Sector Alarm – Nokas. (Conditional approval).

⁶ V2020-16, Schibsted – Nettbil.

⁷ Regulation 16 April 2004 No 631 on access to residential property advertisements.

internet portals had become a necessary marketing channel to reach most potential buyers. The internet portals' practice of refusing advertising access to anyone other than real estate agents, constituted a significant entry barrier, which in effect forced sellers to use estate agents, thereby reducing competition.⁸

The application of section 14 is generally restricted by the EEA Competition Act⁹ Section 7 second paragraph, according to which the application of Norwegian competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices that may affect trade between Member States, but which do not restrict competition within the meaning of Article 53 (1) EEA, or which fulfil the conditions of Article 51(3) EEA or which are covered by a block exemption. The competition authorities are not precluded, however, from applying stricter national laws prohibiting or sanctioning unilateral conduct engaged in by undertakings. The provision corresponds to Regulation 1/2003 Article 3(2). In principle, a section 14 regulation could thus be used to intervene against unilateral conduct by non-dominant undertakings in the digital economy.

Under Section 3 of the Competition Act, certain sectors may, through the adoption of regulations, be exempted from the Competition Act. In 2018, the Norwegian government proposed retaining the regulation exempting coordination of the sale of books from the prohibition on anti-competitive agreements in Section 10 of the Competition Act.¹⁰ However, the regulation does not and cannot exempt the application of Article 53 EEA insofar as trade between EEA states is affected, which may be the case for eBooks.

With regard to other specific sectors affected by digitalisation, it is noteworthy that in 2017 a government-appointed committee submitted a report on the 'sharing economy' (NOU 2017:4 *Delingsøkonomien*). One of the proposals considered was deregulation of the taxi industry in order to enhance competition and technological innovation made possible by digital communication. After a political process, amendments to Act No 45 of 21 June 2002 on professional transport by motor vehicle and vessel entered into force on 1 July 2020, thereby partly liberalising the taxi sector.

In relation to the food and groceries sector, in 2018, the Norwegian parliament ordered the government to consider policies to promote competition, new market entry and innovation, including a possible sector-specific prohibition on price discrimination for suppliers. The Norwegian grocery sector is characterised by high concentration, substantial entry barriers and the absence of international grocery chains. E-commerce/home delivery also has a very limited market share. To date, a sector-specific price discrimination rule in the food/groceries sector has not been put to the Norwegian parliament.

With regard to competition policy targeting the digital sector, in January 2020, the Ministry for the first time instructed the NCA to give particular priority to monitoring the digital economy. The Ministry pointed out that digitalisation contributes to significant technological development and innovation but may also lead to market dominance and potential collusion. The NCA should therefore ensure that digitalisation contributes to increased competition in the interest of consumers and the business community. These instructions could potentially represent a significant policy shift, as the NCA has previously expressed the view that it should deal with global digital competition issues in a uniform manner, and in close cooperation with the European Commission.¹¹ The NCA has also expressed scepticism about using antitrust law as a means of furthering data protection, with reference to the German Bundeskartellamt's decision against Facebook.¹²

The NCA has, however, also voiced competitive concerns about digitalisation. It has opposed the establishment of a publicly funded internet web portal in the grocery sector, which would give consumers access to real-time prices for Norwegian groceries. The NCA has also opposed the exemption from Section 10 on coordination of the sale of books, *inter alia* based on concern that the exemption could reduce the number of publications of eBooks.

⁸ The NCA's note to the OECD Hearing on Digital Economy 2012.

⁹ Act 5 March 2004 No 11 on the implementation and control of the competition rules of the EEA Agreement.

¹⁰ Regulation 19 December 2014 No 1716 on exemption from Section 10 of the Competition Act for cooperation on the sale of books.

¹¹ Interview with the Director of the NCA, 7 February 2019, available at <https://www.tek.no/nyheter/nyhet/i/vQ8EqX/tykke-myndigheter-ut-mot-facebook-applauderes-av-norske-kolleger>. Accessed 14 October 2020.

¹² "Digital regulering", Dagens Næringsliv 8 April 2019, available at <https://konkurransetilsynet.no/kronikk-digital-regulering/>. Accessed 14 October 2020.

The NCA has publicly warned against the competitive risks posed by digital coordination technologies and AI.¹³ The NCA has further monitored the use of MFN clauses in the online hotel booking sector.¹⁴

The NCA has been relatively active in its merger control enforcement in markets linked to the digital economy. Thus, the NCA has intervened against several concentrations in the telecom sector¹⁵ and in the IT services sector.¹⁶ The impact of the digitalisation of information and digital communication is a regularly considered in the assessment of markets for traditional goods or services. In 2008, for example, telephone number searches on the internet were not regarded as a sufficient substitute for telephone number directory services by SMS.¹⁷ And in 2012, Google and Facebook were not considered to be part of the same relevant advertising market as local newspapers.¹⁸ With regard to competition between payment systems, the NCA considered potential competition from internet giants :Apple Pay, Google Pay, Facebook Pay & Amazon Pay.¹⁹ In some cases, the NCA has also intervened against concentrations based on coordinated effects theories, whereby market transparency was found to be enhanced by price announcements on the internet.²⁰

As to abuse of dominance in the digital economy, NCA fined telecom incumbent Telenor NOK 788 million for having changed the network access prices it charged to a potential network competitor.²¹ The alleged infringement was based on the theory that the access prices reduced a potential competitor's incentives to develop its own national communication grid. The NCA's decision was subsequently upheld by the Competition Appeals Committee and is currently pending in the Norwegian courts. ESA recently also found Telenor guilty of abusive conduct in the form of margin squeeze in the mobile broadband services market.²² ESA is also investigating airline operator Widerøe for refusing to supply competitors with its satellite-based approach system receivers that are used to operate local routes in Norway.

The Norwegian competition authorities' enforcement of anti-competitive agreements in the digital economy has been limited. In April 2019, ESA announced that it had discontinued its investigation into whether Finance Norway, Bits, BankID, DNB and Nordea had engaged in agreements, decisions or concerted practices aimed at preventing a potential competitor from entering the e-payments market in Norway. As mentioned, in September 2020, the NCA issued a statement of objections to four publishing houses and their jointly owned database company. The NCA's preliminary assessment was that the undertakings had exchanged competitively sensitive information concerning *inter alia* future book prices and the timing of book releases, through their joint database company.

The joint report from September 2020 by the Nordic competition authorities on Digital platforms,²³ is also a sign of the increased interest in these sectors of the economy on the NCA's part.

3 Norwegian Digital Competition Policy – Specific Issues

3.1 Introduction

In this section, we discuss some specific issues relating to Norwegian competition policy towards the digital economy in more detail. We will therefore consider: market definition and market power (section 3.2); telecom

¹³ The Norwegian Competition Authority (2018), available at <https://konkurransetilsynet.no/kronikk-er-kunstig-intelligens-fremtidens-kartell/>. Accessed 14 October 2020.

¹⁴ The Norwegian Competition Authority (2019), available at <https://konkurransetilsynet.no/kronikk-hotellbooking-pa-nett-er-til-fordel-for-hotellgjestene/>. Accessed 14 October 2020.

¹⁵ V2005-6 Telenor – Tiscali, V2012-8 Telenor – LOS, V2015-1 Telia – Tele2/NwN.

¹⁶ V2019-23, Tieto – Evry.

¹⁷ V2008-22 Opplysningen Mobil AS – Aspiro Søk AS.

¹⁸ V2012-11 A-pressen AS – Mecom Europe AS.

¹⁹ V2018-18 Vipps AS – BankAxept AS/BankID Norge AS.

²⁰ V2006-490 Falck – Viking, V2015-29 St1 Nordic OY – Smart Fuel.

²¹ V2018-20 Telenor.

²² 'ESA fines Telenor EUR 112 million for anticompetitive practices', Press release, 2020, 39.

²³ Digital platforms and the potential changes to competition law at the European level – The view from the Nordic competition authorities (2020), available at <https://konkurransetilsynet.no/nordic-competition-authorities-release-joint-memorandum-on-digital-platforms-and-the-future-of-european-policy/?lang=en>. Accessed 14 October 2020.

and digital infrastructure (section 3.3); data protection and privacy (section 3.4); digital platforms (section 3.5); online advertising (section 3.6); content providers (section 3.7); and comparison portals (section 3.8).

3.2 Market Definition and Market Power in the Digital Economy

The Norwegian competition authorities have not formally addressed the question of relevant antitrust markets for free services. Norwegian, substantive competition law is to a significant extent harmonised with EU/EEA competition law. For guidance, the Norwegian competition authorities generally also look to the European Commission's policy on various issues. If a comparable case were to emerge, this means that the Norwegian competition authorities would consider the European Commission's practice concerning market definition and free services.

When defining relevant markets, the Norwegian competition authorities generally apply the guidance provided by ESA's and the European Commission's Notice on the definition of relevant market. In concrete cases, the NCA and ESA will generally also look to the European Commission's decisional practice for guidance as to how various markets have been delineated in relation to their product and geographical dimensions.

There are few enforcement decisions by the Norwegian competition authorities on digital service markets in the narrow sense. Moreover, the NCA rarely enforces competition rules in markets that are wider in geographical scope than Norway. The NCA's stated policy in response to global tech-giants has been that national competition authorities in the EU/EEA should act in unison under the direction of the European Commission.²⁴

The issue of whether an antitrust market can exist for free services is closely related to competition policy in relation to two-sided markets, where an undertaking serves two different customer groups that provide each other with network benefits. By lowering the price on one side of the market, or even providing a service for free, the 'platform' may increase its prices and profits on the paying side.

The NCA intervened against a concentration in a two-sided market in connection with a media merger in 2012. In V2012-11 A-pressen AS – Mecom Europe AS, the NCA identified significant anti-competitive effects in the markets for printed news in one county and for advertising in printed newspapers in a Norwegian town. The NCA defined separate markets for the different customer groups (readers and advertisers) and addressed the two-sidedness of the service in its competitive assessment by discussing whether network effects could offset the impact of reduced competition in the individual markets separately. The merger was given conditional clearance.

Looking beyond Norwegian competition policy, 'free' services may be offered at zero prices but are not necessarily cost-free. If an intermediary, for example a digital platform, is 'paid' in the form of personal data, the platform can exploit the data to sell targeted advertising. When defining zero-price markets, the traditional SSNIP-test may require analytical adaptations or modifications, for example concentrating on the quality dimensions of the service rather than price.

With regard to the issue of market power, the Norwegian competition authorities have not developed a particular policy or issued specific guidelines for digital networks or platforms. Nor have the Norwegian competition authorities yet finally decided any cases against digital networks or platforms, and they have thus not considered issues such as network effects, economies of scale, access to data or innovation potential in these kinds of digital markets.

On a more general note, it is worth mentioning the NCA's gradually increasing reliance on other analytical tools than structural market factors to measure market power, especially in merger cases. Over the last decade, inspired by US economic theory and UK merger practice, the NCA has increasingly based its decisions - albeit predominantly in horizontal cases concerning unilateral effects and differentiated products-, on customer surveys, analyses of closeness of competition, diversion ratios and price pressure indexes.

3.3 Telecom and Digital Infrastructure

Responsibility for ensuring effective competition in the telecom market in Norway is shared between the Competition Authorities and the National Communications Authority. The agencies' respective competences are

²⁴ Interview with the Director of the NCA, 7 February 2019, available at <https://www.tek.no/artikler/facebook-palagt-store-begrensninger/457500>. Accessed 14 October 2020.

mostly complementary and do not overlap. The Communications Authority primarily regulates the market *ex ante* through general regulations and by imposing obligations on undertakings, while the NCA carries out control of mergers and enforces the prohibitions on abuse of dominance and anti-competitive agreements. The Communications Authority may impose certain obligations on undertakings found to have a dominant position in the telecom sector, and it has done so in relation to Telenor. The obligations imposed on Telenor consisted of offering service providers and MVNOs access to their network on non-discriminatory terms and an obligation not to engage in margin squeeze. The case concerning Telenor's alleged abuse of a dominant position, which we comment on below, illustrates that the obligations imposed by the Communications Authority do not prevent the NCA from enforcing the prohibition on abuse of dominance, and that their competences are complementary. It is also worth mentioning that the Communications Authority has incentivised the roll out of a third mobile phone network through its regulation of networks owners' pricing of voice call termination. Voice call termination is the transfer of a call from another network to the operators own network.

Promoting competition in the telecom sector has been an enforcement priority for the Norwegian competition authorities. This is seen, for instance, in controls of concentration in the telecom sector, in which the NCA has intervened several times.²⁵ A common denominator in all these concentration cases is that the concentrations were in principle found to have anti-competitive effects. Under the Norwegian Competition Act, however, undertakings can propose modifying commitments in order to avoid the harm caused to competition in markets otherwise affected by the concentration. In the cases referred to in this report, the NCA authorised all the concentrations after accepting the proposed modifying commitments. Note that, as under EU law, the modifying commitments are subject to a proportionality test, which means that the commitments must not go further than is necessary to address the significant competitive restraints caused by the concentration.

As part of their enforcement focus on the telecom sector, the Norwegian competition authorities have investigated several cases against Telenor, Norway's leading telecom company. Two of these investigations led to Telenor being found guilty of abusing its dominant position by using pricing structures that distort competition. In the first decision, adopted by the Norwegian NCA in 2018, Telenor was found to have prevented the establishment of a new third mobile network operator in Norway. In the second decision, recently adopted by ESA in June 2020, Telenor was found to have hindered competition by squeezing the margins of operators providing standalone mobile broadband services to Norwegian customers. ESA's decision has not been made public yet.²⁶

More specifically, the first case concerned whether, pursuant to Section 11 of the Norwegian Competition Act and Article 54 EEA, both of which mirror Article 102 TFEU, Telenor abused its dominant position between 2010 and 2014 by preventing the establishment of a third mobile network in Norway. During this period, Telenor and Telia were the only two mobile operators with a mobile network infrastructure that covered all of Norway. When a third actor, Network Norway, tried to establish a third national mobile network, Telenor arguably prevented this from happening by changing its pricing structure for Network Norway, which rented access to Telenor's network.

Access to Telenor's infrastructure was a precondition for Network Norway being able to establish a network of its own. The new terms from 2010 included a fixed monthly 'SIM fee' that Network Norway had to pay Telenor for each of Network Norway's subscribers. The SIM fee was independent of Network Norway's actual data traffic passing through Telenor's network. The new terms allegedly reduced Network Norway's incentives to continue work on establishing its own network. Network Norway was incentivised to merely continue as a service provider in the downstream market. Telenor thus arguably hindered more competition in the upstream market by preventing the establishment of a third network. In 2018, the NCA fined Telenor NOK 788 million for this behaviour, pursuant to the Norwegian Competition Act Section 29, seen in conjunction with Article 6 of the EEA Competition Act.²⁷ The NCA's decision has been upheld by the Competition Appeals Committee and is currently pending before the Norwegian courts.

It is interesting to note in connection with this case that the changed pricing structure was actually found to increase competition in the downstream market, for example by providing Network Norway with more customers. However, the improvements in the downstream market were not found to outweigh the negative impact that the new terms had on competition in the upstream market, which discouraged the establishment of a third mobile

²⁵ V2005-6 Telenor – Tiscali, V2012-8 Telenor – LOS, V2015-1 Telia – Tele2/NwN.

²⁶ Last updated 12 August 2020.

²⁷ V2018-20 Telenor.

network. The Competition Appeals Committee found, in particular, that the changed pricing structure was not reconcilable with the fundamental responsibility a dominant operator, i.e., Telenor must not disturb competition in a market. Telenor was therefore found to be in breach of Section 11 of the Norwegian Competition Act, and of Article 54 EEA since a cross-border dimension was found to be present.

In the second case, the formal investigations opened by ESA back in 2014 concerned possible abuse of a dominant position contrary to Article 54 EEA in the market for mobile broadband services for Norwegian users. ESA found that Telenor charged higher prices for wholesale access to its network than the prices offered to its own purchasers of mobile broadband services. This type of margin squeeze made it impossible for standalone mobile broadband service providers, which were dependent on access to Telenor's mobile network, to operate in the fast-evolving market without selling these types of services at a loss. Telenor had increased wholesale prices for network access during a period of critical growth between 2008 and 2012 when demand for mobile data increased dramatically. Note that the case concerned USB-enabled mobile broadband services, i.e., mobile broadband accessed on large-screen devices such as tablets and laptops, and not phones.

ESA issued a historically high fine of EUR 112 million, declaring that Telenor had abused its dominant position pursuant to Article 54 EEA.²⁸ Telenor is currently considering whether to appeal the decision to the EFTA Court.

3.4 Data Protection and Privacy

In Norway, the enforcement of GDPR and protection of privacy more generally are tasks assigned to the Norwegian Data Protection Authority. The NCA has not focused on big data issues in its enforcement or policy, at least not in a manner that is publicly known. Instead, the NCA has chosen to follow the EU Commission's lead on these issues. There is no direct overlap between the competences of the NCA and the Data Protection Authority. Instead, their respective competences are complementary. This means that, for the NCA to be able to interfere due to concerns about the collection of data, the conduct would have to amount to an anti-competitive agreement or an abuse of dominant position, or, in the case of a merger, it would have to give rise to competitive concerns due to the collection of data.

As regards the use of general terms and conditions for data collection, this is primarily a matter for the Data Protection Authority or the Consumer Protection Authorities.

3.5 Digital Platforms and Online Advertising

As regards competition policy relating to digital platforms, the NCA has advocated deregulation of the taxi sector, thereby enabling the emergence of new business models that use digital platforms to connect drivers and customers. In relation to platforms for booking travel and hotels, and issues concerning MFN clauses etc., the NCA's policy is to await recommendations from the European Commission.²⁹

As to the Norwegian competition authorities' preferred policy tools, it is worth mentioning that, through an amendment of the Norwegian Competition Act in 2013, the NCA became competent to issue commitment decisions pursuant to Section 12 third paragraph, which is inspired by Article 9 Regulation 1/2003. The NCA has used this competence once, in a case concerning the distribution of beer to Norwegian pubs.³⁰

Where it is found necessary in order to promote competition in a market, Article 14 of the Norwegian Competition Act also empowers the Ministry of Trade, Industry and Fisheries to take regulatory action against certain types of anti-competitive behaviour.³¹

The provision is enforced by the NCA and has rarely been used, although there is a seminal example of a regulatory intervention by the Ministry from 2009, when it was found necessary to change the practice for online advertising of real estate. Online advertising platforms, such as the Norwegian *Finn.no*, had up until then only allowed professional operators, such as licensed real estate agents, to advertise their properties online. As online advertising became a more and more common way of reaching potential buyers, the NCA found that refusing private

²⁸ Press release 2020, 39.

²⁹ The Norwegian Competition Authority (2019), available at <https://konkurransetilsynet.no/kronikk-hotellbooking-pa-nett-er-til-fordel-for-hotellgjestene/>. Accessed 14 October 2020.

³⁰ V2020-20, Ringnes.

³¹ See section 2 above.

individuals to sell their own houses and apartments through these channels could distort competition. In practice, this meant that private individuals were forced to use professional sellers in order to reach the online advertising market. This, in turn, allowed professional sellers to charge higher prices since they faced less competition.

By including *inter alia* a non-discrimination clause, the Ministry prohibited this exclusionary practice, enabling private individuals to sell their houses and apartments online.³² Today, the platform allows users to have your own profile and does not just offer online advertising for the sale and rental of properties, but also a range of other products and services in different markets. This development shows that Article 14 of the Norwegian Competition Act was a useful tool for the Norwegian authorities when dealing with an online anticompetitive practice. The regulatory intervention has enabled new online advertising markets to evolve, and a broader range of online services and products is now offered to consumers at a better price. At the same time, it has led to *Finn.no* becoming the largest online advertising platform for housing (and most likely for other products and services as well) in Norway. As mentioned earlier in this report, with regard to competition policy targeting the digital sector, the Ministry has instructed the NCA to give particular priority to monitoring the digital economy. This case seems to fit quite well with the Ministry's message that digitalisation contributes to significant technological development and innovation, but may also lead to market dominance, thereby necessitating close monitoring.

In 2020, cases concerning digital platforms and online advertising have been a priority for the NCA. The NCA ordered a notification of an acquisition of a majority shareholding in an online marketplace for used cars, which was below the general turnover-based notification threshold.³³ On 30 September 2020, the NCA reached the preliminary conclusion that the concentration would result in a significant impediment of competition in an online market for the sale of used cars. In September 2020, the NCA also issued a statement of objections to four publishing houses and their jointly owned database company. The NCA's preliminary view was that the undertakings had exchanged competitively sensitive information concerning *inter alia* future book prices and the timing of book releases, through their joint database company, which supplies online advertising and marketplace services. A preliminary fine was calculated to a total of NOK 502 million.

Finally, it should be noted that the Nordic competition authorities' joint report on 'Digital platforms'³⁴ of September 2020 identifies four challenges digital platforms pose in relation to achieving effective competition: 1) 'Tipping scenarios', where a market may 'tip' in favour of one single platform and leave no room for competing platforms; 2) 'Gatekeeper scenarios', where a platform acts as a regulator and unilaterally set the rules for accessing the ecosystem that it creates; 3) 'Leveraging scenarios', where digital platforms integrate with upstream or downstream markets; and 4) 'The dynamic and fast-moving nature of digital markets', which makes predictions and forward-looking competition analyses uncertain. The report further adopts a balanced and knowledge-based approach to various competition policy proposals targeting digital platforms.

3.6 Comparison Portals and Sector Inquiries

As we briefly mentioned in section A, the Norwegian Consumer Agency developed an internet web portal that was intended to show real-time prices of groceries. This was done on behalf of the Government and its purpose was, among other things, to increase consumer information about prices. The NCA was highly critical of the portal because it would lead to increased market transparency in an oligopolistic market, increasing the risk of collusion.³⁵ In this case, neither the NCA nor the Consumer Agency had power of decision. It was the Government that had the final say, and hence could resolve the disagreement. In the end, development of the portal was terminated in May 2018.

³² Act on access to online advertising of real estate by the Norwegian Ministry of Trade, Industry and Fisheries, 2009, available at <https://lovdata.no/dokument/SF/forskrift/2009-09-09-1169?q=forskrift%20om%20tilgang%20til%20boligannonsering>. Accessed 14 October 2020.

³³ V2020-16, Schibsted – Nettbil.

³⁴ Digital platforms and the potential changes to competition law at the European level – The view from the Nordic competition authorities, 2020, available at <https://konkurransetilsynet.no/nordic-competition-authorities-release-joint-memorandum-on-digital-platforms-and-the-future-of-european-policy/?lang=en>. Accessed 14 October 2020.

³⁵ The Norwegian Competition Authority's consultation submission of 30 November 2011 concerning NOU 2011:4, available at <https://konkurransetilsynet.no/decisions/731-horingssvar-rapport-fra-matk/>. Accessed 14 October 2020.

The case of the grocery internet portal illustrates that the NCA is mainly concerned with comparison portals from an efficiency or welfare point of view, and not from a consumer protection point of view. Unlike in some other jurisdictions, the Norwegian Competition Act does not contain any provisions relating to fair or unfair competition, but only provisions relating to efficient competition. This prevents the NCA from interfering for consumer protection reasons as such, unless the consumer interest at risk is consumer welfare.

3.7 Abuse Proceedings in the Absence of Dominance

The Norwegian Competition Act does not contain a general provision allowing for abuse proceedings against non-dominant undertakings. However, pursuant to Section 14 of the Act, the Government may adopt market-specific regulations if that is considered necessary to promote competition in a market. Such regulations may include the possibility of intervening against non-dominant undertakings' unilateral conduct. Introducing such regulations for the digital economy has not been on the agenda, however. Instead, the debate in Norway about a regulation allowing for intervention against non-dominant undertakings' unilateral conduct has been limited to the grocery market.