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Merger Control 2022

Norway: Law & Practice

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NORWAY

Law and Practice

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CONTENTS

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1. LEGISLATION AND ENFORCING AUTHORITIES

1.1 Merger Control Legislation

The Norwegian merger control rules are laid down in chapter 4 of the Norwegian Competition Act (LOV-2004-03-05-12), the Norwegian Merger Control Regulation (FOR-2013-12-11-1466) and the Fining Regulation (FOR-2013-12-11-1465).

The Norwegian Competition Authority (NCA) publishes guidance and factsheets on merger control and procedural requirements (content requirements, timelines, etc) in Norwegian and English on its web page. Furthermore, the NCA refers extensively to the European Commission's Consolidated Jurisdictional Notice.

The competition rules in the EEA agreement are also applicable for transactions affecting trade between EEA countries. The enforcement of the EEA competition rules is regulated in the Norwegian EEA Competition Act (LOV-2004-03-05-11). The European Commission is competent in cases falling under the Merger Regulation (ECMR), also with regard to rendering decisions with effect in Norway.

1.2 Legislation Relating to Particular Sectors

There is no specific legislation regarding foreign transactions or investments, nor relating to particular sectors. However, the NCA has imposed an information duty (ie, not a merger-filing duty, but a duty to inform the NCA about all concentrations, regardless of turnover thresholds) upon specific undertakings active within the following (concentrated) sectors in Norway:

- fuels;
- energy;
- groceries;
- waste;
- locksmiths;
- laundry;
- garden centres;
- newspaper; and
- broadband.

1.3 Enforcement Authorities

The NCA enforces the aforementioned acts and regulations. Complaints concerning merger control decisions by the NCA (prohibitions and conditional clearance decisions) can be made to the Competition Appeals Board (CAB). The CAB's decisions may be appealed to the ordinary courts.

Pursuant to Section 8 of the Competition Act, the King in Council (in practice, the Norwegian government) may order the NCA to handle a specific case; however, the government cannot instruct the NCA on the merits/assessment in any case.

The EFTA Surveillance Authority (ESA) and the European Commission investigate mergers that have a so-called "EFTA dimension" or a community dimension when certain turnover thresholds are met. So far, no merger with an EFTA dimension has been notified to the ESA. Thus, in practice, all merger cases are handled by the NCA or by the European Commission when the thresholds in the ECMR are met.

2. JURISDICTION

2.1 Notification

Notification is compulsory for all mergers and acquisitions (concentrations) that bring a "change of control" and exceed the national turnover thresholds. The creation of a joint venture must also be notified (see **2.10 Joint Ventures**).

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In mergers and acquisitions that do not meet the turnover thresholds, a voluntary notification may be filed. This is typically done when the parties are in doubt as to whether the NCA will intervene in the transaction. The NCA may intervene up to three months after signing/closing, even if the turnover thresholds have not been met, and it has previously prohibited mergers below the thresholds.

2.2 Failure to Notify

Undertakings failing to notify a notifiable concentration may be sanctioned with administrative fines, under Section 29 of the Competition Act (ie, fines for infringing the standstill obligation). Several administrative fines have been rendered, normally between NOK200,000 and NOK300,000 (approximately EUR20,000–30,000), but also up to NOK25 million (approximately EUR2.4 million).

Sanctions against individuals, such as key employees involved, have never been used in merger cases, but negligent and intentional violations may lead to penal sanctions, normally criminal fines. Perpetrators may also be sentenced to up to three years' imprisonment, or even up to six years in aggravating circumstances.

All decisions sanctioning violations of the Competition Act are made public.

2.3 Types of Transactions

All transactions that involve a concentration come under the purview of the Competition Act. Pursuant to Section 17 of the Competition Act, a concentration is deemed to arise where two or more previously independent undertakings or parts of undertakings merge, or where one or more persons already controlling one or more undertakings acquires direct or indirect control – on a lasting basis – of the whole or parts of one or more other undertakings. The creation of a "full-function" joint venture and asset deals may also come within the purview of merger control.

For asset deals to come within the notion of merger control, the assets must constitute a business with a market presence to which a market turnover can be clearly attributed (examples include, eg, rental/lease agreements, customer base).

Purely internal restructurings or reorganisations within a single economic entity are not considered to constitute a concentration under the Competition Act.

Operations such as shareholders' agreements come under the purview of the merger control regime in the Competition Act, insofar as they lead to direct or indirect control on a lasting basis (see **2.4 Definition of "Control"**).

2.4 Definition of "Control"

Control may be obtained through any form of rights, contracts or any other means that, either separately or in combination, confer the possibility of exercising decisive influence on strategic decisions of an undertaking – with consideration of both the relevant fact and/or law being taken into account – in particular by:

- ownership or right to use all or some of the assets of an undertaking; or
- the acquisition of rights or contracts conferring decisive influence on the composition, voting or decisions of the organs of an undertaking.

Control is acquired by persons or undertakings that are the holders of rights or that are entitled to rights under the contracts concerned or, while not being the holders of such rights or entitled to rights under such contracts, that have the power to exercise the rights deriving therefrom. In essence, control is defined along the lines

in the European Commission's Consolidated Jurisdictional Notice.

All transactions bringing about a change of control are, in principle, caught, including changes in "quality of control" (eg, from joint control to sole control).

Negative control falls within the notion of control (eg, the power to block strategic decisions, such as veto rights beyond "standard minority protection").

In principle, a notification is not required for the acquisition of minority interests, but the NCA may also require a notification for any such minority acquisitions, which may be prohibited if they could lead to, or strengthen, a significant impediment to effective competition (a SIEC test). Exact levels have not been specified in this regard, however. In 2019, the NCA intervened, for the first time since 2004, in Sector Alarm's minority acquisition of Nokas through a conditional clearance decision.

2.5 Jurisdictional Thresholds

Notification is required and mandatory if the following two thresholds are met:

- the combined annual turnover in Norway of all the undertakings concerned exceeds NOK1 billion (approximately EUR98.2 million); and
- the annual turnover in Norway of each of at least two of the undertakings concerned exceeds NOK100 million (approximately EUR9.82 million).

There are no special jurisdictional thresholds applicable to particular sectors. However, it should be noted that some specific undertakings are obliged to inform the NCA of all of their concentrations, even those that do not meet these thresholds (see **1.2 Legislation Relating to Particular Sectors**). Such obligations are a consequence of specific orders imposed by the NCA upon individual undertakings, and do not apply to other companies in the same sector.

2.6 Calculations of Jurisdictional Thresholds

The annual turnover in the preceding fiscal year is decisive for the assessment of the turnover thresholds. The annual turnover from the year of the latest available (finalised) accounts shall be used. Even if it is clear that the current turnover of the "undertakings concerned" (see **2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds**) will be higher or lower compared to the preceding fiscal year, the accounts for the preceding fiscal year should still be used, according to the guidelines of the NCA. However, turnover must be adjusted for any new acquisitions or divestments not reflected in the accounts of the preceding fiscal year (as opposed to "organic" growth). Temporary accounts for the current fiscal year may in any event be included for information purposes, in order to ensure that the NCA's assessment is based on more accurate figures.

The NCA follows the European Commission's Consolidated Jurisdictional Notice when deciding the geographic allocation of the turnover. The turnover must therefore normally be allocated to the country where the service is actually provided or where the product is actually delivered. When products and services are delivered or provided in Norway, the turnover generated must be allocated to Norway, even if the headquarters or offices of the seller and/or the buyer are located in another country. Jurisdictional thresholds are not asset-based.

Sales in a foreign currency should be converted to NOK to determine the thresholds, by using the average rates from Norges Bank (Norway's central bank).

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2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The thresholds relate to the turnover of the "undertakings concerned" – ie, the turnover of the merging parties and their subsidiary companies in merger cases, and the turnover of the acquiring company and the acquired company in acquisitions. Also, the turnover of all subsidiary companies of the undertakings concerned should be included when calculating whether the turnover meets the thresholds. In acquisitions, the turnover of all companies belonging to the same corporate group as the acquiring company (including associated companies, parent companies and subsidiaries) should also be included in the turnover calculation. In other words, the turnover of all companies forming a "single economic entity" with the acquiring company should be included in the buyer's turnover calculation. The concept of a single economic entity is developed in EU case law and is enforced in the same manner by the NCA. The turnover of the selling company should not, however, be included in the turnover calculation.

As previously mentioned, it should be noted that the turnover by recent acquisitions or divestments by the acquirer, which are not reflected in the latest available accounts, must be added or subtracted (see **2.6 Calculations of Jurisdictional Thresholds**).

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control rules insofar as the thresholds are met, although the NCA has not intervened in any such transactions.

There is no local effects test, but the parties to a foreign-to-foreign transaction may, in the same manner as parties to other types of transactions, make use of the simplified notification procedure when certain conditions are fulfilled. Moreover, the merger filing duty does not depend on a local presence (eg, office facilities).

As the turnover thresholds will never be met when a target (including its subsidiaries) has no sales in Norway, a filing is not required in such situations.

2.9 Market Share Jurisdictional Threshold

The only thresholds relate to turnover in Norway. The thresholds do not relate to market shares, but market share information must be included in the notification.

2.10 Joint Ventures

The creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis ("full-function" joint venture) is considered to constitute a concentration within the meaning of the Competition Act, and is thus subject to merger control. The same applies to changes of control in an existing full-function joint venture (eg, a new co-owner replaces a former co-owner).

However, joint ventures that are not full-function fall outside the merger control regulations. Such arrangements are assessed under the behavioural rules.

No special rules apply to determining whether the turnover thresholds have been met for joint ventures, but the NCA will generally follow the principles set out in the European Commission's Consolidated Jurisdictional Notice on what are the "undertakings concerned" and their turnover in joint-venture transactions.

2.11 Power of Authorities to Investigate a Transaction

In order to investigate a transaction below the turnover thresholds, the NCA must first instruct

the parties to notify the transaction in question. Such orders may be issued up to three months after signing/closing if the NCA has reason to believe that competition will be undermined, or if aspects require further investigation.

As mentioned in **1.2 Legislation Relating to Particular Sectors**, some specific undertakings have received general orders from the NCA to supply information about all their transactions. This is not equivalent to a merger filing duty, but will enable the NCA to instruct and impose such a duty below the thresholds.

Finally, as mentioned in **2.4 Definition of "Control"**, the parties may be instructed to notify even where control is not acquired (minority shareholdings).

2.12 Requirement for Clearance Before Implementation

A "standstill obligation" applies to all mergers and acquisitions that meet the turnover threshold, and entails that such transactions may not be implemented prior to clearance from the NCA; see Section 19 of the Competition Act.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Violations of the standstill obligation may be sanctioned with administrative fines, which have been imposed in multiple cases.

Several administrative fines have been rendered, normally between NOK200,000 and 300,000 (approximately EUR20,000–30,000), but also up to NOK25 million (approximately EUR2.4 million). On a related note, in 2020, Norgesgruppen received a fine of NOK20 million (approximately EUR1.9 million) for breaching its information duty (see **1.2 Legislation Relating to Particular Sectors**) towards the NCA in the groceries sector; however, the fine was later withdrawn.

All decisions sanctioning violations of the Competition Act are made public.

Fines have never been imposed in the case of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

The only general exception to the suspensive effect is the implementation of a public bid or a series of transactions in securities, where the NCA is immediately notified about the concentration and where the acquirer does not exercise voting rights according to the securities, or does so solely to preserve the full value of their investment and according to a special exemption granted by the NCA.

In other cases, the NCA may make an exception from the standstill obligation when this is requested by the notifying party, eg, in the case of a failing firm. A recent example of the failing-firm exception granted by the NCA is Gjelsten Holding's takeover of Gresvig in 2020 (exception granted on several conditions).

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Closing before clearance is normally prohibited, and is reserved for exceptional circumstances, such as, eg, a failing firm (see **2.14 Exceptions to Suspensive Effect**). A transaction may be deemed legal if a global closing can be implemented without contravening the standstill obligation vis-à-vis the NCA in Norway, by carving out the businesses in Norway. Whether or not a concentration pursuant to the Competition Act has arisen is decisive for the legality of the business (see **2.3 Types of Transactions** and **2.10 Joint Ventures**). There are no specific exemption rules regarding such transactions in the current merger control regime.

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3. PROCEDURE: NOTIFICATION TO CLEARANCE

3.1 Deadlines for Notification

There is no time limit for notification of a concentrations, provided that the parties have not started implementing it in breach of the standstill obligation.

3.2 Type of Agreement Required Prior to Notification

No specific document is required prior to notification. The NCA may be notified as soon as the parties are able to provide enough information to give an adequate and concrete description of the agreement. In practice, the merger filing is normally sent on the signing date (or shortly thereafter). However, if all material aspects of the agreement at issue are finalised, filing may take place before signing.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

Both parties to a merger are jointly responsible for the filing. In acquisitions, the acquiring party is responsible for filing the notification. In the creation of full-function joint ventures, the parents of the joint venture are jointly responsible.

3.5 Information Included in a Filing

A mandatory notification should include the following:

- contact information of the parties to a merger or, in an acquisition, of the party or parties who gain control, including names and addresses;
- a description of the nature and rationale of the concentration;
- descriptions of undertakings concerned and in the same corporate group;
- the names of the five most important competitors, customers and suppliers in markets in Norway, or in markets of which Norway is a part, in which the undertakings concerned and undertakings in the same corporate group have overlapping activities (applies to horizontal and/or vertical overlaps);
- descriptions of horizontally related markets if the undertakings concerned are active on the same market with a combined market share above 20% of the market (affected market), and descriptions of vertically related markets where the parties' market share exceeds 30% on each of the respective markets; the description should include information on the structure of the relevant markets, as well as information on potential barriers to entry, etc;
- a description of efficiency gains (if any);
- information on whether the concentration is subject to the jurisdiction of (and has simultaneously been filed to) any other competition authorities;
- a copy of the latest version of the agreement, including appendices; and
- annual reports and annual accounts of the undertakings concerned.

In addition, the parties are required to submit a proposed non-confidential version of the filing by clearly marking information to be redacted in the documents. At the same time, the basis of the confidentiality must be provided (ie, brief reasoning for redaction), including proposals for public versions of the documents.

The filing must normally be submitted in Norwegian, although supporting documents in English and other Scandinavian languages are usually accepted. Exceptions have been granted for filings in English, for simplified notifications.

Note that the level of detail (requirements as previously stated) will be somewhat more relaxed if the concentrations qualify for a simplified

notification procedure, eg, concentrations where there are no overlaps or concentrations involving a change only in the "quality of control" (see **3.11 Accelerated Procedure**).

3.6 Penalties/Consequences of Incomplete Notification

If the notification is incomplete, the missing information must be provided before the NCA can consider the transaction. The NCA's time limits do not start running until a complete notification is filed, and the time limits may also be stopped ("stop the clock") during the NCA's case-handling if any further information requests from the NCA are not complied with by the notifying parties in due time.

An incomplete notification is not considered to be a violation as such and penalties thus do not apply, unless the parties breach the standstill obligation.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notification is incomplete, the missing information must be provided before the NCA will consider the notification as having been received. In practice, submitting an incomplete notification will therefore extend the NCA's time limits for intervening or clearing the concentration. This has implications for the possibility of closing the transaction, due to the standstill obligation. Submitting information that is misleading may also lead to penalties in the form of fines. One recent example of the latter is the NCA's administrative fine of NOK7.5 million (approximately EUR740,000) imposed upon Vygruppen in 2020 for allegedly having submitted incomplete/misleading information in the filing to the NCA; however, the CAB recently annulled the decision and sent it back to the NCA.

3.8 Review Process

Prior to the notification, the parties concerned may request guidance from the NCA. However, the NCA will never "pre-clear" any concentration at this stage.

A two-stage procedure starts running when the notification is filed. The procedure is somewhat analogous to the one followed by the European Commission in the EU, with "Phase I" and "Phase II" proceedings, but the time limits are different.

Phase I starts when a complete notification is filed, and normally lasts for up to 25 business days. This first stage is extended by ten business days – ie, to a total of 35 business days – when remedies are already offered in the filing, or if remedies are submitted, at the latest, 20 business days after the filing. This means that Phase I normally extends to 35 working days if remedies are proposed in Phase I. The reason for this is that the NCA may issue a conditional clearance decision at this stage, within 35 business days. If no remedies are offered in Phase I, the NCA will end this stage, either by clearing the transaction or by issuing a preliminary notice of possible intervention, in which case the second stage (Phase II) starts.

In Phase II, the NCA will normally either clear the transaction or issue a statement of objections, no later than 70 business days after the filing was submitted. If the transaction is not cleared, the parties will be given 15 business days to submit their comments to the NCA's statement of objections, and the NCA then has a further 15 business days to issue a final decision in the case (which may be extended by another 15 business days if so agreed). The final decision of the NCA will be either a full clearance, a conditional clearance or a prohibition decision.

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Information requests are relatively common, particularly in Phase II. The extent and nature of the requests will depend on the case. As long as the information is provided within the deadlines decided by the NCA, the clock will not be stopped.

Concentrations using the simplified procedure (see **3.11 Accelerated Procedure**) will normally be cleared in the first stage, within 25 business days. In more complex and potentially problematic concentrations, the procedure may take significantly longer, often between 100 and 115 business days (ie, five months).

3.9 Pre-notification Discussions With Authorities

Parties may engage in pre-notification discussions with the NCA. Such pre-notification discussions are relatively common in complex concentrations, eg, where the parties are aware beforehand that there might be potential issues or where the case concerns complex markets in which it is important to supplement the information in the filing with oral presentations or talks with the case team.

The process and information exchanged at this stage is, similarly to post-filing, treated confidentially to the extent that any of the information exchanged constitutes business secrets, defined by the Norwegian Public Administration Act.

It is common for a notifying party to give the NCA a heads-up before the filing is submitted, so that the NCA can prepare for the filing and assemble its case team.

3.10 Requests for Information During the Review Process

Requests from the NCA vary from simple clarifications to extensive requests for highly detailed information, which may necessitate the involvement of an external economic consultancy. Requests for information are sent in writing (typically by email) from the NCA, and the NCA will normally provide a reasonable deadline by which the request must be answered. Non-compliance with such deadlines does not automatically stop the clock, but the NCA may decide to inform the parties in writing that it reserves a right to stop the clock until the request is answered.

3.11 Accelerated Procedure

Under the "fast-track" procedure, the parties may already offer remedies in the notification, or within 20 business days after the notification was submitted to the NCA. The transaction may then be cleared on conditions in Phase I. The deadline for such clearance in Phase I will be extended from 25 to 35 business days.

In addition, it should be noted that a simplified notification procedure may be used in so far as certain criteria are fulfilled. According to the Norwegian Merger Control Regulation, a number of concentrations may benefit from a simplified procedure.

The creation of joint ventures may benefit from a simplified procedure insofar as the joint venture's sales and/or sales of business areas transferred to the joint venture are less than NOK100 million in Norway, and when assets transferred to the joint venture have a total value of less than NOK100 million in Norway.

The simplified procedure may also be used for changes in the "quality of control" (eg, a change from joint control to sole control over a pre-existing undertaking).

The simplified procedure may also be used for mergers and acquisitions, ie, transactions where one or more undertakings merge, or one or more

undertakings or persons acquires sole or joint control of another, and where:

- none of the parties is active in the same product and geographical market (ie, there is no horizontal overlap) or in a prior or subsequent part of a product market in which another party operates (ie, there is no vertical overlap); or
- two or more parties are active in the same product and geographical market (horizontal overlap), but where the parties' combined market share does not exceed 20% on the market where there is horizontal overlap; or
- one or more of the parties is operating in an upstream or downstream product market in which another party operates (vertical overlap), but where the parties either individually or together have a market share not exceeding 30% on both of the "upstream" and "downstream" markets.

Even if the criteria for filing a simplified notification are fulfilled and the notifying party has filed such a notification, it should be noted that the NCA may still order the filing of a standard notification within 15 business days after the receipt of the simplified notification. As far as is known, the fastest clearances granted under the simplified process have been two to three business days after notification, but the parties should prepare for a case-handling time of at least two weeks, and usually more.

4. SUBSTANCE OF THE REVIEW

4.1 Substantive Test

Due to a further harmonisation with EU law in 2016, the substantive test is now, as under the ECMR, a SIEC test (Substantial Impediment to Effective Competition).

The NCA therefore interferes in mergers and acquisitions that would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. A causal link between the transaction and the negative effects on the competition must, however, be established.

Whether or not the impediment of competition in the market can be regarded as "significant" will depend on a case-specific assessment of the relevant market affected by the proposed transaction. Relevant factors that must be assessed include entry barriers, potential competition and several other market parameters. It is also necessary to assess whether efficiency gains (if any) from the concentration outweigh the restriction of competition in the relevant market.

4.2 Markets Affected by a Transaction

All competition concerns will be subject to investigation, since there is, as such, no de minimis threshold below which competitive concerns are deemed unlikely. Among the key issues are whether the parties have high market shares, the level of market concentration, entry barriers, countervailing buyer power, etc, and whether the parties are deemed to be close competitors. In line with the case law of the European Commission, the NCA will attribute more weight to closeness of competition than to concentration levels where the relevant market at issue is characterised by differentiated products or services. Market structure and concentration, entry barriers, co-ordinated effects, etc, are key factors in the assessment. The relevant geographical and product market definitions will always be the starting point for the analysis if market shares indicate that a transaction may lead to the impediment of competition; however, the competitive analysis will take into account the factors mentioned above in order to determine whether the SIEC test is met by

unilateral effects, co-ordinated effects, vertical effects, etc.

4.3 Reliance on Case Law

The NCA defines markets in a manner similar to the European Commission, and thus, similarly to many other European authorities. Case law from the Court of Justice of the European Union (CJEU) and the European Commission, as well as from other EU member states, is often referred to by the NCA. While cases from similar markets are often taken into account, local factual differences in market structures sometimes lead to different market definitions.

4.4 Competition Concerns

All competition concerns are taken into consideration in an investigation, eg, unilateral, co-ordinated, vertical and conglomerate effects. Vertical and conglomerate concerns are seldom an issue, however, unless foreclosure effects are deemed likely, or if the parties have a high market share in markets upstream or downstream (or in adjacent markets) that may negatively affect competition.

4.5 Economic Efficiencies

If a transaction implies gains in economic efficiency, compensating for the disadvantage of reduced competition, the transaction will – in theory – be approved, despite the negative effects for competition. The economic efficiencies must, however, be merger-specific and passed on to consumers/customers. According to the European Commission's Horizontal Merger Guidelines, efficiencies are merger-specific when they are a direct consequence of the merger and cannot be achieved to a similar extent by less anti-competitive alternatives.

4.6 Non-competition Issues

Non-competition issues cannot be taken into account in the review process.

However, there are rules for foreign direct investment separate from the merger control rules. Filings are required for foreign direct investments falling under the scope of the Security Act. The King in Council (government) is competent to block or set conditions for the acquisition of a qualified share in a business that is subject to the Security Act if there is a "not insignificant" risk of national security interests being threatened (see Section 10-3 of the Security Act). This also applies if an agreement has already been entered into for the acquisition and even if the relevant Ministry within its area of responsibility for the sector in question has not received notification of the acquisition as intended. A decision must be within the purpose of the Security Act and must also be proportionate so that the specific risk of adverse effects on national security interests is balanced against the potential negative economic consequences for the parties.

4.7 Special Consideration for Joint Ventures

According to Section 16(5) of the Competition Act, the NCA is required to examine co-ordination issues between joint-venture parents. If the creation of the joint venture has the co-ordination of independent joint-venture parents as its object or effect, the NCA must consider whether the co-ordination is contrary to Section 10, which prohibits all agreements between undertakings, decisions by association of undertakings, and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Norway. If the co-ordination is deemed contrary to Section 10, the NCA must intervene in the transaction.

5. DECISION: PROHIBITIONS AND REMEDIES

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

If the SIEC test is met, the NCA will intervene in the transaction. The transaction may either be prohibited, or accepted with remedies proposed by the parties.

5.2 Parties' Ability to Negotiate Remedies

Remedies may be accepted if they are considered sufficient to avert the negative effects on competition. Both divestitures and behavioural remedies will be considered, but the NCA clearly prefers structural over behavioural remedies. The NCA has accepted behavioural remedies in many cases, however, often as "fix-it-first" solutions. A Phase II statement of objections by the NCA will often indicate what competition concerns need to be addressed by possible remedies.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable. The key issue remains, with or without remedies, the SIEC test.

5.4 Typical Remedies

The NCA has expressed a clear preference for structural remedies (divestments) in many recent cases, but it approaches this issue in a case-specific manner, and often looks to relevant European Commission practice on remedies in the sector concerned. Remedies for addressing non-competition issues are never required.

5.5 Negotiating Remedies With Authorities

The parties may suggest remedies at any time in the process, even in Phase I (ie, at the time of filing). The NCA may discuss and indicate remedies, but will not formally propose them. It is for the parties to propose remedies, and the NCA may not clear a transaction subject to remedies not proposed by the parties. Remedies are proposed as binding commitments. In practice, remedies may be negotiated and tested before they are formally proposed. If the remedies are found to be insufficient, the NCA must notify the parties that a prohibition decision may be rendered. The parties may then propose new or revised remedies, which will extend the deadline by which the NCA must render its final decision.

5.6 Conditions and Timing for Divestitures

The standard approach requires compliance with the remedies put forward before the transaction may be completed ("fix-it-first"). However, time-limits for divestitures has also been accepted in some cases, but "fix-it-first" is normally applied. By their nature, behavioural remedies are generally applied over time, ie, also after the transaction. Violations of remedies are subject to administrative fines.

5.7 Issuance of Decisions

A short-form formal notice is issued to the parties (typically by email) when a transaction is cleared. Prohibition decisions are longer and far more detailed.

A public (non-confidential) version of decisions (prohibition and conditional clearance decisions) is made available on the NCA's website, typically sometime after the decision has been rendered. The NCA must ensure that business secrets are redacted and not revealed when documents are disclosed to any third party. The NCA decides what constitutes a "business secret", but the parties involved have the opportunity to comment before access to third parties is granted.

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5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

No foreign-to-foreign transactions have recently been considered by the NCA.

6. ANCILLARY RESTRAINTS AND RELATED TRANSACTIONS

6.1 Clearance Decisions and Separate Notifications

A clearance decision does not cover related arrangements. Consequently, the parties involved are responsible for avoiding any conflict with the prohibitions in Sections 10 (anti-competitive agreements, decisions and concerted practices) and 11 (abuse of dominant position) of the Competition Act. However, ancillary restraints directly related to a merger and necessary for the implementation of a transaction will be accepted under Section 10, and will thus be deemed legal according to the practice of the CJEU; see also the European Commission's Notice on Ancillary Restraints.

Since the NCA does not explicitly approve ancillary restraints, separate notifications are neither required nor possible. Nevertheless, informal guidance may be given when the NCA finds (potential) conflicts with Sections 10 and/or 11. Since clearance decisions are usually not reasoned, it is important for all ancillary restrictions to be described in the notification to avoid competition law risk.

7. THIRD-PARTY RIGHTS, CONFIDENTIALITY AND CROSS-BORDER CO-OPERATION

7.1 Third-Party Rights

Third parties are notified by public notice (on the NCA's website) and may contact the NCA to express their opinions and concerns, which will normally be taken into account if they are considered relevant. Third parties such as competitors, customers and suppliers may also express their opinions, either through their own initiative or after being requested to comment by the NCA ("market testing" is common in more complex transactions). Although third parties may always submit comments to the NCA, third parties do not have any formal procedural rights.

7.2 Contacting Third Parties

The NCA will typically market test remedies offered in more complex cases. Written questionnaires and telephone interviews with third parties are frequently used, both during the NCA's review process and for market-testing remedies.

7.3 Confidentiality

The fact of the notification as such is published on the NCA's website. All decisions will be public, including relevant facts from the notification. "Business secrets", as determined by the NCA (see **5.7 Issuance of Decisions**), will be kept confidential.

7.4 Co-operation With Other Jurisdictions

The competition authorities in Denmark, Iceland, Sweden and Norway may exchange information with each other through a Nordic co-operation agreement. This includes non-confidential information, confidential information that is necessary for an ongoing investigation, and notifications on general changes to a

country's law. The authorities do not need to seek permission from the parties involved to share such information. Furthermore, the NCA may also participate in horizontal discussions in the European Competition Network (ECN) and contribute to the ECN Brief, but only regarding non-case-specific issues.

8. APPEALS AND JUDICIAL REVIEW

8.1 Access to Appeal and Judicial Review

The NCA's decisions in merger control cases can be appealed to the CAB within 15 working days of the decision being handed down. The NCA must then pass the complaint on to the CAB within 15 working days, and the CAB must issue a final decision within 60 working days from receipt of the complaint. The parties may file a civil lawsuit against the CAB's decision before the Gulating Court of Appeal.

8.2 Typical Timeline for Appeals

An appeal to the CAB must be lodged within 15 working days of the NCA rendering the decision. The NCA then has 15 working days to forward the appeal to the CAB, which must render its decision within 60 working days. No appeals have been lodged to date and the CAB has therefore not yet rendered any decisions in merger cases. Only two appeals in merger cases have been lodged since the inception of the CAB in 2017. The 2020 Schibsted/Nettbil appeal is still pending a decision. The 2019 Prosafe/Floatel appeal was later withdrawn by the parties.

8.3 Ability of Third Parties to Appeal Clearance Decisions

It is not possible for third parties to appeal a clearance decision.

9. RECENT DEVELOPMENTS

9.1 Recent Changes or Impending Legislation

There is a proposal on the table (NOU 2020:11) to replace the CAB as a "court of first instance" in competition matters with the ordinary City Court. Under the current regulatory regime, the CAB acts similarly to a "court of first instance" in competition matters, replacing the ordinary City Court. Should the proposal be implemented, appeals of CAB decisions must be lodged before the City Court, as opposed to the Gulating Court of Appeal (court of appeal at the instance below the Supreme Court). The NCA has a negative view of the proposal, which is still pending.

9.2 Recent Enforcement Record

The NCA has prohibited the Schibsted's acquisition of Nettbil (online markets for used cars). The decision was appealed to the CAB, which upheld the NCA's blocking decision. However, the Gulating Court of Appeal ruled that the NCA failed to demonstrate that Schibsted's acquisition of Nettbil would significantly impede competition in the market for online sales of secondhand cars. This is the first time an appellate court in Norway has revoked a merger prohibition. The case is now pending before the Supreme Court after an appeal by the NCA. It is the first time that a merger blocking decision will be tried by the country's highest court.

The NCA issued a conditional clearance decision in the Altia/Arcus merger (sale of spirits to Vinmonopolet, the Norwegian monopoly for wine and spirits). Among the remedies was a commitment for the parties to divest several of their brands and assets for spirits, imposed as a "fix-it-first" divestment where the NCA must approve the buyers of the brands/assets before the standstill obligation is lifted.

The NCA has prolonged the behavioural remedies imposed in the 2018 Vipps/BankID merger. After a consultation, the NCA decided to continue for another three years Vipps' obligation to provide BankAxept and BankID (authentication and e-signature solutions) to third-party payment solutions on non-discriminatory terms.

The CAB overturned a decision by the NCA to block DNB's EUR1 billion acquisition of rival bank Sbanken – marking the first time it has set aside a merger ban. The NCA blocked DNB's purchase of online banking rival Sbanken in November 2021, after the Phase II review found that the agreement would take out a key competitor from the mutual fund market.

However, on appeal, the CAB concluded that the acquisition is unlikely to significantly harm competition in the mutual fund distribution market.

Norgesgruppen (groceries) and St1 (fuels) have received fines of respectively NOK20 million (approximately EUR1.9 million) and NOK15 million (approximately EUR1.4 million) for breaching its information duty (see **1.2 Legislation Relating to Particular Sectors**). The fine against Norgesgruppen was later withdrawn by the NCA, while the fine against St1 was reduced to NOK3 million after the SO was issued.

Vygruppen received a fine of NOK7.5 million (approximately EUR740 000) for allegedly having submitted incomplete/misleading information in the filing to the NCA; however, the CAB recently annulled the decision and sent it back to the NCA.

9.3 Current Competition Concerns

The NCA received 156 merger notifications in 2021. This is a clear increase from the previous year, where 93 notifications were received.

Last year, 94 per cent of all notifications submitted were cleared within 25 working days (phase I). Two interventions took place: DNB's acquisition of Sbanken, and the merger between Altia and Arcus. About 60 per cent of the notifications submitted to the NCA are so-called simplified notices.

Due to the reversal of two merger blocking decisions issued by the NCA on appeal, it is going to be interesting to see how this may (or may not) influence the decisional practice and whether the CAB will continue to operate as an administrative appeal body. In a recent public consultation, the government expressed doubts as to whether the CAB, which was established in 2017, shall continue or be dissolved.

Advokatfirmaet Simonsen Vogt Wiig has a merger control and competition law team consisting of ten partners and lawyers in Oslo. The team has assisted in merger control investigations and filings in many different economic sectors, for instance, in telecoms, the airline industry, retail, software, aquaculture, petrol stations, etc, and has been involved in every phase, ie, in Phase I, Phase II and appeal cases. In 2018, SVW's team assisted in some of the largest merger cases in Norway, including the merger of Telia and Get/TDC and St1's acquisition of Statoil Fuel & Retail Marine.

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