Memo

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CLIENT BRIEFING MEMO: COMPETITION LAW AND ENFORCEMENT DEVELOPMENTS Q1 AND Q2 2025

1 OVERVIEW OF THE NCA'S ENFORCEMENT PRACTICES SO FAR IN 2025 IN A "NUTSHELL"

This briefing memo mainly discusses two matters: the NCA's new market investigation tool and a recently closed cartel investigation case with alleged infringements "by object." In a very brief press release, the NCA on 24 June stated the following:

> *"Since 2021, the Competition Authority has been investigating two moving companies suspected of illegal cooperation. The Authority has decided to close the case.*
>
> *In the spring of 2024, the Competition Authority sent a Statement of Objections imposing termination of the cooperation and the imposition of a fine. Both moving companies subsequently submitted comments on the Statement of Objections.*
>
> *The background to the case, now closed, is complex.*
>
> *- After an overall assessment of various aspects of the case, the Competition Authority has concluded that the case is now closed," says Director Marita Mæland Skjæveland. Skjæveland."*

SVW's team represented one of the moving companies after the NCA had issued its Statement of Objections. We agree with the NCA that the case should be closed, and below, we elaborate somewhat more on the "complexity" of the issues in the matter. It is, for sure, a case of principle importance when it comes to the NCA's enforcement, seen in connection with personal criminal liability issues and the NCA's reporting of individuals to the police claiming personal liability, not properly taking into account fundamental principles of human rights under the ECHR. Also, it is an interesting example of priorities over several years in a *de minimis* case compared to other cartels, where the NCA has failed to intervene or react with proportionate sanctions.

So far this year, the Norwegian Competition Authority has not issued any Statements of Objections or rendered decisions on fines for violations of Sections 10 or 11 of the Competition Act. However, the Authority has published information that a dawn raid has been carried out in the veterinary sector.

The so-called “Price Hunter case,” which the Authority passed its decision on in August last year, is currently under appeal at the Competition Appeals Board.

The Authority fined the three largest grocery chains in Norway for having illegally cooperated on mutual access to collect extensive amounts of prices in each other's grocery stores through the use of so-called "price hunters," individuals who check and register prices in competitors' stores, which has had an anti-competitive effect according to the Authority. The decision from the Competition Appeals Board is expected by 21 August 2025 (at the latest).

In the merger control space, the Norwegian Competition Appeals Board upheld the Authority’s decision to intervene against *Norva24 West's* acquisition of *Vitek Environment*. The Authority is currently considering intervening against the merger of *Retriever* and *Infomedia* (decision pending as of 25 June 2025) and has made a decision to allow *Schlumberger's* acquisition of *ChampionX* with remedies. State-controlled railway operator Vy’s acquisition of Flytoget (the Norwegian airport express train company – also state-controlled) was cleared without intervention.

It was announced early in 2025 that the (now previous) Director General, Tina Søreide, would resign on 31 January 2025 due to working environment-related conflicts within the Authority. The Acting Director General is currently Gjermund Nese.

In short, the NCA was not extremely visible or active in the first half of 2025, at least not in cases that are in the public domain.

2 THE NCA’s NEW MARKET INVESTIGATION TOOL APPLIES FROM 1 JULY 2025

2.1 Summary

A new market investigation “tool” was adopted in December 2024 and entered into force with effect from 1 July 2025. The main provisions are Sections 41 and 42 of the Competition Act (also hereinafter referred to as "CA" or "the Act").

The Norwegian Competition Authority has now been granted the authority to initiate market investigations when there are “indications” that competition is being significantly hindered or is at risk of being hindered, contrary to the objectives of the Competition Act. This market investigation “tool” was inspired by a similar “tool” that the Competition & Markets Authority (“CMA”) already has implemented in the UK.

Before launching an investigation, the Competition Authority must conduct a public hearing with a minimum six-week consultation period. The decision to proceed with a market investigation must be made within four months after the consultation period ends and cannot be appealed.

The decision will detail the goods, services, operators, and markets to be investigated. Factors that may trigger a market investigation include high market concentration, barriers to entry, strong buyer power, minority ownership, asymmetric information access, network effects, economies of scale, and high switching costs. These factors can disrupt market competition, and a market investigation is particularly relevant when challenges arise from a combination of structural and behavioral factors. A rationale behind the market investigation “tool” is to grant the Competition Authority with powers to address competition concerns in markets where the standard merger control and behavioral rules under the Act (reflecting EU competition law) are deemed insufficient, e.g. structural issues caused by a series of consolidations below the Norwegian merger control turnover thresholds, or non-abusive, but detrimental practices.

Section 42 of the Act allows the Competition Authority to impose remedies if competition is significantly restricted or at risk of being restricted. Remedies can include any necessary measures to alleviate competition constraints, but structural measures are a last resort, to be used only if behavioural measures are insufficient or more burdensome. Companies can propose their remedial measures, which the Authority can make binding, effectively closing the case for that company. Remedial measures must be decided upon within 18 months of the market investigation decision, with a possible six-month extension in exceptional cases. The Competition Authority can appoint a trustee to assist with the implementation of decisions, and decisions can be reversed if they are based on incorrect information or if key facts change. Appeals against remedial decisions can be made to the Competition Appeals Board, which can annul or uphold the Authority's decision but cannot issue new remedial measures on its own.

2.2 Launch of market investigations – Section 41 CA

2.2.1 *Legal basis*

The Competition Authority may investigate one or more specific markets or segments of markets if there are signs that competition is being, or is at risk of being, significantly hindered in a manner that contravenes the objectives of the Act. Section 41 governs the initiation of a market investigation.

2.2.2 *Substantive requirements for the Authority to launch a market investigation*

The first paragraph outlines the substantive requirements for a market investigation to be initiated. The first paragraph reads:

> *""(1) The Competition Authority may conduct a market investigation in one or more markets or parts of markets if there are circumstances that indicate that competition is or is in danger of being significantly restricted contrary to the purpose of the Act."*

According to the preparatory works, the term "circumstances" is to be interpreted broadly and may, according to its wording, include all circumstances in a market that may affect competition. These may, for example, relate to the structure and functioning of a market or the behavior of market participants.

Examples of "circumstances" that may be relevant when assessing whether a market investigation should be initiated include high market concentration, significant barriers to entry, strong buyer power, or a high degree of minority ownership. It may also relate to consumer patterns or consumer choice, for example, where customers have limited access to information relevant to assessing the benefits of the transaction (asymmetric information access) or where network effects or other elements mean that customers are linked to a supplier in such a way that competition is restricted.

Economies of scale and high switching costs may also be relevant factors. These are market features that can have a disruptive effect and thus contribute to the competition not functioning satisfactorily. A market investigation may be considered particularly relevant where competition challenges originate from a combination of structural and behavioral factors.

In addition to the factors mentioned above, when assessing whether the legal threshold for initiation is met, it is also relevant to consider whether the market is characterised by persistently high prices and high margins or a low degree of quality, service, product development, and innovation.[1]

The term "*indicates*" means that an assumed causal link is required between the market circumstances under investigation and the restriction of competition that is a result of one or more of these circumstances. However, to open a market investigation, the Competition Authority is not required to demonstrate an actual causal link. It is sufficient to account for an assumed connection. Moreover, the burden of proof requirements for initiating a market investigation are lower than the requirements for adopting a decision on remedial measures, cf. the wording "*indicate".* This means that the standard of proof is lower than the general preponderance of probability.

As the wording itself suggests, it is stated in the preparatory works that the term "*markets*" must be interpreted broadly, and there is no requirement for a market definition before a market investigation is initiated. As part of the Norwegian Competition Authority's preparation of a draft decision to be heard (cf. the second paragraph), the Authority must nevertheless describe the relevant circumstances to be investigated and the connection with the restriction of competition they result or may result in.

It is a condition that the restriction of competition in question is "*significant*". This means that the Norwegian Competition Authority can only initiate a market investigation in markets where the circumstances may have a significant effect on competition. There is a requirement that the restriction of competition in question has a particular scope or seriousness, for example, that it affects many players, constitutes a significant barrier to entry, or leads to persistently high prices or limited innovation. This *"significant"* threshold for initiating a market investigation corresponds to the threshold for deciding on remedial measures.

Furthermore, the circumstances must indicate that competition "*is significantly restricted*" or "*is in danger of being significantly restricted*". These are alternative requirements. Thus, there is no requirement for a specific restriction of competition to have already materialised as a result of the matters to be investigated in a market investigation. This is similar to what applies under the standard behavioral rules, where there is no requirement for the Competition Authority to prove that competition has actually suffered.

2.3 Procedural requirements

2.3.1 *The NCA must first conduct a consultation regarding a draft decision to open market investigation*

According to the second paragraph, the Norwegian Competition Authority shall conduct a hearing on the draft decision regarding the market investigation before making a final decision:[2]

[1] See section 2.4.3 of the preparatory works for a more detailed account of the types of circumstances that may justify the opening of a market investigation. The Ministry considers the need for market investigations to address competition challenges in digital platform markets and other markets more flexibly and targeted. This is particularly relevant considering the rapid development and use of algorithms that can both promote and inhibit competition. Market investigations will allow the Competition Authority to implement more precise measures based on a deeper understanding of the markets, which can be more effective than broader regulations (No.: "Forskrift"). This also applies to markets that are crucial for the green transition, such as the energy and transport sectors, as well as the grocery market, where market investigations are proposed to address specific challenges, including price discrimination and vertical integration.

[2] See a more detailed description of the consultation process in section 4.4.3 of the preparatory works.

> *"(2) Before deciding to open a market investigation, the Competition Authority shall conduct a hearing on a draft decision regarding the market investigation. The consultation period shall be at least six weeks.*

In the draft decision, the Authority should specify the circumstances that are relevant in the assessment of whether circumstances or conduct may substantially restrict competition.

The consultation is conducted by sending the draft decision to a pre-selected group of players. Both individual players, industry organisations, consumer organisations, sector authorities, interest groups and other stakeholders may be involved in the consultation. In addition, the consultation is published on the Norwegian Competition Authority's website.

The draft decision must provide information about the background to the market investigation, including whether the Norwegian Competition Authority has received orders or requests to consider initiating a market investigation. Furthermore, an overall description of the markets covered must be provided. The circumstances that indicate that competition is significantly restricted or is in danger of being significantly restricted must also be described. The Norwegian Competition Authority shall preliminarily outline the measures that may be relevant to improve competition.

2.3.2 *The NCA's final decision to open a market investigation*

It follows from the provision's third paragraph that the Competition Authority decides whether a market investigation should be carried out:

> *(3) After the consultation has been concluded, the Competition Authority shall decide whether to conduct a market investigation. The decision shall be taken without undue delay and no later than four months after the expiry of the consultation period. A decision to conduct a market investigation shall be published without undue delay after the decision has been made. The decision cannot be appealed.*

Such a decision shall be made without undue delay after the consultation has been concluded and no later than four months after the expiry of the consultation period. If the submissions or other circumstances imply that the scope or subject matter of the market investigation will be significantly changed, the Authority should conduct a new consultation.

The decision to conduct a market investigation shall be published. The time of publication forms the basis for calculating the deadline for imposing remedial measures (if any). Publication must take place without undue delay after it has been made. The decision to initiate a market investigation is a procedural decision that cannot be appealed. However, where participants are ordered to provide information pursuant to Section 24 of the Competition Act as part of a market investigation, they may appeal this order.

2.3.3 *Minimum requirements to the NCA's draft decision and final decision to open market investigation*

The fourth paragraph outlines the minimum requirements for the content of both the draft decision to conduct a market investigation and the final decision itself:

> *"(4) The draft decision pursuant to the second paragraph and the decision pursuant to the third paragraph to conduct a market investigation shall contain information about the goods, services, operators and markets that the market investigation will cover."*

Both the draft and the decision must contain information about the goods and services, players and markets that the market investigation will cover. This means that the Competition Authority must provide a general description of these issues. The opening decision should, in the same way as the draft, also describe the circumstances that indicate that competition is significantly restricted or is in danger of being restricted considerably, and thus justify that the conditions for opening a market investigation are met. Furthermore, a preliminary description of the measures that may be appropriate to remedy the competition problems must also be provided.

2.4 Remedial measures in cases of market investigation – Section 42 CA

2.4.1 *Substantive requirements for the Authority to impose remedies*

The first sentence, first paragraph of Section 42 reads:

> *"(1) The Competition Authority may impose remedies if there are circumstances that significantly restrict or are likely to significantly restrict competition contrary to the purpose of the Act.*

Measures can only be imposed if there are "*circumstances that significantly restrict or are likely to significantly restrict competition".*

The term "*circumstances*" is interpreted broadly, and in the same manner as in Section 41. It is not a requirement that circumstances that justify specific remedial measures following a market investigation must have been part of the grounds for the market investigation. Thus, the matter may have been discovered during the market investigation. However, informing potentially affected market participants of the new circumstances may be necessary.[3]

"*Significant*" entails that the restriction of competition must appear to be persistent or repeated. It must not have a short-term or temporary nature. It must also not be purely "hypothetical", although actual effects must not be proven. The Norwegian Competition Authority can thus only impose remedies where the circumstances justifying the measures have or are likely to have a qualified effect on competition, which would (at least) be likely to materialise without remedies, and if the restriction of competition has a particular scope or seriousness. Both conduct and other circumstances, as well as a combination of these, may be relevant factors. In any decision, the Competition Authority must justify why the actual or potential restriction of competition is considered "significant".

Furthermore, the circumstances must "*significantly restrict* " or "*are likely to significantly restrict competition* ". These are alternative requirements and are to be interpreted similarly as in Section 41.

2.4.2 *Which remedies can the NCA impose?*

The remedies that the NCA can impose are regulated by the first and second paragraphs, which read:

[3] As per Section 17, third paragraph, of the Public Administration Act. For a more detailed description of the type of circumstances that may justify a market investigation and subsequent order for action, there is a non-exhaustive review on section 41 and in sections 2.4.4 and 3.4.3.1 of the preparatory works.

> *" (1) (...) The decision may include any measure necessary to remove or reduce the restriction of competition. However, structural measures may only be imposed if there are no equally effective behavioral regulation measures, or if a behavioral regulation measure would be more burdensome for the company.*
>
> *(2) In cases covered by the first paragraph, an undertaking may itself propose remedial measures. The Competition Authority may then close the case with a decision that makes the measures binding on the undertaking. The decision shall state that the Competition Authority will not proceed with the case under the first paragraph if the measures are implemented."*

2.4.3 *Remedies ordered by the NCA itself – first paragraph*

The remedies may include any measure necessary to remove or reduce the restriction of competition. Where the remedies address factors that are likely to substantially lessen competition, they must be necessary to eliminate or mitigate the potential restriction of competition. In such cases, the remedies may include measures that prevent the restriction of competition from occurring or reduce the potential for competition to be restricted.

The Competition Authority may impose all types of measures, cf. the term "*any*". However, the possible measures are limited to those that are "*necessary to reduce or eliminate the restriction of competition*". This means that the Authority must consider whether a measure will reduce or eliminate the restrictions of competition and whether the measure is necessary for this to happen. This also flows from the general principle of proportionality under Norwegian public administrative law, which applies also to the Competition Authority's decisions.

The requirement of proportionality implies that the Competition Authority may only impose structural measures if there are no equally effective behavioral regulation measures or if behavioral regulation measures would be more burdensome. This implies that structural measures, typically the sale of a business or parts of a business, assets or other rights, are a last resort that can only be imposed if behavioral regulation measures are not suitable and sufficient.

2.4.4 *Remedies proposed by the undertaking itself – second paragraph*

The provision allows an undertaking to propose remedies. The Authority may make such proposed measures binding on the undertaking. If the undertaking's proposed measure is ordered by the NCA, the NCA may close the case. The prerequisite is that the measure or measures are implemented. In practice, this means that the case for the company in question is closed and that no further measures can be imposed on the company based on the market investigation in question.

2.5 Procedural requirements – deadline for orders of remedies

It follows from Section 42 third paragraph that:

> *(3) Orders for remedial measures under the first and second paragraphs may be issued no later than 18 months after the decision to carry out a market investigation has been published in accordance with section 41 third paragraph. In special cases, the Competition Authority may extend the deadline by up to six months.*

As follows from the wording, the deadline for the Competition Authority to impose remedial measures is, as a main rule, 18 months from the time when the decision on market investigation is published. However, in "special cases", the deadline may be extended by "up to" six months

According to the preparatory works, "special cases", for example, where special circumstances have delayed the investigation process, e.g. delays in responding to an order to provide information or where the parties have requested an extension of the deadline for responding to a notice of decision, may provide grounds for extending the deadline. Another example is when the investigation reveals that more profound and time-consuming analyses are required to ensure the case is as well-informed as possible before making a decision. The deadline may also be extended if a proposal for remedial measures under Section 42, second paragraph, is submitted late in the process. Therefore, the Authority does not have the opportunity to conduct a thorough assessment of the measures within the available timeframe. Furthermore, the deadline may be extended if an undertaking that is a party to the case requests an extension of the deadline and the other undertakings concerned do not object or agree to it. Priorities and capacity considerations at the Norwegian Competition Authority, however, cannot justify an extension of the deadline.

The Norwegian Competition Authority's decision to extend the deadline will be a procedural decision that cannot be appealed. The decision to extend the deadline must be published.

2.6 The NCA's option to appoint a trustee

The fourth paragraph states that the Competition Authority may appoint an administrator to assist in implementing decisions:

> *"(4) The Competition Authority may appoint a trustee to assist in the implementation of decisions under the first or second paragraph. The trustee shall have his remuneration covered by the Competition Authority. The King may issue regulations on the administrator's position and tasks."*

It is up to the Norwegian Competition Authority to assess whether a trustee is needed in these cases. If a trustee is appointed, the Competition Authority must cover the trustee's remuneration.

2.7 The Authority's competence to reverse its decision

It follows from the fifth paragraph that:

> *(5) The Competition Authority may, upon request or on its own initiative, reverse a decision under the first or second paragraph if*
> *a. key facts that were essential to the decision change*
> *b. it turns out that the decision is based on incomplete, incorrect or misleading information from the undertakings.*

As follows from the wording, the NCA may "*upon request*" or "its own initiative" reverse a decision adopted under the first and second paragraphs. The NCA's right of reversal under Section 42 is broader than the general right of reversal under Section 35 of the Public Administration Act.

2.8 Appeal

The sixth paragraph of the provision regulates the competence of the appeal body, and reads:

> *"(6) In the event of an appeal against a decision under this provision, the Competition Appeals Board may annul or uphold the Competition Authority's decision. The Competition Appeals Board cannot make a new decision on remedial measures. If the appeals body finds that the conditions in the first paragraph, first sentence are met, but that the Competition Authority's measures are not*

> *necessary, proportionate or suitable to remedy the restriction of competition, the decision may be annulled and the case sent back to the Authority for a new assessment. A new decision in the case must then be made within three months. The time limit in the third paragraph does not apply when the Competition Authority adopts a new decision following an appeal."*

The Competition Appeals Board is the appeal body. In cases of appeals against decisions made under this provision, the appeal body may annul or confirm the Competition Authority's decision. Alternatively, the appeals body may decide that the case should be sent back to the Competition Authority for a new assessment. Sending the case back to the Authority may be relevant if the appeal body agrees that the conditions for taking an intervention decision have been met but that the adopted measures cannot be maintained, either because they are not necessary, appropriate or proportionate. The Competition Authority is then allowed to make a new decision within three months. The time limit for the Competition Authority to decide within 18 months, with the possibility of a six-month extension in exceptional cases, does not apply when the Norwegian Competition Authority makes a new decision following an appeal.

The Competition Appeals Board's competence in appeals against decisions on remedies proposed by the parties is thus limited under this provision, different from ordinary appeals under the Public Administration Act, where the appeals body can replace the first instance's decision with its own. This solution is a consequence of the system in the remedial measures scheme.[4] If a decision on remedies is invalid, but without a new decision being excluded, the undertaking must be able to decide whether to offer new measures, and the Authority must be able to determine whether to prioritise orders under section 42 first paragraph or enter into new discussions with the undertaking.

3 The "Moving Companies" Cartel Case

3.1 Introduction

One of the most unusual cartel matters our team has worked on over the past years was ultimately closed after a lengthy investigation. The NCA announced the closure in a brief press release on June 26, 2025. Undoubtedly, the moving companies involved had *likely* infringed Section 10 of the Competition Act on numerous occasions over a relatively long period. On that basis, the NCA issued a "Statement of Objections" where they concluded that the "by object infringements" deserved a fine of 10 % of both moving companies' annual turnover, the 10 % being the regulatory maximum for cartel infringements.

As counsel to one of the moving companies (Company A), we did not object to the NCA's material findings; we usually do, of course. However, we raised several points: One of them was Company A's inability to pay the fine. That is a type of defence that may be relevant to a plea in some cases, as it was here. However, undoubtedly the most interesting and unusual aspect of this case was its procedural aspects. We raised several procedural points, including breaches of the European Convention on Human Rights ("ECHR") ("double jeopardy") and the privilege against self-incrimination. Below, we will outline the timeline of the NCA's investigation and summarise the alleged breaches before we comment on the procedural defence. As a reader, ***you may jump to the next section***. The following paragraph mainly elaborates on how the NCA handled the matter procedurally over a long period. (Relatively speaking.)

[4] In the same way as the in Section 12 third paragraph seventh sentence of the Competition Act.

3.2 Key Dates and Milestones in the Investigation

1. **31.08.2021**:
   The NCA submitted a request to the Hordaland District Court for permission to conduct evidence-gathering ("dawn-raids") at the premises of Moving Company A, Moving Company B, and associated individuals.

2. **01.09.2021**:
   Hordaland District Court approved the evidence-gathering request and "rubber-stamped" the dawn-raid request.

3. **14.09.2021**:
   The NCA conducted dawn raids at the premises of Moving Company A, Moving Company B, and individuals associated with these companies. Electronic materials, mobile phones, and physical documents were seized.

4. **15.09.2021**:
   Evidence-gathering continued at the premises of Director B (Moving Company B).

5. **02.05.2022**:
   The NCA submitted a request for additional evidence-gathering at the premises of Director A (Moving Company A).

6. **05.05.2022**:
   Hordaland District Court approved the additional evidence-gathering request.

7. **10.05.2022**:
   The NCA conducted further evidence-gathering at Director A's premises.

8. **January–February 2023**:
   The NCA conducted interviews with key individuals from both companies, including:
   - **Director A** (Moving Company A) on 31.01.2023
   - **Director A1** (Moving Company A) on 01.02.2023
   - **Director B** (Moving Company B) on 20.02.2023
   - **Director B1** (Moving Company B) on 21.02.2023

9. **June–December 2023**:
   The NCA held status meetings with both companies and exchanged correspondence to gather additional information.

10. **25.04.2024**:
    The NCA issued a **Statement of Objections (NO.: "varsel")** to Moving Company A and Moving Company B, outlining the alleged breaches of competition law and proposing fines at the maximum level (10% of the group turnover for both companies).

11. **11.06.2024**:
    We submitted a response on behalf of Company A to the NCA's Statement of Objections . In the response, it was submitted that the NCA's fine calculation was based on erroneous turnover data, and that a fine (if any) had to be reduced due to Company A's precarious economic situation.

12. **29.08.2024**:
    We obtained information that the NCA, before conducting the interviews with Director A and A1 in Company A, had filed criminal complaints against them for cartel infringement to the Police. Director A and A1 were, at the same time, also owners of Company A (with a 33.33 % share each)

13. **11.09.2024:**
    We received a copy of the NCA's criminal complaint filed with the Police. Noteably, the NCA's protocols from the interviews carried out with Director A and A1 in Company A as part of the NCA's administrative investigation was attached in full in the criminal case brought to the Police

14. **04.10.2024:**
    We submitted a letter to the NCA arguing that the case handling had **breached fundamental rights enshrined in the ECHR**, notably "double jeopardy" as well as the privilege against self-incrimination. We requested that the NCA take a position on these procedural points.

15. **15.01.2025:**
    After several rounds with comprehensive information requests from the NCA pertaining to Company A's financial situation (inability to pay), we reiterated in an e-mail to the NCA that we reserved the right to revert to procedural issues under ECHR, depending on how the case develops.

16. **31.01.2025:**
    Final information on Company A's financial situation (inability to pay) was submitted to the NCA after a long series of comprehensive information requests to the company had been handled.

17. **25.03.2025:**
    We received an email from the NCA's case team stating that the **cartel investigation against Company A and Company B had been closed**, i.e. it was closed without any final decision.

18. **26.06.2025**:
    The NCA published a press release stating that the cartel investigation had been closed. The NCA's press release was very brief and simply stated that the investigation had been closed after an *"overall assessment of different circumstances",* i.e. not commenting upon the ECHR aspects.

19. **03.07.2025**:
    Director A and A1 in Company A received information from the Police that the Police had also closed its criminal investigation, and hence also the **criminal investigation was finally closed**.

As can be seen, the resources put into the case by the NCA were significant over a long period.

3.3 Summary of the Alleged Breaches of Competition Law

The NCA alleged that Moving Company A and Moving Company B engaged in **illegal bid-rigging, market-sharing, and price coordination** in violation of **the Competition Act Section 10**. The alleged conduct included:

1. **Illegal Bid-Rigging**:
    - The companies allegedly coordinated their bids in response to customer requests for moving services.
    - One company would submit a **low bid** to secure the contract, while the other would submit a **higher, non-competitive bid** to create the illusion of competition.

- In some cases, the companies exchanged pricing information to ensure that one party would win the contract.

2. **Market-Sharing**:
   - The companies allegedly divided customers and markets among themselves, ensuring that they would not compete with the same customers.
   - This included agreements on which company would handle specific customer requests or geographic areas.

3. **Price Coordination**:
   - The companies allegedly exchanged sensitive pricing information and coordinated their pricing strategies.
   - In some cases, one company would provide the other with a suggested price to include in their bid, ensuring the bids were not competitive.

4. **Fictitious Bids**:
   - The companies allegedly submitted **fictitious bids** to meet customer requirements for multiple offers (e.g., when public or corporate customers required at least three bids to approve moving expenses).
   - These fictitious bids were designed to ensure that the preferred company's bid would be selected.

5. **Exchange of Sensitive Information**:
   - The companies allegedly exchanged detailed information about customer inquiries, pricing, and bid strategies.
   - This exchange of information reduced uncertainty about each other's market behaviour and eliminated competition between the companies.

The NCA provided numerous examples of the alleged conduct, including the following examples:

- **January 2020 (Customer A)**: Moving Company A provided Moving Company B with a suggested price for a bid. Moving Company B submitted a higher bid, ensuring Moving Company A won the contract.
- **May 2020 (Customer B** Moving Company B shared its bid with Moving Company A before submission. Moving Company A submitted a higher bid, creating the appearance of competition.
- **April 2021 (Customer C)**: Moving Company B requested Moving Company A to submit a bid at a specific price to ensure Moving Company B's bid would be selected.

3.4 Duration of the Alleged Conduct

- The alleged conduct occurred over **28 months**, from **May 2019 to September 2021**.
- The NCA considered this a **single, continued, and coordinated infringement** of competition law.

3.5 Impact on the Market

- The alleged conduct undermined competition in the market for moving services in Norway.
- Customers, including private individuals, businesses, and public entities, were deprived of the benefits of genuine competition, such as lower prices and better service quality.
- The companies created a false impression of competition, distorting the market and harming customers.

3.6 Outline of the defence and comments on the case

It seems clear that the NCA decided to close its case based on the procedural issues we raised. Had the NCA felt confident that its case-handling complied with fundamental rights under the ECHR, it could have issued a fining decision in what appeared as a *likely* and rather "clear-cut" cartel case. If the NCA took the view, as we argued, that the Company was unable to pay the fine, it could have issued a fining decision and reduced the fine, even down to zero. That would have been the "correct" way to go about the case since the NCA should, of course, strike down on cartels even if cartel participants would not be able to pay the fine. We will not comment further on the "inability to pay" defence as it is not new or special for this case.

The *unique* nature of this case relates to procedural issues under the ECHR.

We argued, first, that the NCA had breached the **privilege against self-incrimination** in its interviews with Director A and A1 of Company A. In the interviews pertaining to the administrative cartel investigation, the NCA had followed "standard protocol" and informed the two individuals that it is a punishable crime to provide wrong answers to the NCA or to refuse to provide answers.

This is correct insofar as liability for undertakings is concerned. However, at the time when the interviews were conducted, the NCA was aware – unlike Director A and A1 – that it had already filed a criminal complaint against them to the Police. The case was thus a type of "dual track" case where parallel investigations were taking place both in the administrative track (NCA) and the criminal track (the Police). Such cases have been extremely rare. Since the entry into force of the current 2004 Competition Act, there have been rumours about one or two instances. This case was likely the second case.

We pointed out that there was nothing in the protocols from the NCA's interviews that indicated whether the clear distinction between self-incrimination for the company and individuals had been explained to the individuals. Thus, they (both individuals) were under the impression that they were obliged to answer all of the NCA's questions, and to answer them truthfully, despite it also being reported to the police in a criminal investigation/case.

From the summary ("minutes") of the deposition, it appeared that the privilege against self-incrimination was discussed for about one minute, without any distinction being made between individual protection under the ECHR and protection for the company. Thus, the NCA seemed to follow "standard protocol" although the case was anything but standard. We pointed out that the NCA had to deal with this aspect much more carefully and make it clear to the individuals that they were simultaneously under criminal investigation but had failed to do so.

The NCA's case-handling error on this point was particularly severe because the NCA, as it turned out, had later submitted the entirety of the protocols from the deposition to the Police.

Traditionally, Norwegian law has not been considered to prevent information provided by an individual to the authorities during administrative proceedings from being used in subsequent criminal proceedings. (See, for instance, Norwegian Supreme Court in [SCR] Rt. 1994 p. 610.) However, based on more recent case law from the European Court of Human Rights, this practice cannot be upheld.

Thus, in our submission to the NCA in the case, we emphasised that following the Strasbourg Court's rulings in *Saunders* and *I.J.L. et al. v. the United Kingdom*, it is incompatible with the privilege against self-incrimination under Article 6 ECHR to use statements from individuals to the NCA as incriminating evidence in later criminal proceedings. In the case, Director A and A1 of Company A had therefore contributed information that had been used in both the administrative and the criminal investigation,

which the NCA likely would not have received, and would not be entitled to obtain, if the protection against self-incrimination had been respected.

In the second place, we also commented briefly upon the prohibition of **"double jeopardy"** ***("nos bis in idem")*** under Article 4 of Protocol No 7 to the ECHR. We emphasised that Director A and A1 in Company A were also owners, with a 33.33 % share each, and that an administrative fine against Company A thus would also amount to a *de facto* "punishment" against the two owners. Criminal and administrative charges against them for the same conduct would therefore, we argued, amount to "double jeopardy".

In *retrospect*, we can only observe that our defence strategy in this case was the right one and successful.

All charges were ultimately dropped in what seemed to be a "clear-cut" cartel case. To the best of our knowledge, the "Moving Companies Cartel Case" is **the first and only cartel case in Norway where a procedural defence of this kind has succeeded. It therefore represents a procedural "landmark" case because we can safely assume that the NCA – going forward – would have to deal very differently, and much more carefully, with evidence gathering in "dual-track" cases before the NCA and the Police**.

This is likely very relevant, given that one objective of Norway's competition policy for years has been for the NCA to make more use of the criminal track in "hardcore" cartel cases. We hope that this case has served as a "wake-up call" for the NCA, and that individuals who may be subject to criminal cartel investigations in future cases will have their fundamental rights under the ECHR fully safeguarded.