

Norwegian Cartel Enforcement 2024

An overview of Norwegian Cartel Enforcement

January 2024



Dear reader,

Looking back on 2023, it is impossible to ignore several landmark judgments and legislative proposals that defined and will continue to define the antitrust landscape in Norway. 2022, in comparison, appeared relatively less eventful, serving as a prelude to the significant developments that unfolded in the following year.

A highlight of 2023 was the landmark decision by the Competition Appeals Tribunal (CAT) in the Book Publishers II case. Carefully examining the facts and evidence at hand, the CAT clearly rejected the Norwegian Competition Authority's (NCA) analysis and understanding of the behavior that led to the initial decision. Moreover, the CAT gave further guidelines as to when information sharing as a stand-alone infringement can be considered a by object infringement. This final and pivotal ruling resulted in the waiver of EUR 48 million in total fines and serves as a testament to the importance of checks and balances in our antitrust system and the role of independent review bodies in upholding the principles of fairness and justice.

The year 2023 also saw a series of pending follow-on damage claims that garnered significant attention within the legal and business communities. In February, the Truck Cartel case witnessed the rejection by the Oslo District Court of a MEUR 41.6 follow-on damage claim by the national incumbent postal operator. The case is currently on appeal. In June, the Supreme Court rejected an opt-out class action damage claim on behalf of more than 400,000 alarm customers following a cartel case involving the two leading Norwegian home alarm companies. The rejection by the Supreme Court was based on fundamental concerns related to the financing model, introducing significant hurdles to third party litigation financing in opt-out cases going forward.

The NCA closed one case related to suspected illegal information exchange without sanctions in 2023 and did not initiate any new investigations in cartel cases. Among the most noteworthy legislative proposals, the Ministry of Trade, Industry and Fisheries issued a hearing suggesting that the NCA is granted powers to impose significant fines or director disqualification on individuals following violations of the Norwegian Competition Act.

This annual report aims to provide an overview of recent developments and the Norwegian cartel enforcement system, offering guidance to practitioners, businesses and stakeholders invested in the antitrust landscape.

Thank you for your attention!



1. Overview of 2023

2. The Norwegian Cartel Enforcement System

3. BAHR - EU & Competition Law

Book Publishers II: The NCA's decision annulled in its entirety – thorough assessment of the facts and law on information exchange



Background

- In **2022**, the NCA found that Norway's four largest publishers and the online industry portal Bokbasen, had illegally exchanged information by uploading **future prices and release dates** to Bokbasen. According to the NCA the practice constituted **a restriction by object**
- On 23 November **2023** the CAT concluded, following a comprehensive review of the available evidence, that the prices disseminated via the industry portal represented **the publishers' current and binding prices**
- **The publishers were completely exonerated. The decision is final**

Important legal clarifications

- The CAT reaffirms that the concept of an object restriction should be **interpreted narrowly**, and that exchange of information should only be deemed an object restriction if the harm to competition follows from **reliable and robust experience**
- To determine whether an **exchange of information** constitutes an object restriction, consideration must be given to the **nature of the information exchanged** and **the way it is exchanged**
 - Case law suggests that sharing of information about future prices, volume and strategies via private channels normally constitutes an object restriction
 - Future prices are prices that are not fixed and binding upon the undertaking – it is the legal and commercial reality that is decisive when assessing the nature of the price, including whether deviating from the price will result in considerable commercial consequences
 - Sharing competitively sensitive information through a private channel can be a violation by object unless the information is equally accessible to the parties and their customers – if shared through a private channel the behavior would not be considered an object restriction if the information is deemed to be genuinely public
 - For publicly shared information to be classified as an object restriction, it would need to pertain to future and non-binding prices that hold no value for customers or consumers
- The NCA did not have the powers to appeal the decision. Following a legislative change effective from July 2023, the NCA may appeal future CAT decisions

Follow-on damage claim related to the truck cartel: insufficient evidence for Posten's alleged economic loss



• **Background: EU Commission truck cartel settlement**

- In 2016, the EU Commission imposed a collective fine of 2.9 billion euros on four truck manufacturers for price coordination, which resulted in a series of follow-on claims throughout Europe
 - These four manufacturers has admitted participation in the cartel, while the case of one manufacturer is currently pending before the EU Court of Justice
- Posten (the incumbent Norwegian postal operator) filed a claim before the District Court arguing that the cartel resulted in Posten being overcharged by the manufacturers

• **Key takeaways from Oslo District Court's ruling of 28 February 2023**

- No presumption of economic loss – economic loss must be assessed on a case-by-case basis where the claimant has the burden of proof
- The court concluded that it was likely that the exchange of price lists indirectly influenced the transaction price to end customers
- However, this was not considered sufficient to prove that the illegal cooperation resulted in Posten being overcharged and thus suffered an economic loss
 - Empirical analysis demonstrating a quantifiable loss for Posten required to prove actual loss
- The court, acting without expert lay judges, expressed difficulties in comprehending the complex analyses provided by the economic experts of the parties – and rejected all of them
- The court rejected reversed burden of proof in cartel infringement cases
 - As long as the EU damages directive (2014/104/EU) is not yet implemented in Norwegian law, the burden of proof remains with the plaintiff

• **The case is pending before the Court of Appeals**

- An appeal was highly anticipated, given the significant doubts expressed by the court

Alarm Case: The Norwegian Supreme Court rejected third-party financing model in opt-out follow-on class action



• **Background: Opt-out class action following NCA and CAT decisions**

- The Norwegian home alarm companies Sector and Verisure were fined MEUR 41 and MEUR 67 respectively for market sharing, following infringement decisions by the NCA in 2019 and the CAT in 2021
- The Alarm Customer Association was established with the exclusive aim of seeking compensation on behalf of more than 400,000 customers via an opt-out structure, meaning that consumers affected by the claim (customers of either company) must actively choose to opt-out if they wish not to be included in the claim
- To fund the legal action, the Association entered into an agreement with a third-party litigation finance firm to the effect that, should the class action prove successful, the finance firm would be compensated through obtaining a cut of the individual payouts to each class action member with priority

• **The Supreme Court's assessment: The financing model is not permissible under the Norwegian Disputes Act**

- The Court concluded that the Disputes Act does not allow for third-party financing in an opt-out class action when it is conditional upon the financing firm receiving compensation through a cut of the total amount awarded
- The key finding was that members of the class could not be held responsible for litigation costs through a foreordained reduction agreed between the Association and the litigation financing firm
- The Court also concluded that the EEA-principle of effectiveness, which stipulates that procedural rules must not render the exercise of EEA rights practically impossible or excessively difficult, does not prevent such interpretation of the law
- Although there may be well founded reasons to allow litigation financing in opt-out class actions, the Court expressed that it is for the legislator to decide whether to facilitate such actions through an amendment of the Disputes Act

• **Although the decision cannot be seen as an outright rejection of any third-party financing of opt-out class actions, structuring third party financing in opt-out class actions is challenging**

- Opt-in class actions is always an alternative, but can be difficult to organize – particularly in cases where the customers are consumers
- The most feasible structure of an opt-out class action damage claim under the current legislation will likely involve non-profit actors and publicly funded organizations, e.g., the Norwegian Consumer Council, as group representative

Legislative updates in 2023

NCA with competence to appeal CAT decisions

- On 1 July 2023 a legislative change entered into force providing the NCA with competence to appeal certain CAT decisions to Gulating Court of Appeal
 - Includes decisions on anticompetitive agreements and abuse of dominance
 - Merger control decisions not covered by the appeal competence
 - Not applicable to decisions appealed to the CAT before 1 July 2023
 - Accordingly, the NCA did not have competence to appeal CAT's decision to overturn the NCA's Book Publishers II decision (slide 5)

Hearing: Suggestions for new sanctions against individuals

- Background: The existing criminal sanctions, including imprisonment and fines, have not demonstrated adequate preventative effects
 - No sanctions imposed on physical persons under the current legislation of 2004
- Report delivered to the Ministry of Trade, Industry and Fisheries recommending administrative sanctions sent on hearing: Fines and director disqualification orders to individuals proposed
 - Potentially severe fines – the maximum fine is not fixed
 - Disqualification order up to five years
 - Negligent act sufficient

Hearing: Proposal for a market investigation tool

- Suggestion: Provide the NCA with flexible powers to adopt behavioral or structural remedies through individual decisions
- Conditions: Existence of circumstances that significantly restrict or are likely to significantly restrict competition contrary to the purpose of the law
 - Balance of probabilities as standard of proof
- The NCA may also adopt temporary remedies if considered necessary
- Conditions for starting a market investigation:
 - Competition is considered restricted or at risk of becoming restricted

All ongoing NCA investigations related to alleged information exchange or increased transparency – will this change following CAT overruling?

Under investigation: S.O. issued

EUR 1.8 billion fine indicated in grocery market

The Grocery case

- Grocery chains' agreement not to hinder competitors accessing each other's stores to collect actual shelf prices
- Practice established by long-running industry standard for comparative advertisement
- The industry standard has been known to the NCA as well as the public

The NCA's preliminary findings in S.O. of December 2020

- Preliminary finding: Grocery chains agreed to give access to stores for extensive information gathering. The chains utilised the gathered information to coordinate prices. Constitutes an infringement by object
- Fines of total **EUR 1.8 billion** indicated in S.O.
- Total fines substantially reduced by the 10% maximum cap of annual turnover
- Decision expected in the beginning of 2024

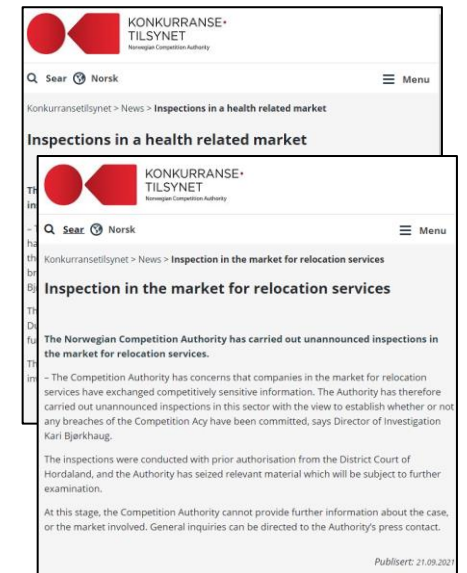
Under investigation: S.O. not issued

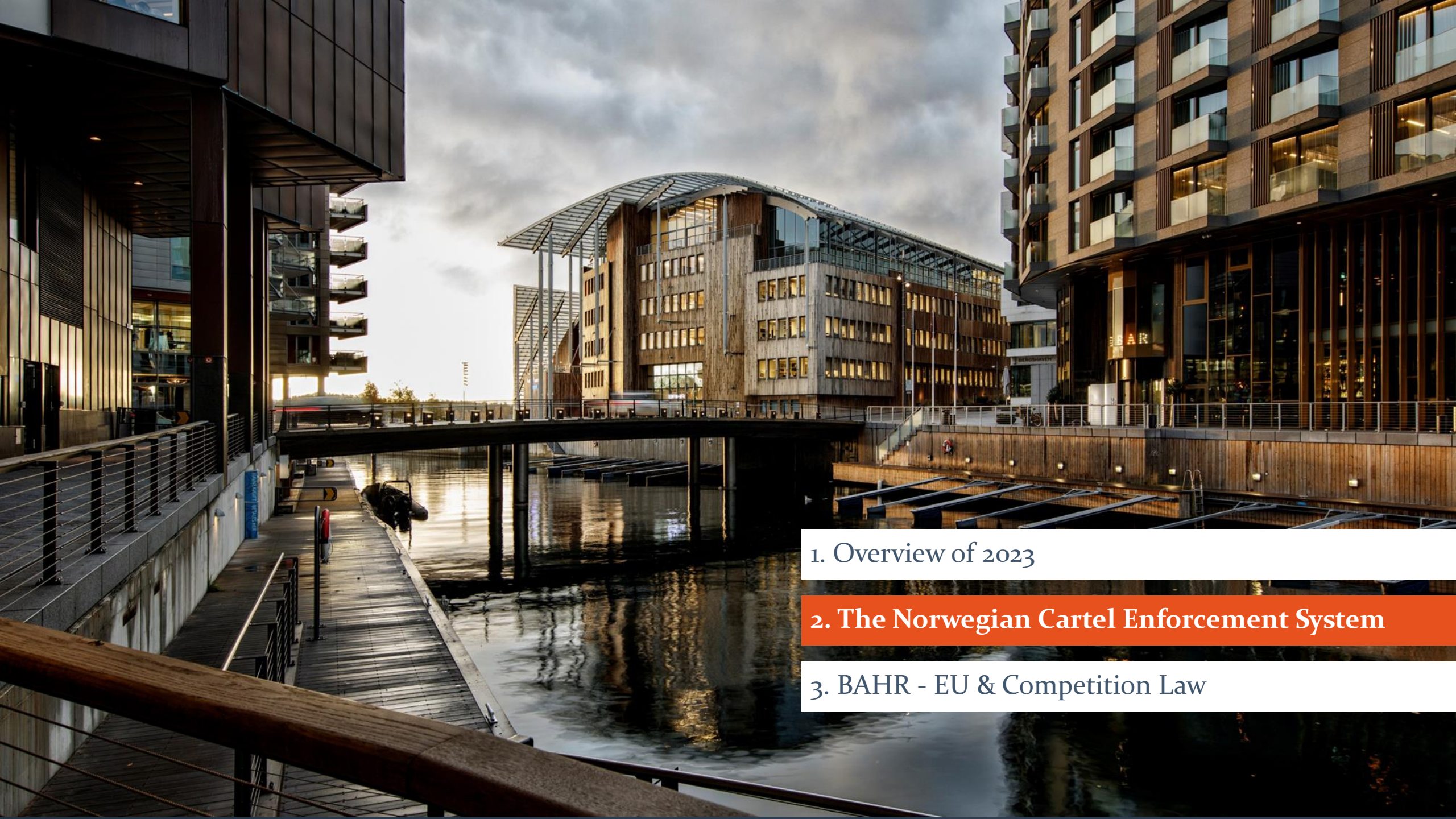
Health related market

- June 2021: Investigation announced
- Suspicion of information exchange

Market for relocation services

- Sep. 2021: Investigation announced
- Suspicion of information exchange



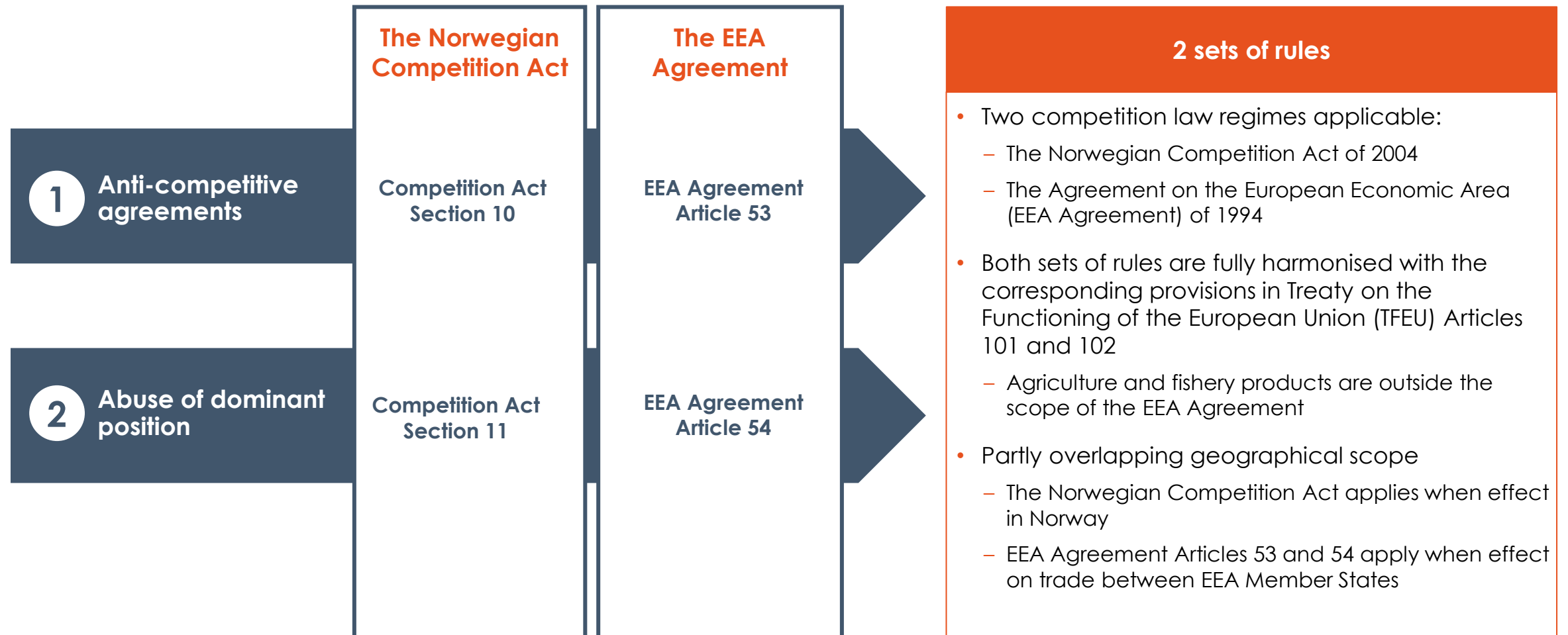


1. Overview of 2023

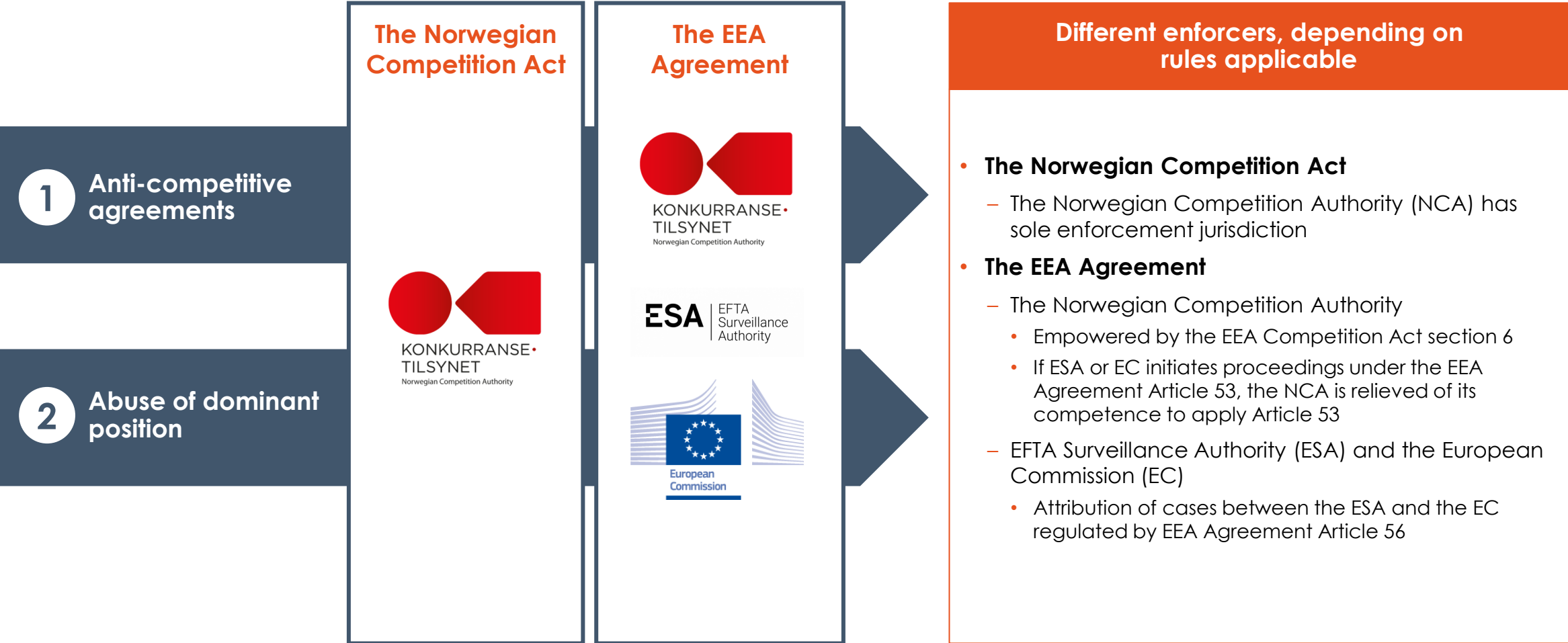
2. The Norwegian Cartel Enforcement System

3. BAHR - EU & Competition Law

Two sets of rules: The Norwegian Competition Act and the competition rules in the EEA Agreement



Norwegian Competition Act: The NCA is the sole enforcer EEA Agreement: Enforcement by the NCA, the ESA and the EU Commission



The NCA has wide powers of investigation

Unannounced inspections (dawn raids)

- At all locations and premises of the undertaking
- At private homes if particular grounds to assume that evidence is kept there
- Inspections require decision by the District Court

Power to take statements

- Statements from any natural or legal persons

Requests for information

- Can be requested from any individual or undertaking
- Non-compliance or providing wrongful or misleading information can be sanctioned

The NCA's Dawn Raid powers are similar – but not identical – to the European Commission's

- General rule: The NCA should take copies of documents. However, originals may be seized if the originals are deemed to have particular value as evidence
 - ESA/EC cannot seize original documents
- The NCA will regularly take copies of electronic material (servers, electronic devices etc.)
 - The parties (or its representatives) have the right to be present when the NCA starts examination of electronic material, to clarify whether the information is protected by legal privilege (LLP)
 - Correspondence with in-house lawyers is considered LPP under Norwegian law, unlike for ESA/EC
- The parties have the right to receive copies of seized documents and electronic data, if there is no risk of harm to the investigation

The EFTA Surveillance Authority's powers to conduct Dawn Raids in Norway

ESA's own investigations in Norway

- ESA has the power to conduct Dawn Raids in its own investigations
 - Pursuant to EEA Competition Act section 3
 - ESA's Dawn Raids powers is identical to the EC's Dawn Raid powers
 - Does not need approval from national court, if the dawn raid is carried out by ESA
 - ESA's decision to carry out a Dawn Raid can be reviewed by the EFTA Court
- ESA shall consult the NCA before conducting a Dawn Raid
 - NCA officials may actively assist ESA, upon request from the NCA or ESA
- If reasonable suspicion exists, ESA also has the power to inspect other premises than the undertaking's
- The NCA can conduct Dawn Raids on behalf of ESA (or another EEA EFTA State)
- In June 2021 ESA conducted a down raid against the electronic retail chain Elkjop
 - Ongoing investigation of both anti-competitive agreements and abuse of dominant position

ESA | EFTA
Surveillance
Authority



ESA's Dawn Raids on behalf of the EC

- The EC can request ESA to conduct inspections in EFTA States in cases where the EC has jurisdiction
 - Pursuant to EEA Agreement Protocol 23 article 8(2) (adopted as regulation in Norway)
 - In accordance with the rules that applies for ESA's Dawn Raids
- The EC is entitled to take an active part in the Dawn Raid
- All information obtained will be transmitted from ESA to the EC
- ESA also has the power to request the EC to conduct Dawn Raids in cases where ESA has jurisdiction

The NCA's toolbox: Several possible outcomes of investigation cases

Cease and desist order

- The NCA may order undertakings to bring illegal agreements to an end
- The order may include any measure necessary, including structural measures

Administrative fines

- Administrative fines up to 10% of the undertaking's total annual turnover
- The NCA follows same calculation method for setting fines as the EC
- Indication of fine in S.O.

Cartel Settlement

- May lead to a reduction of maximum 10% of fine
- S.O. issued first
- Requires admission of guilt (opening for follow-on claims)
- So far not applied by the NCA

Commitment Decisions

- An undertaking under investigation can offer commitments
- No admission of guilt required
- One commitment decision in a § 10 case concerning alleged concerted practice (price signalling)

Criminal sanction for individuals

- Normally initiated by the NCA reporting the individual for prosecution
- The NCA has reported two cases to the public prosecutor's office

Leniency

- May lead to full immunity from administrative fines
- Similar system as in the EU
- Applications to NCA, ESA and EC may be needed if EEA Agreement Article 53 is applicable

The NCA's fines have increased over the last decade

Three highest cartel fines per case:

1 Alarm (2019/2020)	Market sharing Sector Alarm: NCA's fine accepted Verisure: CAT upheld NCA's decision. Not appealed.	MEUR 108
2 Book Publishers II (2022) (overturned by CAT)	Information exchange through third party CAT overturned NCA's decision in 2023 and acquitted the publishers	MEUR 48
3 Asphalt (2013)	Bid rigging NCA: Veidekke MEUR 19.3, NCC MEUR 12.3 Appeals Court: NCC MEUR 13.1 Veidekke granted full immunity	MEUR 32
Grocery (S.O. 2020)	Access to stores/information exchange NorgesGruppen: MEUR 766 REMA 1000: MEUR 645 Coop: MEUR 422	MEUR 1 833

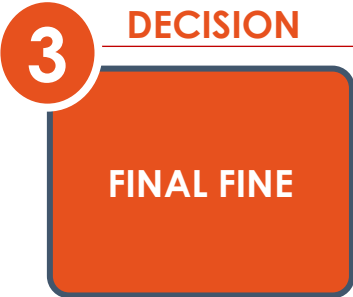
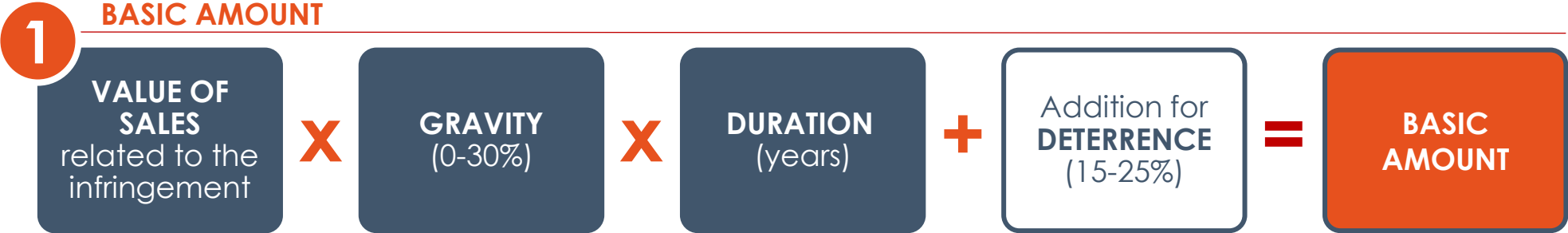
The NCA sanctions information exchange in the same way as naked cartels – will this continue after the CAT overruling?



Information exchange sanctioned as hard as naked cartels: Gravity of infringement 15-19%

- The last decade: Several cases regarding naked cartels, mainly related to bid rigging
- Today: NCA's decisions regarding information exchange indicate that the NCA considers the seriousness of the infringement equally as naked cartels
- The NCA has publicly expressed concerns about price signaling, especially through media
 - The NCA accepted commitments in a case concerning the cooperation between two fuel retailers in setting retail fuel prices, by publishing recommended list prices for retail fuel on their own websites
- Third party facilitator for information sharing has also been fined by the NCA (Book Publishers II)

The NCA applies the EC's guidelines on method of setting fines



The NCA has consistently held the gravity of infringement to be 15-19% regardless of form of conduct

Cartel fines, 2015-2023:

	INFRINGEMENT	VALUE OF SALES (MEUR)	x GRAVITY	x DURATION	+ DETERRENCE	= BASIC AMOUNT	± AGGR./ MITIGATING etc.	MAXIMUM LIMIT (10%)	FINAL FINES (MEUR)
ES-KJEDEN (2015)	Price fixing	3.8	15%	4.5	15%	3.5	- Inability to pay	1.2	0.022
ARRO, CAVERION (2015)	Bid Rigging	1.3	19%	[1]*	19%	0.5	+ High turnover - Partial leniency	N/A	0.5
NORVA, LINDUM (2016)	Bid Rigging	2.5	17%	[1]*	17%	0.6		N/A	0.6
BOOK PUBLISHERS I (2017)	Collective Boycott	8.9	19%	0.5	19%	2.9	+ High turnover	N/A	2.7
EL-PROFFEN et al. (2017)	Bid Rigging	10.5	15%	[1]*	15%	2.5		Met for 3 parties	1.6
ALARM (2019/21)	Market Sharing	113.4	16%	6 / 5.8	16%	143.5		Met for Sector Alarm	108
BOOK PUBLISHERS II (2022) (overturned by CAT)	Information Exchange	135.6	16%	8/5	16%	185.4		Met for all parties	47.7

* In individual bid rigging cases – the value of the tender has been used as basis

Cartel settlements and commitment decisions

Cartel settlements

- Reduction of fine – maximum 10% reduction
 - Will normally require an S.O.
 - The system modelled after the EU/EEA
- No cartel settlements since introduction in 2016
- In order to enter into a cartel settlement procedure, the NCA must find the case suitable and will invite to settlement discussions
 - The NCA must present i) the case and the evidence in its possession, ii) its preliminary assessment and iii) the estimated amount of the administrative fine to be issued
- Settlement requires the undertaking to admit the infringement
 - If the undertaking refrains from settlement, the investigation will continue as if settlement proceedings were not initiated
 - Documents relating to the settlement negotiations cannot be used as evidence

Commitments

- The NCA may accept commitments offered by undertakings under investigation
 - The NCA will adopt a decision making the commitments binding upon the undertaking
 - The decision can be reached before the NCA has made a full assessment of whether the requirements for the finding of an infringement are fulfilled
- Commitments require no admittance of the infringement
- One commitment decision under the prohibition against anti-competitive agreements/concerted practices so far:
 - Circle K and YX Norge AS (2020): Price signalling through publication of list prices for retail fuel on internet

Criminal sanctions for individuals: Imprisonment for up to 6 years



- Criminal sanctions for infringement of the Norwegian Competition Act Section 10 (Anticompetitive agreements)
 - Criminal sanctions also for procedural infringement, e.g. failing to comply with information requests or inspections at premises or in homes
- Imprisonment for up to **six years** for anticompetitive agreements with severely aggravating circumstances
- 2004-2023: The NCA has reported two cases to the public prosecutor's office. This has however not resulted in a criminal charge related to infringement of the Norwegian Competition Act Section 10
- Long history of criminal sanctions in Norway
 - Criminal sanctions (imprisonment and fines) for individuals in Norway since 1960
 - From 1986-2004: 41 cases were reported to public prosecutor
 - Fines issued in 23 of the cases; no imprisonment
- Currently being evaluated: New proposal on administrative sanctions, including fines and disqualification orders

Leniency

Norwegian Competition Act: Undertakings

- Similar (but not identical) procedure as in the EU
- The NCA administers and enforces the leniency system in Norway
- Full leniency is granted to the first applicant that submits sufficient evidence of possible infringement and cooperates with the NCA in the investigation
- The undertaking may apply for a leniency marker to ensure a 'place in line' while gathering evidence
- S.O. reveals the identity of the leniency applicant

Norwegian Competition Act: Individuals

- Personal criminal liability
- Individuals are not formally protected by the undertaking's immunity
- From July 2022, reports from the NCA to the public prosecutor's office are no longer a condition for criminal charges
 - The public prosecutor may initiate prosecutions independently
 - However, it remains probable that most prosecutions for violations of the Competition Act will be initiated after a report from the NCA
 - The NCA will normally not report individuals who disclose unlawful cooperations and fully cooperate with the NCA during their case handling

EEA Competition rules: No one-stop shop

- When EEA Agreement Article 53 applies, leniency applications to NCA, ESA and EC may be required
 - Especially relevant if jurisdiction between the enforcers is not yet clarified

Follow-on damage claims: Several procedural questions decided by the courts during the last years

Norwegian tort law

- EU damages directive (2014/104/EU) not incorporated into the EEA Agreement
- National tort law applies:
 1. Economic loss required – damages normally limited to direct loss; no presumption of harm
 2. Basis of liability – intention or negligence
 3. Causal link between the economic loss and the basis for liability
 4. Cartel members jointly and severally liability for damages
- Specific regulation of limitation period in the Norwegian Competition Act
 - 1 year after final decision or judgment
 - Supplements the Limitation Act

Damage Claims: Procedural questions

Foreign defendants can be held liable in Norwegian Courts

- Norwegian Supreme Court in Posten v Truck Cartel
 - Only Volvo Norge AS had domicile in Norway. The others were domiciled in other countries, however all countries are parties to the Lugano Convention
 - The foreign defendants held that the Lugano Convention art. 6 nr. 1 was not fulfilled
 - The Norwegian Supreme Court decided that the cases were sufficiently “closely connected” and allowed the case to be decided by the Norwegian courts

Plaintiffs have the right to get access to the S.O.

- Appeals Court decided in 2020 in Posten v Truck Cartel that the defendants are obliged to disclose the EC’s S.O.


Opt-out class action damage claims (a claim representing all end-users unless they actively withdraw) cannot be financed by third-parties in exchange of a share of the total compensation awarded

- Norwegian Supreme Court decision in relation to alarm customer organisation’s claim against the two alarm companies Sector Alarm and Verisure following cartel decision from the NCA and CAT
- The Supreme Court’s decision puts restrictions on the financial structuring of opt-out damage claims

Review of the NCA's decisions

Scope of review determined by the Appeals Committee of the Supreme Court

The Norwegian Supreme Court
 | NORGES HØYESTERETT

Referrals to the EFTA Court


Full review of all aspects of the case

Gulating Appeals Court
 GULATING LAGMANNSRETT

The Competition Appeal Tribunal (CAT)

Konkurransklagenemnda

The Norwegian Competition Authority
 KONKURRANSE-TILSYNET
Norwegian Competition Authority



1. Overview of 2023

2. The Norwegian Cartel Enforcement System

3. BAHR - EU & Competition Law

BAHR – your trusted antitrust advisor throughout the entire process

Compliance



We ensure compliance in accordance with your business needs

- We ensure that conduct and agreements are compliant with the competition rules, hereunder compliant information sharing
- We provide compliance sessions, including mock dawn raids, and dawn raid / compliance manuals – off the rack or tailor made for your business

Investigation



We are experienced in handling all aspects of on-going investigations

- Dawn raids
- Leniency applications
 - Before the NCA, ESA and the EC
- Dialogue and submissions with enforcers
- Handling of extensive requests for information
- Cartel settlements and commitments decisions

Review



In close cooperation with our litigation department, BAHR Competition Litigation Team helps you with review processes

- We handle review cases before the CAT and Norwegian Courts, full-service with antitrust, litigation and in-house economic resources
- We are experienced working closely with external economic expertise

Follow-on litigation



In close cooperation with our litigation department, BAHR Competition Litigation Team helps you with your damage claims

- We handle follow-on damage claims before Norwegian Courts, full-service with antitrust, litigation and in-house economic resources
- We are experienced working closely with external economic expertise



BAHR is widely regarded as a leading competition law team, particularly in the field of merger clearance, where the firm offers notable experience advising private equity clients. The team also has a strong behavioral practice, assisting clients with abuse of dominance investigations and market inquiries. Team members offer additional experience in state aid matters and public procurement disputes. BAHR's prestigious clientele stems from a range of sectors, including energy and retail, as well as state-owned companies.

Chambers Europe 2023

The EU & Competition Law Team outside BAHR's Oslo offices

BAHR's EU & Competition team: Consistent top Tier rankings

			
2023	Band 1	Tier 1	Elite
2022	Band 1	Tier 1	Elite
2021	Band 1	Tier 1	Elite
2020	Band 1	Tier 1	Elite
2019	Band 1	Tier 1	Elite

- **Helge Stemshaug** is ranked Band 1 and Beret Sundet Band 2 in Competition / Antitrust by Chambers Europe 2023
- **Helge Stemshaug** and **Beret Sundet** named as *Thought Leader 2023* by Who's Who Legal – Competition
- **Beret Sundet** ranked in "*Hall of Fame*" by Legal500 – EU and Competition

Contact details



**Helge
Stemshaug**

Partner

T +47 928 81 396

E hst@bahr.no

"As one of Norway's top experts Helge Stemshaug is well placed to handle a variety of competition law mandates ranging from merger control to large-scale cartel investigations."

Chambers Europe



**Beret
Sundet**

Partner

T +47 928 81 385

E bsu@bahr.no

"Beret Sundet is an excellent competition lawyer. She is distinctly solution-oriented and provides concise and practical advice. She is also service-minded."

Legal 500



**Arne Torsten
Andersen**

Partner

T +47 971 47 338

E ata@bahr.no

"He is a good strategic adviser and is capable of considering the client's legal position and is good at understanding the client's needs."

Chambers Europe



**Elin
Moen**

Partner

T +47 415 26 541

E emo@bahr.no

Elin Moen returned to BAHR in August 2023 following 8 years as Senior IP and Competition Counsel with OSE-listed international media group Schibsted. Elin has also served as a member of the Norwegian Competition Appeals Tribunal, as well as deputy judge at district court level.

BAHR

bahr.no