

# BECCLE

BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS

## NEWSLETTER WINTER 2012

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### *Our first newsletter!*

This is the first Newsletter from BECCLE. The goal is to inform about activities at the center, such as seminars, conferences and research, and to offer some shorter notes on specific competition policy issues.

Topics in this newsletter issue:

- *Seminars this semester*
- *Report from a merger control conference*
- *Topics in master theses and research*
- *Two short policy notes*
- *Publications*

### News

Tommy Staahl Gabrielsen, director at BECCLE, is a member of the committee appointed by the government that will evaluate the need for a [new law for code of conduct in the grocery sector](#). Tina Søreide, Faculty of Law at University of Bergen and Erling Hjelmeng (leader) at University of Oslo are also in the committee and affiliated with BECCLE.

Kurt R. Brekke has been appointed by the government as a member of [the committee on the national regulation of public procurements](#).

Simen Aardal Ulsaker, a University of Bergen student with an office at BECCLE, won The Norwegian Competition Authority's prize for the best master thesis in competition economics with ['Konkurranseanalyser i oppstrømsmarkeder'](#).

BECCLE has won a tender for a project on buyer power (organized with SNF). The report will be submitted to the Ministry of Government Administration, Reform and Church Affairs, and will work in collaboration with above committee.

May 13-14 BECCLE will host the annual conference of [CLEEN](#) (Competition Law and Economics European Network), a network consisting of nine institutions. Professor Carl Shapiro from University of Berkeley will be the keynote speaker.

BECCLE took part in one of the workshops under the opening of Peder Sather Center for Advanced study at University of California, Berkeley. The topic merger screening was discussed by [Carl Shapiro](#) from University of Berkeley and [Lars Sørgard](#) from BECCLE/NHH.

### Past seminars – Fall 2012

13.08: *Debashis Pal, University of Cincinnati: ["On the Merits of Endogenous Access Pricing"](#)*

29.08: *Ronny Gjendemsjø, University of Bergen and BECCLE: ["The EFTA court's judgment in the Posten case"](#)*

12.09: *Erling Hjelmeng, University of Oslo and Øystein Foros, NHH: ["Meldeplikt eller ikke meldeplikt - Norgesgruppen og ICA-Maxi"](#)*

10.10: *[Asbjørn Englund \(Oslo Economics\)](#), [Roar Gjelsvik og Even Tukun \(Konkurransetilsynet\)](#) og [Helge Thorbjørnsen \(NHH\)](#): 'A-pressens oppkjøp av Edda Media: Beregning av diversjonsrater'*

17.10: *Lars Henriksson, Stockholm School of Economics: ["Countervailing buyer power in EU antitrust analysis"](#). [Comments](#) by Tommy Staahl Gabrielsen, Uni. of Bergen.*

30.10: *[Nils-Henrik M. von der Fehr, University of Oslo](#), [Lars Sørgard, NHH](#) and [Frode Steen, NHH](#): *Loyalty programs in the airline industry in Norway.**

06.11: *Professor Christian Schultz, University of Copenhagen: ["Sale of virtual capacity as a merger remedy"](#)*

12.11: *Adina Claiçi, European Commission, DG Competition – Chief Economist Team: ["Anti-competitive exclusionary conduct in EU antitrust practice."](#)*



*Tommy S. Gabrielsen (BECCLE), Adina Claiçi (DG COMP) and Christine B. Meyer (Norwegian Competition Authority) at the BECCLE seminar November 12.*

12.12: *[Linda Orvedal, Norwegian Competition Authority](#) and [Lars Sørgard, Norwegian School of Economics](#) and BECCLE: 'Welfare standard in antitrust'*

## Merger control conference

BECCLE and SNF (through a project for the Norwegian research council) arranged a conference on merger control at NHH November 30.



*Professor Frank Verboven, Katholic University of Leuven*

The conference started with a lecture by Daniel Rubinfeld from University of Berkeley on challenges in merger control seen from a US perspective. It was followed by a session on theory of mergers with presentations by Patrick Rey (University of Toulouse) on vertical mergers, Bjørn Olav Johansen (University of Bergen and BECCLE) on upstream merger and downstream buyer power and Andreea Cosnita-Langlais (University of Paris X) on ex ante versus ex post merger control.



There was also a session on ex post merger evaluation, with presentations from Frank Verboven (University of K.U. Leuven) on the Swedish painkiller market and Patrick Friberg (Stockholm School of Economics) on the Swedish beer market, and finally Richard Gilbert (University of Berkeley) on a merger in an auction market (US cattle market). You find the program and all the presentations [here](#).

## Master theses – some topics

**Linn Bratberg** provides an overview over [remedies](#) used in merger decisions in Norway, and she points to some specific merger cases where it seems as if remedies have not had the intended effect.

**Bjarne Bjørkevåg Sunde** has analyzed the pricing strategy of firms selling [electricity to end-users](#), and shows how they are able to sell electricity at a high price to some end-users (practicing price discrimination). He finds for example that firms, such as Fjordkraft with ‘Strøm til Innkjøpspris’, are offering expensive spot contracts with contractual terms so that they are not reported on Norwegian Competition Authority’s ‘Kraftprisoversikten’.

**Simen Aardal Ulsaker** has analyzed [a merger between upstream firms](#), for example between producers selling to retailers. He explains why the competitive effect of such a merger can be distinctly different from the well known effects of a traditional horizontal merger.

**Teis Lunde Lømo** analyses [contract negotiations in vertical distribution networks](#) under different assumptions of market structure, distribution of bargaining power and contract structure. He shows that if the parties are unable to negotiate over fixed fees in wholesale contracts between producers and retailers this may induce higher prices for the consumers.

**Maja Ahrens Niedersøe** conducts an experimental study of [price formation in the market for gasoline](#). She shows that the observed weekly price cycles that is observed on the Norwegian gasoline market can be reproduced in a controlled experiment. Moreover, she shows that the price cycles are stronger in more competitive markets, and that the cycles do not rely on direct or indirect communication between the oil companies.

In several theses master students report results from surveys and discuss how these results can be used to estimate diversion ratios and to delineate the relevant market:

- [Groceries](#) (Nina Halleraker and Grethe Wiig)
- [Bus transport](#) (Rolf Sindre Ulfstein)
- [Sport retailers](#) (Therese E. Thorhallsson)
- [Health products](#) (Inger Lin Gleditsch)
- [Book retailers](#) (Kristine Baisgård)

## Some research topics

**Lars Mathiesen, Jostein Skaar and Lars Sjørgard** discuss whether the producers of electricity in the Norwegian hydropower market have incentives to sell a large quantity during summer to create shortage and high [electricity prices](#) the following winter. They find that market power may lead to the opposite, lower prices during winter. To detect the effects

of market power in such a market we need more knowledge about price elasticities of demand for various seasons (summer versus winter).

**Øystein Foros, Hans Jarle Kind and Greg Shaffer** analyze the possible anticompetitive effects of [partial ownership](#) with control. They found that such an ownership can be more profitable and more anticompetitive than 100 % ownership. They apply their findings to explain price differences between Norway and Sweden in the pay-TV market.

**Tommy Staahl Gabrielsen, Erling Hjelmeng and Lars Sjørgard** discuss the potential for intervention towards [minority share ownership](#) and interlocking directorships under the current provisions in the Treaty on the Functioning of the European Union. They argue that there is a potential more intervention against the acquisition of minority shareholdings as well as the creation of interlocks than so far in the case law of the court of justice.



Illustration: [www.colourbox.com](http://www.colourbox.com)

**Øystein Foros and Frode Steen** analyze the [price formation in the Norwegian gasoline market](#), where prices increase sharply every Monday at 11 am and decrease gradually during the rest of the week. They find that four big gasoline companies use an industry wide adopted vertical restraint (labeled price support) that moves price control from the hands of the independent retailers into the hands of the headquarters.

**Birthe Eriksen and Tina Søreide** discuss the design of a leniency program for antitrust violations. They argue that it is important to take into consideration the relationship between [corruption and price fixing](#) when designing such a program.

**Kurt Brekke, Luici Siciliani and Odd Rune Straume** analyze [how competition in the hospital market may affect quality when prices are regulated](#). In contrast to received literature they find that the relationship is ambiguous. If hospitals care only about profits, competition would yield higher quality. However, if hospitals also care about the patients' utility (altruistic), competition may yield lower quality, which may explain the mixed empirical results.

**Ronny Gjendemsjø, Faculty of Law at University of Bergen and BECCLE**

## Policy note: Post-i-butikk

On 18 April 2012 the EFTA Court's judgment in Case E-15/10, [Posten Norge AS v ESA](#) was pronounced. ESA had fined Posten Norge (Posten) EUR 12.89 million for an abuse of a dominant position in the market for parcel delivery services ([case No. 34250 Norway Post/Privpak](#)). The Court upheld the decision after reducing the fine to EUR 11.11 million.

Posten rolled out its Post in Shop (PiS) concept in year 2000. One part of the concept was delivery of packages from distance selling companies to consumers in a post office or a retail outlet. Posten entered into agreements with three of the leading grocery chains in Norway; Norgesgruppen/Shell, COOP and ICA. Norgesgruppen/Shell was given a preferred partner status in return for an exclusive access for Posten to all outlets in their retail network and a non-compete obligation for Norgesgruppen in the delivery of parcels market. The agreement with COOP and ICA secured Posten exclusivity in all outlets in which a PiS was established. According to ESA these exclusivity agreements amounted to an abuse. ESA also found that Postens renegotiation process created disincentives for the grocery chains to supply the competitors of Posten for the 2 years which this process lasted, and therefore amounted to an abuse.

The main question before the Court was whether Postens conduct was an abuse. Neither the question of dominance nor the market definition was part of the appeal.<sup>1</sup> The relevant market was over the counter delivery of packages from distance selling companies to consumers.

The Court's assessment of the exclusivity agreement was very much in line with the case law of the EU courts. The deciding factor was if the agreements foreclosed a substantial part of the distribution channels for over the counter delivery of packages. Posten foreclosed 50% of the distribution channel by its agreements. The Court leaned on ECJs judgment in Case C-549/10 *Tomra* when deciding that a foreclosure of such a degree was sufficient for there to be an abuse (para 160 and 161). The Court also referred to ECJs statement in *Tomra* that competitors should be able to compete on the merits for the entire market and not only a part of the market.

A significant part of the judgment was the question of which kind of outlets that should be considered to make up the relevant distribution channel. Here the Court agreed with ESAs finding, which was that an agreement with one of the leading grocery store, kiosk or petrol station chains was of significant importance to new entrants (para 145-162). These types of outlets had big advantages for a package delivery concept since they were both more efficient and more

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<sup>1</sup> Apart from the question of abuse, the applicant also argued, unsuccessfully, that ESAs decision had to be annulled due to an error in law regarding the burden of proof.

competitive than other types of outlets (para 152-157). It was 50% of this kind of outlets that was foreclosed by Postens exclusivity agreements.



Illustration: [www.colourbox.com](http://www.colourbox.com)

Posten argued that the lack of actual effects showed that the agreements could not be regarded as an abuse. After stating that there is no need to prove actual effects (para 189), the Courts response was that lack of actual effects in some cases may cast doubts on a finding that a certain conduct is not liable to restrict competition, but Posten had not presented convincing arguments for such a doubt in this particular case (se para 192-197).

While the assessment of the exclusivity agreements is straight forward, an interesting part of the case is the finding of Postens renegotiation process as an abuse (para 176-180). During the renegotiations Posten held the status as preferred partner open. This was not an abuse itself, as it was a normal negotiation strategy, but the fact that its partners knew they had to give Posten exclusivity in the entire chain to achieve this status, reduced their incentives to cooperate with Postens competitors. As the negotiations lasted for around 2 years this was not an insignificant effect. The judgment is not entirely clear on whether such negotiations can be an abuse if there are no pre-existing exclusivity agreements between the undertakings.

The Court's general remarks on the concept of abuse are well known statements used by the ECJ and the General Court in many judgments. Though the way the requirement of effect is formulated deserve some comments. Not surprisingly it is stated that there is no requirement of an actual effect. What kind of effect that is required is formulated in many different ways. In para 129 The Court stated that it must ascertain whether the conduct is "*intended to restrict or foreclose competition (...) or are capable of doing so*". In para 131 it is stated that it is sufficient that "the conduct in question was *liable to distort competition*". In para 187 the Court states that it is sufficient "that the applicants' practices *tended to restrict competition*". It is hardly controversial to say that *intended to, tended to, capable of* and *liable to* does not have the exact same meaning. The judgment does in this sense not contribute to any clarification regarding to what degree it must be proven that the conduct will affect competition.

The judgment did not contain many surprises and it is in line with the EU-courts quite formalistic, as opposed to effects

based, test for exclusivity agreements. The main question was if Posten through its agreements foreclosed a substantial part of the distribution channel for over the counter delivery of parcels. When that was the case the agreements amounted to an abuse. Posten also failed to argue that the exclusivity was objectively justified (para 199-242).

Posten did however succeed in achieving a reduction of the fine, mainly because ESA needed 86 months to reach its decision.

Lars Sörgard<sup>2</sup>, Norwegian School of Economics and BECCLE

## Policy note: Kystbussen

Kystbussen is an express coach service between Bergen and Stavanger, and it is jointly run by the Boreal Transport Sør and Tide Buss. In May 2007 the Norwegian Competition Authority (KT) found that the cooperation between the two companies was a violation of Section 10 in Konkurranseloven (identical to Article 101 of TFEU), and decided that it had to be terminated (decision [V2007-9](#)). Kystbussen appealed to the Ministry of Government Administration, Reform and Church Affairs (FAD), and May 4 2012 FAD [reversed](#) KT's decision.

KT found that it was not a violation by object, partly because they were encouraged by public authorities to jointly establish such a service in the early 90s, and the decision was based on an effects-based approach. There were no other express coach services on the same route. KT found it likely that if the cooperation had been terminated then the company leaving Kystbussen would establish its own route. Furthermore, they concluded that at least one of the four requirements for an efficiency defense according to Section 10 (3) was not met.

Kystbussen appealed the decision in June 2007 to FAD. In December 2007 FAD informed the parties that its decision was postponed, because it planned to propose an exemption from Section 10 in the competition law for express coach service in Norway. A public hearing was started in June 2008, but the proposal was never implemented by FAD. The case handling was further delayed, because ESA had a dawn raid at Norway Bussekspress in summer 2008. In November 2009 ESA closed its case, and in May 2010 the parties were informed that the appeal case was reopened. In September 2010 FAD asked the parties to provide further documentation concerning the efficiency defense, but the parties did not provide any further documentation. FAD then asked Oslo Economics to analyze any possible efficiency gains, and they delivered their report in September 2011. In December 2011 a new express coach company entered the route (Bus4You by Nettbuss). In May 2012 FAD concluded that Kystbussen violated Section 10, but that due to efficiency gains that were

<sup>2</sup> I was the chief economist at KT in 2007 when their decision was made.

passed on to consumers it qualified for an exemption according to Section 10 (3).

The proposal to exempt express coach service from Section 10 and the decision to order a report on efficiencies from an external consultancy both delayed the final decision. The delays made it possible for Kystbussen to be the only express coach service on this route for four and a half year after the decision.

It is the parties that have the burden to prove that the four requirements for an efficiency defense are met. It is therefore a surprise that FAD asked an external consultancy firm to document efficiency gains, after the parties had not responded to a request for more documentation of efficiency gains.

It is also a surprise how FAD discussed the Section 10 (3) requirements, and in particular how they found that consumers received a fair share. They argued that Kystbussen led to efficiency gains, and in their view the most important one is that cooperation would imply that no buses would return empty (elimination of ‘tomkjøring’ – empty return). However, it is not obvious that all these gains are indispensable. There are examples from other express coach routes in Norway on how they organize traffic in an efficient way even if they do not have own local traffic along the whole route. In that respect the efficiency gains could to a large degree be achieved even without Kystbussen.



Illustration: [www.colourbox.com](http://www.colourbox.com)

FAD does not explain why consumers are expected to receive a fair share of the efficiency gains, if any. Why should for example elimination of ‘tomkjøring’, with a given number of scheduled buses, encourage Kystbussen to set lower prices? Why not have the same margin, and in addition save costs with Kystbussen by eliminating ‘tomkjøring’? The cooperation might affect the total number of buses, but typically we expect dampened competition by a reduction from three to two firms to lead to lower total supply and thereby higher – not lower – prices. One important question is then whether the reductions are on marginal costs, which would lead to a downward price pressure, rather than fixed costs. If saving of marginal costs, are they so large that it outweighs the upward pricing pressure from a change from three to two rivals in the market? FAD’s appeal decision is silent on this point, except that it simply assumes that the efficiency gains will benefit the consumers.

It is of interest to compare this with the analysis of efficiency gains in merger control. FAD are in those cases skeptical to the realization of any efficiency gains, arguing that a merger that leads to more market power often leads to more waste of resources (slack). A merger from three to two would typically be regarded as one with a large potential for an anticompetitive effect. If they had applied the same line of reasoning in this case, they would argue that Kystbussen’s potential for efficiency gains would lead to waste. If no net gains there would be no chance for the consumers to benefit from this. For example, the elimination of ‘tomkjøring’ would not lead to lower costs but more waste, and no potential for consumer benefits since there would be no gains to share.

The cooperation leads to a reduction in operators from three to two (and until December 2011 from two to one), and according to FAD to ‘*some anticompetitive effects*’. In light of this, it is hard to see how one can conclude that efficiency gains, which partly are savings of fixed costs and partly could be realized even without cooperation, is enough to reverse the upward pricing pressure from the cooperation as such. One explanation could be that the final conclusion, and therefore the arguments on the way and the case handling as such, was heavily influenced by political constraints. In contrast to merger cases, we do not know when the decision in such a case is political and when it is based on competition law.

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## Publications

### Articles

L. Mathiesen, Ø.A. Nilsen and L. Sjørgard: [‘A note on upward pricing pressure: The possibility of false positives’](#), *Journal of Competition Law and Economics*, 2012, 8(4), 881-7.

K.R. Brekke, R. Cellini, L. Siciliani, O.R. Straume: [‘Competition in regulated markets with sluggish beliefs about quality’](#), *Journal of Economics & Management Strategy*, 21, 131-178, 2012.

S. P. Anderson, Ø. Foros, H. J. Kind and M. Peitz: [‘Media market concentration, advertising levels, and ad prices’](#), *International Journal of Industrial Organization*, 2012, 30(3), 321-5.

Ø. Foros and F. Steen: [‘Vertical Control and Price Cycles in Gasoline Retailing’](#), *Scandinavian Journal of Economics*, forthcoming.

L. Mathiesen, J. Skaar and L. Sjørgard: [‘Electricity production in a hydro system with a reservoir constraint’](#), *Scandinavian Journal of Economics*, forthcoming.

B. Eriksen and T. Søreide (2012): [Lempning for kartellvirksomhet og korrupsjon](#). *Tidsskrift for strafferett*. This material was first published by Gyldendal in [‘Tidsskrift for](#)

[strafferett](#) and is reproduced by agreement with the publishers.

K.R. Brekke, R. Cellini, L. Siciliani, O.R. Straume: [“Quality competition with profit constraint”](#), *Journal of Economic Behaviour & Organization*, 84, 642-659, 2012.

## Master theses

Astrid Boge: [“Compliance program i forbindelse med kartellbekjempelse”](#), NHH, June 2012.

Lene Hole Didriksen: [“Lokkevarer i dagligvaremarkedet – konkurransevirksomheter”](#), NHH, June 2012.

Elise Sandanger: [“Horisontal konkurranse i dagligvaremarkedet. Bruken av egne merkevarer i konkurransen mellom norske dagligvarekjeder”](#), NHH, June 2012.

Jørgen Roberg Andersen: [“Effekten av fastpris på bøker”](#), NHH, June 2012.

Marita Venøy og Lene Strønen Rørvik: [“Incentivsystemer for Konkurransetilsynet. Hvordan bør en optimal incentivkontrakt utformes?”](#), NHH, June 2012.

Simen Aardal Ulsaker: [“Konkurranseanalyser i oppstrømsmarkeder”](#). Department of Economics, University of Bergen, June 2012.

Kathrine Tvedt Lavik: [“Prosjektsamarbeid i tilbudskonkurransar”](#). Department of Economics, University of Bergen, June 2012.

Maja Ahrens Niedersøe: [“Priszykler i bensinmarkedet – en eksperimentell studie”](#). Department of Economics, University of Bergen, June 2012.

## Policy reports

L. Sjørgard: [“Merger screening in markets with differentiated products”](#), chapter in A. Fredenberg (ed.): *More Pros and Cons of Merger Control*, Swedish Competition Authority, Stockholm, November 2012.

E. Hjelmeng: [“HR-2012-1942-A Staten v/Konkurransetilsynet v Gran & Ekran AS”](#)

T. Sjøreide: [“Risks of Corruption and Collusion in the Awarding of Concession Contracts”](#). EU DG for internal policies.

E, Hjelmeng og L. Sjørgard: [“En mer effektiv konkurranselov”](#), *Samfunnsøkonomen* 7/2012, oktober 2012.

L. Sjørgard: [“Måling og prioriteringer i konkurransepolitikken”](#), SNF Arbeidsnotat A21, 2012.

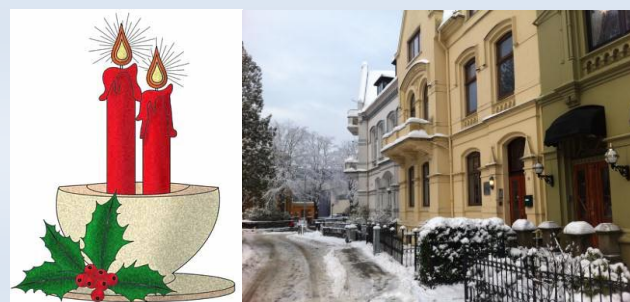
## BECCLE

Bergen Center for Competition Law and Economics (BECCLE) was [established](#) in 2011, and it is a center jointly owned by Norwegian School of Economics and the University of Bergen.

BECCLE is a meeting place for economists and lawyers interested in competition policy questions. The center is located in Parkveien 20. At present there are persons with positions at other institutions such as [Norwegian School of Economics](#) (NHH), [University of Bergen](#) (UiB), [University of Oslo](#) (UiO), [Institute for Research in Economics and Business Administration](#) (SNF), [Norwegian Competition Authority](#) (KT) and [Chr. Michelsen Institute](#) (CMI) that are affiliated with BECCLE.

In 2012 BECCLE joined a European network of research institutions with a similar focus: [CLEEN](#) (Competition Law and Economics European Network).

BECCLE will publish a newsletter 3-4 times a year. Next Newsletter will be published late Spring 2012.



Outside BECCLE's office at Parkveien 20

**We wish you all a Merry Christmas  
and a Happy New Year!**