



KVALE

New market investigation tool:
A business perspective

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Agenda

1. Do we need a new competition tool: Current legislation not sufficient?
2. Fundamental rights and principles of law have to be ensured during all phases
3. Remedies
4. Pros and cons seen from a business perspective: High level

Why is current legislation not sufficient? (1/2)



- Information gathering
 - The Competition Act already contains far-reaching competence to gather information
 - Section 24: *Anyone* must provide the competition authorities with the information these authorities require to *perform their responsibilities under the Act*
 - Section 9: The Competition Authority shall *supervise competition in the various markets*, among other things by: [...]
- Market analysis: Question of resources (not insufficient regulation)
- NCA already has extensive powers to ensure efficient competition
 - May sanction and order end to infringements
 - May order interim decisions
 - May recommend new regulations (*forskrifter*) to promote competition (section 14)
 - May question anti-competitive effects of public measures

Why is current legislation not sufficient? (2/2)



- NCA: More flexible and efficient than adopting a regulation
 - Cf. para 8 of NCA memo to NFD
- Correct?
 - Not necessarily quicker/more efficient: UK procedures often take several years
 - New regulation (section 14) requires 6 weeks hearing
 - Why is it more flexible than adopting regulation under section 14?
- Market analysis have already been conducted in many markets
 - Groceries, digital markets, taxi and more
- What NCA in fact asks for: **Power to impose remedies, i.e. intervene against legal behaviour**
 - Other elements related to a market investigation already possible to conduct with current legislation



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Fundamental rights and principles of law have to be ensured



- The NCA is asking for far-reaching and very invasive competence
 - To intervene against *legally compliant behavior*
 - Within all sectors?
 - Normal procedure if a need to prohibit/regulate currently legal behavior is to amend current legislation/adopt new regulations
- Far-reaching competences require high focus on fundamental rights and principles of law
 - NCA has underlined that companies' right to legal certainty and predictability as well as principle of proportionality need to be ensured (para 9 of memo to NFD)
 - Only statements and no analysis so far
 - May influence on the effectiveness of a new competition tool
- Fundamental rights and principles of law that need to be addressed include
 - Protection against self-incrimination
 - Predictability
 - Proportionality
 - Transparency and access to file/information
 - Right to be heard
 - Appeal possibilities

Protection against self-incrimination

- New Competition Tool: Purpose to intervene against future behavior
 - Not to sanction infringement/past illegal behavior
- Protection against self-incrimination relevant?
- Same legal basis for requesting information for market investigations and investigations for possible infringements? (section 24)
 - Can NCA go on "fishing expeditions" disguised as RFIs for market investigations?
- NCA should specify its purpose in RFIs: Market investigation or investigations for potential infringement
 - RFIs need to be reasoned and scope addressed
 - Binding on the NCA?



Legal certainty, predictability and proportionality



- Procedures for market investigation need to be set out in detail to ensure legal certainty
- The **scope** of market investigations need to be specific and clear
- Specific **triggering events/thresholds** for NCA for different stages of market investigations
 - NCA should provide reasoned opinions showing why thresholds are met
- RFIs must be **proportionate and reasoned**
 - Need to know vs nice to know!
- The process should be subject to **legal timelines** for the NCA
 - Also in order to fulfill purpose of being more efficient tool

Transparency and access to information/documents



- Transparency important to ensure legitimacy and trust in market investigation processes
 - The public should be provided with a reasoned opinion by the NCA
- Act on right of access to information held by public authorities (*offentleglova*) will apply
 - No reason the exemption in current act related to investigations for infringements should apply for market investigations
 - If no infringement case, no risk for "evidence tampering"
- Business secrets will have to be redacted
 - Obligation of NCA to ensure business secrets of undertakings are not divulged to others
 - Unproportionate to put this burden on parties in market investigation cases
 - Draft public version to be presented to parties for comments
- Work related to access to documents likely to demand lot of resources

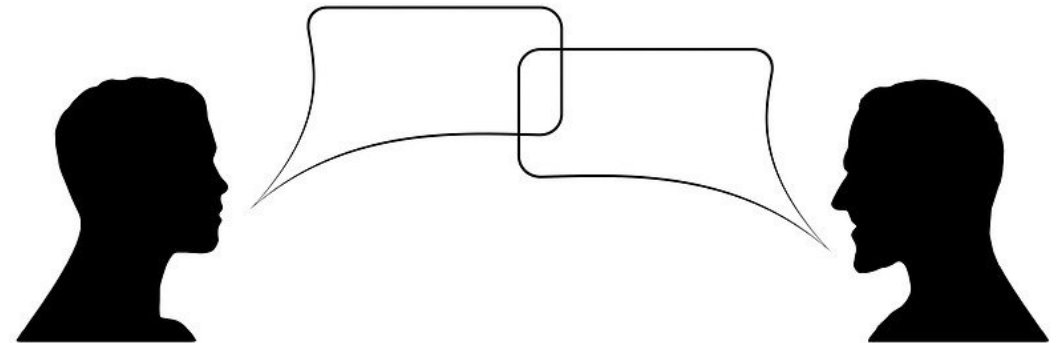
Right to be heard and appeal possibilities

- **Right to be heard (*kontradiskjon*)**

- NCA should have to publish a preliminary / draft report
- If remedies considered imposed on undertakings (*enkeltvedtak*): Act on public administration (*forvaltningsloven*) will apply – procedural requirements to be followed
- Undertakings possibly affected by potential remedies must be able to comment on a preliminary report of the NCA
- Also third parties should be able to comment and provide relevant information and comments
- Any remedies should be subject to market testing

- **Appeal possibilities**

- RFIs in market investigations should be subject to same appeal possibilities as other RFIs
- Which steps/phases in the market investigation process should be subject to appeal – and by whom?
- A decision where remedies are imposed should clearly be subject to appeal
- Any other steps during the process subject to appeal and by whom?

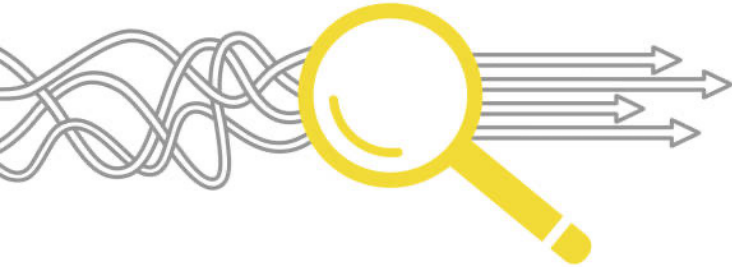




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Remedies: Predictability and proportionality

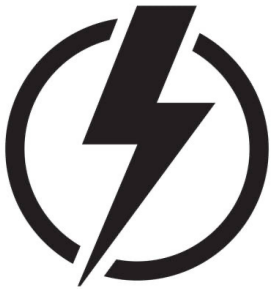


- Predictability
 - Even more difficult for undertakings to assess "compliance"
 - Important that possible outcomes, types of remedies are clearly set out in the Act
- Proportionality
 - Any remedies need to be proportionate
 - Can a divestiture imposed on an undertaking acting in compliance with current legislation be considered as proportionate?
- Follow-up of remedies
 - How should compliance with remedies be ensured?
 - Trustees, self-reporting, other?
 - Who should bear the costs of ensuring compliance with remedies?
 - Proportionate to impose on undertakings having acted in compliance with current legislation to bear costs related to remedies?

A few comments to some UK remedies



- Groceries/food supply sector
 - NCA has suggested the new tool in light of discussions in grocery sector
 - In UK (at least) 2 remedies in grocery sector
 - Amendments to planning laws – possible to implement in Norway without new tools (cf. section 9 e NCA may point out anticompetitive effects of public measures)
 - Establishment of groceries Supply Code of Practice and a Groceries Adjudicator – In Norway have already such code and an authority (lov om god handelsskikk and Dagligvaretilsynet)
- Energy sector
 - Recommendations to regulator – possible under current legislation in Norway
 - Measure to encourage consumer switching – NCA has already been doing this for decades





EEA Agreement limitation for remedies?

- NCA cannot prohibit behaviour which is compliant with EEA Art. 53
 - *"The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty."*
 - *Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings"*
- Likely to represent a limitation to remedies which may be adopted by NCA
- Limitation only if trade between EEA states is affected
 - Will normally be the situation



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Pros seen from a business perspective



- Well-functioning markets important also for undertakings
- Infringement investigations are very lengthy
 - Irreparable harm may occur before anti-competitive behaviour ceases
 - New competition tool might be quicker and prevent irreparable harm to occur
 - However, also today possible to order interim measures and to speed up processes
- Threat of market investigation outcomes in itself a potential disciplinary effect?
- Might ensure a more open and constructive process/dialogue between NCA and undertakings?
 - Compared to current infringement investigations processes
 - Cf. new tool to ensure well-functioning markets going forward and not to sanction
 - However, likely to depend on how extensive powers NCA will have with regard to remedies

Cons seen from a business perspective



- Unpredictable
 - May be imposed invasive remedies – even if acting in compliance with current legislation
- Burdensome
 - Providing information to extensive RFIs very burdensome for businesses (requires a lot of internal resources used to comply with)
 - Compliance with remedies may be burdensome
- Costly
 - In addition to internal resources, increased costs to advisers (lawyers and economists)

Thank you!



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