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The International Comparative Legal Guide to: Cartels & Leniency 2012

A practical cross-border insight into cartels and leniency

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Norway

Eivind Sæveraas



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for the cartel prohibition in Norway is Section 10 of the Norwegian Competition Act (Act of 5 March 2004 No. 12). The Norwegian Competition Authority (“NCA”) and courts are also competent to apply Article 53 of the EEA Agreement alongside the domestic legislation where the required effect on competition and trade within the EEA can be demonstrated.

Cartel enforcement in Norway can follow either an administrative/civil law track or a criminal law track. The civil sanctions include orders to bring an infringement to an end (Section 12 paragraph 1-3), interim measures (Section 12, paragraph 4) and administrative fines (Section 29). The criminal sanctions are fines and imprisonment (Section 30). Both companies and individuals may be sanctioned. Prosecution of individuals (typically management involved in a cartel) are only subject to criminal sanctions.

1.2 What are the specific substantive provisions for the cartel prohibition?

The substantive provision of relevance to cartels is Section 10 of the Competition Act. According to Section 10, agreements and concerted practices between undertakings are prohibited if they have as their object or effect the prevention, restriction or distortion of competition.

The prohibition is modelled on Article 101 TFEU. The preparatory works of the Act state that Section 10 shall be interpreted and applied in accordance with the case law of the courts of the European Union and the EFTA Court, and the administrative practice of the European Commission and the EFTA Surveillance Authority. Hence, judgments and decisions in individual cases as well as interpretative notices from the European Commission and the EFTA Surveillance Authority are relevant when interpreting and applying Section 10 of the Competition Act.

1.3 Who enforces the cartel prohibition?

The administrative competition authorities in Norway are the King (i.e. the Council of Ministers acting as a collegium), the Ministry of Government Administration, Reform and Church affairs and the Competition Authority (*Konkurransetilsynet*). However, in

practical terms, the principal administrative authority in cartel cases is the Competition Authority. While the Government and the Ministry engage in policy-shaping and are involved in the adoption of sector-specific legislation they play a limited role in the day-to-day cartel enforcement.

Where the NCA chose to report an enterprise and/or an individual to the police, the investigation and adjudication is carried out in application of the Criminal Procedure Act. The investigation in such cases is carried out by the National Authority for Investigation and Prosecution of Economic and Environmental Crime (*Økokrim*) which is both a national police unit and a prosecution authority.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The NCA may start an investigation on its own initiative, as a result of a complaint from a third party or following information from a party to a concerted practice (an applicant for leniency).

The NCA will, in an initial phase, gather information. It may require the suspected cartel participants and any third party to provide any information it considers necessary and may obtain a court order to carry out surprise inspections (dawn raids) at the premises of undertakings and in private homes.

If the NCA considers that the evidence supports the finding of a cartel, and it does not intend reporting the case to the police, it will inform the parties of its findings and legal assessment in a reasoned statement of objections, giving the parties a deadline to submit their comments (Section 16 of the Public Administration Act).

If the NCA concludes that Section 10 of the Competition Act has not been infringed, it will inform the parties accordingly by means of an administrative letter, and, if the case was initiated by a complaint, by a reasoned decision which can be appealed to the Ministry (Section 12 paragraph 3 of the Act).

In contrast, if the NCA concludes that the conduct in question amounts to an infringement of Section 10 of the Act, it will adopt a decision requiring that the infringement be brought to an end. If the NCA finds that the infringement was intentional or negligent it may, depending on the nature and gravity of the matter, decide to impose administrative fines on the parties (Section 29).

While the NCA will generally accommodate a party’s request for a meeting, there is no formal oral hearing during the investigation or prior to the adoption of the decision.

The NCA may choose to report a case to the National Authority for Investigation and Prosecution of Economic and Environmental Crime (*Økokrim*). *Økokrim* does not have the power to impose fines or other sanctions but it can issue a proposal for a fine and/or

confiscation of gains in terms of an optional penalty writ (“forelegg”) which can be either accepted or declined by the enterprise or the individual in question. If such a proposal is accepted, it will, in practice, have the same effect as a final judgment, and can only be annulled on appeal on the basis of procedural errors, errors in the application of the law, or because it cannot be upheld as a declaration of intent. If it is not accepted Økokrim must bring charges before a competent court of first instance to have the matter adjudicated.

1.5 Are there any sector-specific offences or exemptions?

Section 3 of the Competition Act provides for three general exemptions/legal basis for exemptions from the Act:

- The Act does not apply to terms and conditions relating to work or employment.
- Legal basis for exempting certain markets or industries from all or parts of the Act by means of regulation. Currently there are three regulations in force:
 - Regulation of 23 April 2004 no. 651 applicable to certain categories of agreements related to the sales of books.
 - Regulation of 17 December 2010 no. 1660 applicable to certain categories of agreements related to veterinary emergency services.
 - Regulation of 19 June 2000 no. 674 applicable to certain categories of agreements between certain groups of health personal regarding the operating subsidies of private practices.
- Legal basis by way of regulation to provide for such exemptions that are necessary to implement agricultural and fisheries policies. Regulation of 23 April 2004 no. 651 pertaining to exemptions for cooperation etc. within the agricultural and fishery sectors has been adopted to this effect.

1.6 Is cartel conduct outside Norway covered by the prohibition?

The Act applies to terms of business, agreements and actions that are undertaken, have effect or are liable to have effect within the realm of Norway (Section 5). Accordingly, the Act prohibits actions conducted outside Norway if they produce effects or are liable to produce effects in Norway. The scope of the Act was extended to Svalbard by Regulation of 17 October 2008 no. 1126.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal (of Økokrim acting under the Criminal Procedure Act)
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*

Investigatory power	Civil / administrative	Criminal (of Økokrim acting under the Criminal Procedure Act)
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes*	Yes*
■ Right to retain original documents	Yes*	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes*	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The NCA has investigative powers which are to a large extent similar to those of the European Commission. However, the powers of the NCA surpass those of the Commission in some aspects. The NCA may retain original documents, and the company is not entitled to copies of the confiscated documents.

2.3 Are there general surveillance powers (e.g. bugging)?

The NCA does not have such powers.

If a cartel case is reported to criminal investigations, general criminal procedural law will apply, which includes general surveillance powers (subject to a court order).

2.4 Are there any other significant powers of investigation?

No.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The NCA may carry out surprise inspections when there are reasonable grounds to assume that the Competition Act or decisions under the Competition Act have been infringed, or when it is necessary to meet Norway’s obligations under agreements with foreign states or international organisations (Section 25).

The NCA may demand assistance from the police to enforce the court’s decision concerning a surprise investigation. In practice, the police often accompany the NCA on arrival in case the enterprise should be reluctant to grant the NCA officials access to the premises. Where there is no time to await the court’s decision prior to initiating a surprise investigation the NCA may demand that the police seal off areas where evidence may be located until the court has rendered its decision.

There is no legal requirement to wait for the arrival of a company’s legal advisor before the search commences. In practice, the NCA will usually wait approximately 30 minutes for the arrival of legal advisors, provided the officials can be reassured that employees will not try to remove documents from the premises.

2.6 Is in-house legal advice protected by the rules of privilege?

The NCA does not have the right to confiscate documents or storage devices containing information covered by legal privilege or to order enterprises or individuals to produce such documents or devices. Under Norwegian law, the legal privilege also comprises communication with in-house lawyers, provided that the lawyer acted in his capacity of legal advisor (and not, for example, as a member of the management team).

The principle of legal privilege under Norwegian law will not be applicable when the NCA merely assists the EFTA Surveillance Authority in connection with the latter's investigation under the EEA Agreement.

The NCA has the right to review legally privileged documents "to the extent necessary to verify" whether they contain information covered by legal privilege. This enables the NCA to review the documents more thoroughly than was accepted by the EC Court of First Instance in the *Akzo* case. In the event of a dispute over such information, the documents or storage devices in question can be sealed and the dispute referred to the competent court.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The company under investigation has the right to legal representation. Furthermore:

- access to residential premises requires that there are "special reasons to assume that evidence may be kept there";
- the seizure made may be brought in before the District Court at any time; and
- if the NCA are in doubt as to whether a seized document is covered by legal privilege, the NCA shall bring the question in before the District Court.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes, the obstruction of an investigation is subject to sanctions. Failures to comply with orders during investigations, to break seals and to provide incorrect or incomplete information are subject to administrative fines, and also to penal provisions in case of intentional failures or gross negligence.

The Competition Authority may also impose periodic penalty payments to ensure compliance with an obligation to provide information.

To our knowledge sanctions have not been imposed for obstructing investigations. However, individuals have been reported to the police for such obstructions. The Competition Authority has over the last year taken a stricter approach against failures and infringements against procedural rules in general.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The Competition Act contains provisions on both administrative fines and criminal fines for companies infringing the cartel

prohibition in the Competition Act Section 10. According to the *ne bis in idem principle* (prohibition against double sanctions) both administrative fines and criminal sanctions cannot be imposed on the company for the same infringement.

Administrative fines

Section 29 of the Competition Act 2004 provides that an undertaking may be subject to administrative fines if the undertaking or someone acting on its behalf intentionally or negligently has violated Section 10 of the Competition Act. Several factors will determine the NCA's decision concerning the fine. Section 29 provides that particular attention shall be paid to the turnover of the infringer, the gravity and duration of the violation, and applicable rules on leniency. The Regulation on the calculation of and leniency from administrative fines provides for more detailed rules in this respect. The Regulation is based on the 1998 Commission Guidelines. Amendments to the Regulation based on the 2006 Commission Guidelines have been proposed.

Section 3 of the Regulation lists examples of other elements that may influence the calculation of the fine, including whether the arrangement or action was actually implemented, whether the undertaking through guidelines, instructions, training, supervision or other actions could have prevented the infringement, and the financial position of the corporate group of which the undertaking is a part.

Section 3 of the regulation also gives provisions as to the effect of the duration of the infringement. For an infringement that has lasted between one and five years, the amount based on the elements above can be increased up to 50 percent. When the duration of the infringement exceeds five years, the amount can be increased up to 10 percent for each year the infringement has lasted.

The maximum administrative fine for an infringement of section 10 of the Competition Act is an amount corresponding to 10 percent of the undertaking's total sales revenue for the latest accounting year.

Criminal fines

According to the Competition Act Section 30 *cf.* Section 48a of the Penal Code criminal fines may be imposed on companies. No specific sentencing guidelines exist with regard to criminal sanctions. However, it is presupposed in the preparatory works that the fine shall be in accordance with principles for administrative fines. The principles for the setting of criminal fines in Section 48b of the Penal Code also apply.

Confiscation of proceeds

According to the Penal Code Section 34 any proceeds of a criminal act shall be confiscated. There is no such provision for cases where an administrative fine has been imposed.

3.2 What are the sanctions for individuals?

According to Section 30 of the Competition Act, anyone who intentionally or through gross negligence engages in cartel activity may be sanctioned with fines or imprisonment for up to three years. In severely aggravating circumstances, cartel activity may be sanctioned with imprisonment for up to six years. Norwegian competition law has for many years provided for fines and imprisonment for individuals engaging in cartel activity. While individuals have in many cases received fines for their involvement in cartel activity there are no examples of imprisonment.

The Penal Code Section 34 (confiscation of proceeds) also apply for individuals.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The financial position of the corporate group of which the undertaking is a part is a relevant factor when setting the fine. It is proposed to include a rule where "inability to pay" may be taken into consideration.

3.4 What are the applicable limitation periods?

The limitation period is 10 years for both administrative fines and criminal sanctions.

For administrative fines, the limitation period is suspended once the NCA takes steps to secure evidence under the Competition Act Section 25 (dawn raid) or informs an undertaking that it is suspected of infringing the Competition Act.

For criminal sanctions, the limitation period is suspended by any legal proceeding where the undertaking/individual is given the status as charged.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. There are no prohibitions against such payments from the company.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes. The employee may in principle be held liable for economic loss inflicted on the company, including legal costs and financial penalties.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. The legal basis for the Norwegian leniency programme is Section 31 of the Competition Act which states that an undertaking's assistance to the competition authorities in the detection of its own and others' infringement shall be considered when determining the amount of the administrative fine under Section 29 or criminal fines under Section 30. The details of the leniency programme are set out in the Regulation on the calculation of and leniency from administrative fines.

Full leniency

Pursuant to Section 4 of the Regulation an undertaking shall be given full leniency if it, on its own initiative, is the first to submit evidence that is sufficient for the Competition Authority to:

- (i) obtain a court order to carry out a surprise investigation, and the NCA at the time the information is submitted, is not in possession of sufficient evidence to be able to acquire such an order; or
- (ii) prove an infringement of Section 10 of the Competition Act, and the NCA at the time the information is provided is not in possession of sufficient evidence to prove such infringement.

However, full leniency will only be granted if the undertaking:

- (i) fully cooperates with the NCA's investigation;
- (ii) terminates its participation in the infringement at the latest when the evidence is submitted; or

- (iii) has not sought to coerce other undertakings to participate in the infringement.

According to Section 4 of the Regulation, only the first company meeting the cumulative criteria may be granted full leniency.

Partial leniency

Pursuant to Section 6 of the Regulation undertakings that do not meet the conditions for full leniency can still be granted partial leniency if the submitted evidence significantly strengthens the NCA's ability to establish an infringement of Section 10 of the Competition Act. In addition, the undertaking must end its participation in the infringement no later than when the evidence is submitted. In such cases, the first undertaking may obtain a reduction of between 30 and 50 percent, the second undertaking a reduction of between 20 and 30 percent, and subsequent undertakings up to 20 percent.

To date there has been only one decision by the NCA where leniency has been granted (V2011-11 (*Icopal Tak/Fløysand Tak*)). On 14 October 2011 the NCA issued a statement of objections to two companies within the asphalt sector where the NCA's preliminary conclusion is that one of the companies shall be granted full leniency.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

No. The evidence can, however, initially be submitted in hypothetical terms.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. The NCA will record the oral application.

4.4 To what extent will a leniency application be treated confidentially and for how long?

Third parties

According to Section 26, the Access to Information Act does not apply as long as the case has not been brought to its conclusion. If the case has been reported to the public prosecuting authorities, the case is not regarded as brought to its conclusion. This does not prohibit the NCA to give access to the leniency application as long as information that is subject to a duty of confidentiality is retracted, but in practice the NCA will not give access to a leniency application during the investigation.

After the case has been brought to its conclusion the NCA has in practice denied access with reference to the exemption in the Access to Information Act Section 24 regarding regulatory or control measures and documents relating to offences.

According to the Competition Act Section 26 first paragraph, anyone with a legal interest (e.g. victims of cartel activity claiming damages) is also allowed access to confidential information in cases that have been concluded, unless such access is unreasonable. Access to a leniency application may therefore be given.

Parties

According to the Competition Act Section 27, undertakings and individuals under investigation for violation of the Competition Act are to be allowed access to case documents, provided such access results in no harm or risk to the investigation or to third parties. The right to access does not apply to documents pertaining only to other undertakings or individuals. Furthermore, the Public

Administration Act Section 19 also applies (both under and after the investigation). This provision allows the NCA to deny parties access to *inter alia* business secrets and information concerning “other circumstances which for special reasons should not be disclosed”. The parties’ access to a leniency application must be assessed under this provision as there is no specific provision regarding access to the leniency application.

4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

The requirement to cooperate with the NCA applies until the administrative procedure is brought to an end.

4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

No, there is not.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The Competition Act does not lay down any specific procedures for individuals that report on their employers’ cartel activities. The leniency programme does furthermore not apply to individuals. In practice, the NCA will however normally not seek to penalise individuals in leniency cases and individuals will normally not be prosecuted by *Økokrim*.

“Whistleblowers” are also less likely to be held individually responsible and prosecuted for their own participation in illegal activities, but there are no specific procedures that apply to such situations and such individuals will not have immunity against penal sanctions. Whistleblowers are, however, to some extent protected against sanctions from their employer in accordance with provisions in the Working Environment Act.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities’ approach to settlements changed in recent years?

The Competition Act does not contain any settlement or plea bargaining procedures. In criminal cases the prosecuting office may issue an optional penalty writ and the person charged may accept the option by endorsing the writ. Plea bargaining as such does not take place in these cases, but to some extent discussions occur regarding the level of fine that may be acceptable for the companies involved.

A fine issued by the NCA is an administrative sanction, which may be challenged before the courts subject to the procedure in the Civil Litigation Act. Mediation may take place in such cases and settlements may be reached.

7 Appeal Process

7.1 What is the appeal process?

In general, the NCA’s decisions may be appealed to the Ministry of Government Administration, Reform and Church Affairs. Decisions regarding administrative fines can however not be appealed, but may be challenged in court. Penal sanctions are imposed by the courts, according to the general criminal procedure.

7.2 Does an appeal suspend a company’s requirement to pay the fine?

Yes, if taken to court the administrative fine will not be legally enforceable until finally decided by the courts. It is not resolved in theory or practice if interest in such cases may be added from the date of issue on the original administrative fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes. As follows from the above, the appeal process involves court proceedings in both criminal and civil law cases and cross-examination is a natural part of such proceedings.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for ‘follow-on’ actions as opposed to ‘stand alone’ actions?

The civil damages actions follow the general principles and rules of the law on damages. The claimant must substantiate a basis for liability, an economic loss and causation between the harmful event and the loss. Violation of the cartel prohibition will normally be considered a sufficient basis for liability. Therefore, it is easier to establish the necessary legal basis for a claim in “follow on” actions. Still, any damages will require the proof of causation and an economic loss.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes, they do.

8.3 What are the applicable limitation periods?

The limitation period is three years from the time the injured party got information on the damage and the wrongdoer. It may depend on the circumstances if the starting point will be the time of the decision, the time of a statement of objections or some other (earlier) event. If the cartel case is subject to criminal proceedings the damage claim is not time-barred until one year after a legally enforceable criminal judgment.

8.4 Does the law recognise a “passing on” defence in civil damages claims?

In principle, yes, but there exists limited case law.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The main rule under the Civil Litigation Act is that the losing party shall reimburse the opposing party for litigation costs.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have not been any judgments, but there have been some settlements.

9 Miscellaneous**9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.**

A committee appointed by the government is currently conducting a review of the Competition Act. The committee will deliver a report in February 2012. This report is expected to include several proposals for amendments to the Competition Act, including amendments related to procedural issues and provisions related to leniency. Previous proposals and discussions regarding possible legal developments have been put on hold until the committee delivers their report, including a 2008 proposal to extend leniency to cover criminal sanctions.

The proposal to further harmonise sanctions (calculation of fines) with the 2006 EU guidelines, mentioned above, may however possibly be handled independently of the work of the committee.

9.2 Please mention any other issues of particular interest in Norway not covered by the above.

Nothing to report.

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