



**Konkurransetilsynet**  
Norwegian Competition Authority



# Norway

# Annual Report 2003 - OECD

The Norwegian Competition Authority

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## Executive Summary

This report provides a brief summary of some of the more important activities of the Norwegian Competition Authority (NCA) in 2003. It contains a description of certain key cases handled by the NCA and some markets and areas that the NCA has paid special attention to.

In 2003, the NCA handled 30 cases concerning mergers and acquisitions. This resulted in four interventions. One of the most important merger cases was the merger between the two largest banks in Norway, DnB and Gjensidige NOR. In that case the NCA imposed a number of conditions to approve the merger.

The NCA made six interventions against anti-competitive practises during 2003. This included inter alia an intervention against the corporate discount schemes of the airline group SAS.

The NCA carried out four dawn raids in 2003. In the construction sector, dawn raids led the NCA to evidence on comprehensive price fixing, collaboration on tenders and market sharing in several large construction projects. The case was reported to the public prosecuting authority with a request for criminal investigation and prosecution.

During the period, the NCA handled numerous cases regarding formulation and implementation of other policies. The NCA focused inter alia on the pharmaceutical sector and the agricultural sector.

The NCA continued to be active in international forums and organisations. The Nordic competition authorities had several meetings and made two reports. In the autumn of 2003, general directors of competition authorities of the EU States and the EFTA States visited Norway. The NCA also participated in several meetings in OECD and ICN.

A new Competition Act entered into force on 1 May 2004. The new Act is to a large extent harmonised with the EU/EEA competition rules and provides the basis for a more ambitious competition policy in Norway. The NCA were involved in the drafting of the new Act during 2003.

The Parliament has decided that the NCA shall move from Oslo to Bergen before the end of 2006. The organisation has been preparing for this process in 2003.

# I. Legislation and strengthening of Competition Policy

## I.1 Strengthening of Competition Policy

Through its action plan for enhanced competition from 2001, the Government has expressed its intention to improve the resource allocation. Special focus is put on the public sector. The NCA has actively followed up the five main elements of the action plan, which are:

- To strengthen the competition authorities.
- To review public regulations and measures that may restrict competition.
- To ensure that public procurement enhances competition and facilitates market access.
- To ensure that privatisation of public enterprises does not restrict competition or create monopolies.
- To ensure that the public sector is organised and run in a manner promoting competition.

On assignment from the Ministry of Labour and Government Administration, the NCA has made a survey of public regulations and measures that may restrict competition. Entry regulations, taxes, and unfair competition between private and public entities are the most frequent subjects addressed.

Based on this survey, the NCA has issued recommendations to the Ministry of Labour and Government Administration on the more fruitful areas for further consideration. These include the markets for public service pensions, annuities, and elevator control. Also, it was proposed to review the Planning and Building Act, the restaurant regulations, and the agricultural and dairy regulations.

## I.2 Adoption of a new Competition Act

The Parliament adopted a new Competition Act, which entered into force 1 May 2004. The NCA were involved in the drafting of the new Act during 2003.

### **EU/EEA harmonisation**

The new Act contains a prohibition against anti-competitive agreements and concerted practices and a prohibition against abuse of dominance. The prohibitions correspond largely to the prohibitions in the Articles 81 and 82 of the EC Treaty and Articles 53 and 54 of the EEA Agreement. But the new Act goes on step further. It also introduces a possibility to regulate markets that are not functioning properly.

### **Investigation and sanctions**

The new Competition Act maintains the extensive investigative powers of the Competition Authority and the possibility of imposing criminal sanctions on individuals and undertakings violating the Act. The Act also provides the Competition Authority with the competence to impose administrative fines on companies in breach of the prohibitions. The aim of the Act is to have a similar level of fines as in the EU. The Act also provides the basis for a transparent leniency programme.

### **Merger control**

The new Act introduces a mandatory notification system for concentrations. Concentrations where the undertakings concerned have a combined annual turnover in Norway exceeding

NOK 20 million (approximately USD 2,89 million), must be notified to the NCA by way of a standardized notification. Undertakings may not implement the concentration during the first phase of the procedures.

The Competition Act also provides the necessary instruments to reduce the procedural time and streamlining the case handling. Moreover, it retains the SLC (Substantial Lessening of Competition) test as the relevant merger test.

## II. Enforcement of competition law and policies

This section deals with the issues of illegal collusion, exemptions from the prohibitions, interventions against anti-competitive practices and the control with acquisition of businesses. The focus is on the activities in 2003 and the NCA's enforcement of the now repealed Competition Act of 1993.

### II.1 Illegal collusion

Sections 3-1 to 3-4 in the Competition Act of 1993 contained explicit prohibitions against:

- Collaboration and influence on *prices, mark-ups and discounts*.
- Collaboration and influence on *tenders*.
- Collaboration on, or use of influence to achieve, *market sharing*.

In 2003, the NCA dealt with 59 cases concerning the prohibitions on price fixing, collusion on tenders and market sharing. One case was referred to Økokrim, the public prosecuting authority for economic crimes, with a request for criminal investigation and prosecution.

#### Enforcement of the prohibitions in the Competition Act

	1999	2000	2001	2002	2003
Handled	114	101	50	99	59
Dismissed	92	47	7	3	7
Dismissed by warning	20	50	39	92	51
Coercive fine	1	0	1	0	0
Referred for prosecution	1	4	3	4	1

In cases involving possible breaches of the prohibitions of the Competition Act, the NCA occasionally carries out inspections at the premises of the companies. In order to carry out such inspections and secure evidence, the NCA must obtain an authorisation by the Courts. In 2003, the NCA carried out inspections in four cases.

### Selected cases

#### Price fixing and collaboration on tenders in the building and construction sector

In the construction sector, dawn raids led the NCA to evidence on comprehensive price fixing, collaboration on tenders and market sharing in several large construction projects. The illegal activities took place during 1994-2000 and involved several large public construction projects, like of industrial buildings, power plants, bridges and harbours, as well as the construction Oslo Airport Gardermoen and its express railway. The total cost of the projects

amounted to more than NOK 2.5 billion. The case involved the major construction companies Selmer Skanska, NCC Construction, Veidekke and Reinertsen Anlegg. The case was reported to the public prosecuting authority with a request for criminal investigation and prosecution.

## II.2 Exemptions from the prohibitions

Section 3-9 of the Competition Act of 1993 empowered the NCA to grant exemption from the prohibitions. Exemptions could be granted if competition in the respective market would be strengthened, if the efficiency gains made offset any restrictive effects on competition, if the restriction of competition was of little significance or if there were special grounds for doing so.

In 2003, the NCA considered 42 requests for exemption. In 37 cases, exemption was granted for the whole, or parts of, the planned collaboration. Two requests for exemption were rejected. Three exemptions were rescinded.

### Exemptions from the prohibitions in the Competition Act

	1999	2000	2001	2002	2003
Handled	85	147	113	72	42
Granted	53	99	91	63	37
Refused	6	5	6	8	2
Lifted	26	43	16	1	3

### Provisions from which exemption was granted

	2001	2002	2003
Section 3-1, Subsection 1, price collaboration	78	49	31
Section 3-1, Subsection 2, vertical price influence	13	14	7
Section 3-2, collaboration on tenders	17	7	5
Section 3-3, market sharing	17	11	3

### Legal basis for the exemption

	2001	2002	2003
Section 3-9 a) competition strengthened	37	25	13
Section 3-9 b) efficiency gains	26	15	9
Section 3-9 c) minor significance for competition	28	17	15
Section 3-9 d) special considerations	4	9	5

## II.3 Intervention against anti-competitive practices

Based on Section 3-10 of the Competition Act of 1993, the NCA could intervene against anti-competitive practices and undesirable behaviour of dominant companies.

In 2003, the NCA assessed 62 cases relating to anti-competitive practices. Six decisions to intervene were made. The remaining cases were dismissed.

### Interventions against anti-competitive practises

	1999	2000	2001	2002	2003
Handled	69	74	65	79	62
Decisions	4	7	3	6	6

In addition to individual decisions, the NCA issued one regulation imposing maximum prices within the transportation sector.

## **Selected cases**

### **Corporate discount schemes in civil aviation**

In December 2003, the NCA intervened against the corporate discount agreements of the SAS group. The NCA prohibited the use of the certain progressive discounts applying to the purchase of air services purchased. The NCA also prohibited certain provisions in the agreements, which obliged the customer to prefer SAS to other airlines. These agreements created customer loyalty, and they allowed the airline to strongly reduce the fares to the most attractive customers, without risking reduced revenue from other customers.

### **Exclusivity clauses in publishing agreements**

In July 2003, the NCA intervened against publishing agreements of the largest Norwegian book clubs. The NCA concluded that the book clubs cannot include exclusivity clauses in their publishing agreements for new Norwegian and translated fiction for adults. Before the NCA's intervention, a book could not be distributed by other book clubs for a period of about two years. The NCA prohibited the application of such exclusivity clauses for two years after the publishing of the first edition of a book.

### **Competition in assembling card transactions**

In April 2003, the NCA prohibited an agreement that ties the banks to use the Banks' Central Clearing House (BBS) to assemble card transactions from retail outlets. The prohibition paved the ground for competition in offering these services to the banks, something that will benefit card users.

### **Exclusivity clauses in fixed telephone agreements**

The NCA prohibited certain exclusivity clauses in the fixed telephone agreements between Norway's largest telecom company, Telenor, and the Norwegian Federation of Co-operative Housing Associations (NBBL). The decision gives local housing co-operatives the possibility to enter into agreements with other telecom companies in addition to Telenor

## **II.4 Control with mergers and acquisitions**

Section 3-11 of the Competition Act of 1993 gave the NCA power to intervene in business acquisitions that would significantly restrict competition. The term "business acquisition" included both mergers and acquisitions of businesses and parts of businesses. Intervention may take the form of issuing prohibitions, giving orders, or granting consents subject to certain conditions.

Under the Competition Act of 1993, mergers and acquisitions were not subject to a mandatory notification requirement. However the NCA monitored the markets closely to consider whether mergers and acquisitions threatened to weaken competition.

In 2003, the NCA made an in-dept investigation of 30 mergers and acquisitions. The NCA intervened in four cases. On one occasion, the NCA issued a decision temporarily prohibiting a merger from being implemented.

### Intervention against mergers and acquisitions

	1999	2000	2001	2002	2003
Handled	31	39	27	36	30
Decisions	2	2	2	3	4
Temporary prohibition	-	-	-	2	1

### Selected cases

#### Comprehensive commitments imposed in major bank merger

In November 2003, the NCA imposed a number of conditions in order to approve the merger between the two largest banks in Norway, DnB and Gjensidige NOR. The merged entity would result in a reduction of competition in several markets, inter alia the markets for loans to private customers and small and medium-sized enterprises, and group pension plans. The commitments imposed reduced competition concerns and enhanced future competition.

#### Acquisition of flour manufacturer prohibited

In July 2003, the NCA prohibited the acquisition of Norgesmøllene by Felleskjøpet Øst Vest (FKØV). The former company is the largest manufacturer of consumption flour in Norway, while the latter is a cooperative supplying cereal grain product, concentrated cattle foods, machinery, and other inputs to agriculture. In the NCA's view, the acquisition would have increased FKØV's possibility to exercise market power, while also reducing the possibilities for new entries.

The decision was appealed to the Ministry of Labour and Governmental Administration, and the Ministry decided to approve the acquisition on strict conditions.

## II.5 Price labelling investigation

According to Section 4-1 of the Competition Act of 1993, price labelling is mandatory in the retail trade. To enhance transparency, retailers should provide information on the price per unit of measurement.

#### Enforcement of orders to provide price information

	1999	2000	2001	2002	2003
Number of controls	976	983	133	55	776
Warning	587	432	123	48	256

#### Satisfactory price labelling in the retail grocery trade – but not in convenience stores

An investigation executed by the NCA in March 2003 showed that the retail grocery trade to a great extent complies with these obligations. The investigation also showed that the small-scale grocery outlets (convenience stores, newspaper shops, candy stores, petrol stations, etc) failed to comply with the requirements to the same extent.

### III. Role in formulation and implementation of other policies

In accordance with Section 2-2 d) of the Competition Act of 1993, the NCA were to call attention to the restraining effects on competition of public measures, where appropriate by submitting proposals aimed at increasing competition and facilitating entry for new competitors. In order to do this, the NCA could issue submissions specifying factors restricting competition.

The NCA is increasingly being used as a hearing body by other public authorities. This provides an opportunity to influence the decision process and include the competition aspect when considering the adoption of new public measures. The NCA handled 236 hearing cases during 2003 and made substantive remarks in 96 cases.

The NCA pointed out the unfortunate effects of public measures initiated by other public authorities on its own initiative in 17 cases.

#### Expert opinions and advocacy

	1999	2000	2001	2002	2003
Handled	182	179	245	261	236
Submissions on substance	78	77	85	103	96
Expert opinions under Section 2-2 d)	17	12	11	14	17

#### Selected cases

##### More outlets for non-prescription drugs

Since the autumn 2003, non-prescription drugs are subject to free pricing, and consumers can buy non-prescription drugs in grocery retail shops, convenience stores, kiosks and petrol stations. To enhance competition in this market, the NCA gave an expert opinion on the proposed regulation allowing non-pharmacy outlets for non-prescription drugs. The NCA emphasized the importance of giving the new outlets the same conditions as pharmacies. Therefore the NCA opposed the idea of imposing a minimum assortment of drugs upon each retailer and a full-scale assortment upon their wholesalers. Also, it was essential that pharmacies and alternative outlets be subject to the same regulations concerning package size.

##### Agriculture - critical assessment of the role of market regulators

In many of the expert opinions submitted by the NCA during 2002 and 2003, the need to reconsider the necessity of the various market regulations in agriculture was called for. The dominant suppliers, Tine, Prior, Norsk Kjøtt, and Felleskjøpet, are regulators of the milk, eggs, meat, and grain markets, respectively. The NCA has proposed to transfer the responsibilities of market regulation to an independent administrative authority.

As a result of the NCA's expert opinions, new regulations were adopted regarding the market regulator's duties to purchase, to supply and to provide information in the relevant markets. For instance, purchasing requests from new entrants are to be effectuated, unless they are deemed unreasonable.

##### Proposal to divide the largest supplier of electric energy

In an expert opinion the NCA stated that state ownership in the electricity market should be reconsidered. A more appropriate ownership structure could contribute to improved competitive conditions in this market. The cross ownership relations should be reduced and a

split should be considered for Statkraft, in particular if the company should become wholly or in part privatised. An expert committee supported the NCA's proposal to reconsider state ownership and to sort out the structure of cross ownership in this market.

#### **The Norwegian States Railways should divest its bus company Nettbuss**

The Norwegian States Railways ownership of Nettbuss may restrict competition in the markets for long and medium haul passenger transport. The NCA expressed this view in its expert opinion submitted to the Ministry of Transport and Communication.

## **IV. Resources available to the Competition Authority**

The Parliament has decided that the NCA, as one of several government supervisory authorities, is to be moved from Oslo. The relocation of the NCA to Bergen is to be completed by 1 January 2007. The reorganisation process was a high priority in 2003.

It is the Parliament's presumption that the relocation process be carried out in such a manner that:

1. the NCA operates efficiently during the relocation period,
2. as many employees as possible follow the NCA to Bergen, while no one ends up in unemployment, and
3. a new, efficient organization is built up systematically.

In order to achieve these aims, the NCA took a number of steps to prepare the relocation. It has been equally important to preserve an attractive working environment in the Oslo office, so as to maintain productivity at the present, high level throughout the relocation period. Strong emphasis has therefore been put on measures to keep key personnel from leaving.

#### **Budget**

	Employees	Budget expenditure in NOK 1000	Budget expenditure in USD 1000
2003	107	65 110	9408
2002	107	69 878	10 099
2001	97	66 700	9 640
2000	137	71 701	10 362
1999	145	65 624	9 484
1998	150	64 412	9 309

#### **Employees - profession**

	2002	2003
Economists	38	40
Lawyers	26	27
Other professionals	21	20
Support staff	22	20
All staff combined:	107	107

## **V. Summaries of new reports and studies on competition policy issues**

### **Report on the market for pharmaceuticals**

Commissioned by the NCA, the report “The pharmaceutical markets after the pharmacy reform: Regulation, market structure and competition” was written.

The report divides the pharmaceutical market in two, non-prescription drugs and prescription drugs. For non-prescription drugs prices are set in the market, while the prices on prescription drugs are regulated.

According to the report, the reform of the pharmaceutical market has resulted in more pharmacies and increased availability. However, this has meant reduced profitability in pharmacies – and non-prescription drugs have become more expensive. Their prices increased by 27 per cent from 1999 to 2002.

### **Competition in the Nordic energy market**

The Nordic competition authorities have, in the joint report “A powerful competition policy”, examined the competitive conditions in the Nordic energy market and addressed the need to coordinate competition policy enforcement.

The report’s main conclusion is that, to a large extent the deregulation of the Nordic energy market has been successful. Through the Nordic energy trade, the advantages of interconnecting hydropower and thermal power systems are being exploited. The existence of a common Nordic market has enhanced competition, in spite of a few obstacles.

The report shows, nevertheless, that there still is a great potential for exercising market power and charging excessive prices. Regional markets are subject to high concentration, which is partly due to cross ownership and joint ownership of power plants. Second to Denmark, Norway’s national energy market is the most concentrated one in the Nordic countries. Increased capacity in the transmission network will reduce, but not completely eliminate, the problems of dominance.

The report recommends that the authorities consider how a more competitive ownership structure, with reduced cross ownership, can be developed. In each country, one or two large suppliers dominate the domestic national market. Cross ownership is far-reaching. Subsequent mergers that will further increase market concentration should be carefully analysed. Nordic competition authorities should cooperate more closely in cases affecting more than one country.

### **Other reports released in 2003:**

- Competition in the financial markets
- Competition in the telecommunications and mass media markets
- Merger remedies (joint report from the Nordic competition authorities)

## **VI. International co-operation**

The NCA is actively involved in international cooperation, more so than ever in 2003. Cases related to the European Economic Area are, as before, a top priority, but cooperation through the OECD and within the Nordic countries is also important. It is essential that the NCA, representing a small country outside the increasingly larger European Union, establishes and maintains international contacts. This is achieved through the many networks in which the NCA participates.

### **The EEA Agreement**

Norway is a part of the European Economic Area (EEA) through its membership in EFTA. The EEA encompasses the EU States and Iceland, Liechtenstein and Norway. The rules and regulations in the EEA Agreement have been implemented into Norwegian legislation through special acts and regulations.

The NCA gives high priority to cooperation with the EFTA Surveillance Authority and with the European Commission, with a view, in particular, to strengthen and improve the enforcement of EEA competition law. During the recent years the European Commission has undertaken a substantial revision of the EU competition rules. The new legislation entered into force concurrently with the extension of the European Union in May 2004. The NCA assists the Ministry of Labour and Government Administration in incorporating the rules into the EEA Agreement and into Norwegian law.

From 1 May 2004, there are considerable changes in the procedures regarding enforcement of the prohibitions against anti-competitive practices and abuse of dominant position in the European Union. The notification system of mergers and acquisitions are put to an end, and enforcement will be decentralized to national competition authorities and courts.

It has been difficult to find a good solution regarding decentralized enforcement in the EFTA pillar of the EEA. EFTA Surveillance Authority and the European Commission are currently trying to find a proper way for the non-EU countries to take part.

In order to protect Norwegian interests, the NCA has involved itself in the Commission's case handling, especially in merger and cartel cases. The NCA participates actively in the European Competition Authorities (ECA) network, formed by the directors general of the EEA competition authorities. The NCA has been strongly involved in the ECA Air Traffic Working Group on competition in civil aviation. In September 2003, the NCA hosted a meeting of the director generals of the competition authorities of all EU and EFTA States, including the ten new member states of the EU. Important topics of discussion were competition in civil aviation and in the health sector. The joint Nordic report on the market for electric power was presented.

In line with the general globalisation of trade and industry, cross-border competition crimes are becoming even more common. The NCA cooperates with competition authorities in other countries, both bilaterally and through the EEA Agreement.

### **Nordic cooperation**

The Nordic competition authorities meet regularly and cooperate closely on competition policy, analyses, and enforcement. Joint studies turn the differences in competence and

experience into an asset. This cooperation contributes to a more efficient enforcement in the Nordic countries and gives the Nordic countries stronger say in international forums.

In 2003, Sweden joined the Nordic cooperation agreement, which allows for the exchange of confidential information between the competition authorities of the respective countries. Norway, Denmark and Iceland signed this agreement in 2001.

### **International Competition Network (ICN)**

ICN was established to provide a forum for discussion of competition policy to authorities and independent experts in developed and developing countries alike. The NCA participates in this network. The cooperation aims to make institutions, legislation, and enforcement more efficient. As of 1 January 2004, the competition authorities of 84 countries were participating in the network. Topics of discussion during the last year have been merger control, advocacy and capacity building. Guidelines have been published in these areas. The Norwegian competition authorities have adjusted to these guidelines.

### **OECD**

In 2003, the NCA made several written and oral contributions during the meetings of the Competition Committee. The contributions covered topics such as remedies in merger control, financing and public procurement of non-commercial services in deregulated markets, prosecution of individuals in cartel cases, and the relationship between consumer and competition policy.

In 2003, the Competition Committee finalized a broad evaluation of Norwegian competition policy. The OECD recommended an amendment to the present Competition Act, compatible with the Government's own proposal, and advised the Government to continue reforming the Norwegian economy and civil administration with undiminished strength.

The OECD evaluates the performance of Norwegian economy annually. These evaluations are presented to the OECD's Committee of Economic Development and Regulatory Reforms. One of the conclusions in 2003 was that the competition policy had been substantially strengthened over the last few years.