



# Competition law to your morning coffee - september 2023



Line Voldstad  
Partner, Head of Regulatory and  
FPR (Norway)



Kjetil Haare Johansen  
Partner, Country Managing  
Partner



Katrine Lillerud  
Lead Lawyer



Oda Linneberg Uggen  
Associate



Thea Åkermoen  
Associate



David Berset  
Associate

In this newsletter, the competition law team at DLA Piper Norway provide insight to the latest and most relevant decisions from the EU, national courts, and competition authorities. The newsletter aims to provide a brief and easy-to-understand summary of current decisions and trends from the world of competition law, preferably as light reading material suited for your morning coffee.

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**This summer, the government announced a new hearing on price discrimination in the grocery industry.** The Government wishes to carry out a more thorough assessment of a possible ban on differences in wholesale prices. Norwegian discount chains disagree on whether such a ban would be positive for end-users. Previous hearings on banning unfair differences in wholesale conditions in the food and grocery value chain and the hearing on banning negative easements and exclusive leases in the grocery market in 2022 have received shared reception. Some actors criticize the government for poor investigation. It will therefore be interesting to read this consultation document, get an impression of the stakeholders' views, and not least see what steps the Government is potentially taking.

**A new Act on amendments to the Competition Act gives the State, represented by the Norwegian Competition Authority, the right to initiate legal proceedings** with respect to the Competition Appeals Board's decisions in cases concerning enforcement of the Competition Act from 1 July 2023. Previously, only companies had this opportunity, but the Ministry writes in the preparatory works to the amendment that the ability to enforce the competition rules effectively and clarify competition law issues in the courts are important prerequisites for achieving the purpose of the competition rules. In the consultation round, several questions were asked about many different matters to the consultative bodies, including the Competition Appeals Board. Only the Norwegian Competition Authority was in favour of this right. Other consultative bodies found the proposal problematic. Among other things, it was pointed out that it is unusual for an administrative body to have legal action competence in cases where a case has been reviewed by its own appellate body.



**In March, the Ministry sent out a hearing regarding a proposal for additional amendments to the Competition Act.** The ministry suggest allowing the Norwegian Competition Authority to impose fines and management quarantine on individuals, as well as the right to initiate market investigations. The deadline was 30 June 2023. The background for the proposal for sanctions against individuals was a report by Professor Jon Petter Rui at University in Bergen. He recommends that the Authority is granted such access, and finds no obstacles to this in either the Constitution, EEA law or the ECHR. Of the incoming consultation responses, it is generally pointed out that this is inadequately investigated, and Rui himself writes that this should have been subject to broader assessment. It should also be mentioned that Rui only had a couple of months to investigate. The Norwegian Bar Association states that there is a significant weakness in the inquiry because the fundamental question of whether it is, and in what cases, if any, it is necessary that individuals can be held liable for violations of the competition rules has not been asked or investigated. The proposal related to the market investigation tool has also been criticized for inadequate investigation in most of the consultation responses. It will be interesting to see if the criticism in the preparation of the law is upheld.

**In September, the Ministry of Culture and Equality circulated a proposal for regulations relating to the sale of books (the Book Act Regulations) for hearing.** According to the Ministry, the Book Act Regulations are necessary for the new Book Act to enter into force, and it is intended that both the Act and the Regulations will enter into force on 1 January 2024. Broadly speaking, the regulations contain an exemption from the scope of the Book Act for self-publishers, a right to give discounts in special cases, a prohibition on giving away books with a fixed price and an opportunity to set a new fixed price for reissued publications. The proposals are largely a continuation of the provisions in the Regulations relating to exemptions from Section 10 of the Competition Act. It is not proposed that the other statutory provisions in the Act be used at this time.

**This summer, the European Commission launched an investigation to determine whether Microsoft's practice of including Teams in the Office 365 package is anticompetitive.** The Commissions concern is related to consumers not being given the opportunity to choose whether to include Teams when purchasing the Office suite or not. The case gives us a "d  j   vu" feeling, because in 2013 Microsoft was found in breach of a commitment to give European consumers a choice about which browser they wanted to use. At the time, Microsoft was imposed a \$730 million fine. To prevent history from repeating itself, Microsoft has now come up with remedial measures in the form of, among other things, detaching Teams from the Office 365 suite from October 1 this year. However, the investigation is still ongoing, and it remains to be seen whether the measure satisfies the Commission, which has not yet commented on this.



**In July, the European Court of Justice ruled on a decision related to the European Commission's merger control in consolidated telecom markets in the case - [Case 376/20 P, CK Telecoms](#).** The background for the decision was that the Commission in 2016 prohibited a merger between two mobile operators in the UK. The merger would have reduced the number of operators in the country from four to three, and the market was therefore oligopolistic. The ban was further annulled by the General Court in 2020, but the European Court of Justice has now overturned this judgment and sent the questions back to the Lower Court. In general, the view of the European Court of Justice was that the General Court erred in law on some issues, including the assessment of competitiveness and when they assumed a higher standard of proof-threshold than "more likely than not" burden of proof in the merger question.

The decision has been viewed by many as a victory for the European Commission, and Vice-President Margrethe Vestager has [stated](#) that the importance of the decision extends far beyond the specific nature of the case. On closer reading, however, the decision shows that the Court largely based its decision on case-specific matters and that the General Court had misunderstood some of the Commission's arguments, as well as what the Commission had considered. It now remains to be seen whether the Commission can simply assert that all competitors in oligopolistic markets are "close competitors" and that one of the players is an "important competitive force" to detect a significant obstacle to effective competition (SIEC). The judgment is clear that all circumstances must be considered in order to assess complex situations and whether the circumstance is capable of supporting the conclusions drawn. The judgment shows that the courts are not reluctant to test the legal understanding and application of the law by the Commission. The Court also has some noteworthy statements on the Commission's guidelines as a legal source.

**The new group exemption for vertical agreements (VBER) is in place in Norwegian law.** In July this year, the new group exemption for vertical agreements Regulation 2022/720 became part of Norwegian law through a [regulation \(2023-07-07-1258\)](#) with retroactive effect from 1 June 2022. The new regulation replaces the previous VBER Regulation, which expired on May 31, 2023. VBER authorises, subject to certain conditions, exemption from certain forms of vertical cooperation between undertakings, which in principle are prohibited pursuant to Section 10 of the Competition Act. Among other things, the new regulation is even clearer about prohibiting the effective use of the Internet and provides clearer guidance for information exchange.

**The Norwegian Competition Authority has submitted a consultation response to the Ministry of Transport and Communications' [hearing on proposed changes in the taxi market](#).** The Taxi Committee's proposal, which is the background for the consultation, is to reintroduce stricter regulations in the taxi market, and thus partly go back on deregulation from 2020. Among other things, the taxi committee wants all taxi operators to be obliged to be affiliated with a taxi central. The Norwegian Competition Authority is critical of the proposal and believes that the obligation may make it more difficult for new taxi operators to establish themselves in the market. The Authority also notes that the changes introduced in 2020 have not yet been given sufficient opportunity to operate in the market.

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