



UiO • **Institutt for privatrett**
Det juridiske fakultet

Quantitative analyses in merger control **- Introduction and Norwegian experience**

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Outlook and propositions

- Many/some CA's apply a larger «tool box» of economic techniques to assess the competitive effects of mergers and acquisitions
 - E.g. 2010 US Horizontal Merger Guidelines
- Many/some CA's increasingly rely on e.g. diversion ratios and price pressure indices to assess the competitive effects of mergers and acquisitions
 - E.g. UK (CMA/OFT/CC)
 - E.g. EU (telecom mergers)
- The Nordic CA's have (to varying degrees?) adopted such «tools» and quantitative techniques in their enforcement policy
- These developments are not the result of legislative changes or court precedents, but represent changes in the CAs' policies inspired by advancements in competition economics
- These developments in the CAs' enforcement practice give rise to questions of both substantive and evidentiary law

Norwegian merger control statistics

- Interventions (2004->)
 - Ca. 40 interventions against concentrations
 - Ca. 15/25 prohibitions/commitments
 - Ca. 15/7/3 structural/behavioural/both
- Administrative appeals
 - Ca. 10
- No case law
- Geographical markets
 - International markets: 1
 - National markets: ca. 20
 - Regional markets: ca. 10
 - Local markets: ca. 5
 - «National and local dimensions»: ca. 4

Retail – geografic markets – NCA’s practice (2004-)

Case	Product market	Geografic market	Decision
2008-3, Shell-YX	Fuel from gas stations	<u>Local</u>	Prohibition on acquiring two local gas stations
V2008-10, REMA-Lidl	Groceries from grocery stores	<u>Local (national aspects)</u>	Structural remedy in one local market
V2009-14, Validus-Sunkost	Health foods from health food stores	<u>National (possible local dimension)</u>	Prohibition
V2011-5, Norli-Libris	Books from book stores	<u>National and local dimensions</u>	Structural remedies in four local markets
V2012-18, Plantasjen-Oddernes	Garden products from garden centres	<u>Local</u>	Prohibition
2014, NG-ICA (SO) §10	Groceries from grocery stores	<u>National and local dimensions</u>	No decision
V2014-2, Sats-Elixia	Fitness centres	<u>Local</u>	Structural remedies (11 centres) in local markets
V2015-24, Coop-ICA	Groceries from grocery stores	<u>National and local dimensions</u>	Structural remedies in 90 local markets
V2015-29, St1-Shell	Fuel from gas stations	<u>National and local dimensions</u>	Structural remedy (all St1 stations)
2015, NG-Tiger/Esso	Kiosk goods («KBS»)	<u>National and local dimensions</u>	Approval
V2016-16 , Umoe/Peppes-Dolly Dimple’s	Pizza restaurants, take-away/home delivery of pizza	<u>National and local dimensions</u>	Prohibition
A2017-2, Adams Matkasse – Godtlevert	Home delivery of groceries	<u>National and local dimensions</u>	Approval

Norwegian substantive merger control law and policy

- The Competition Act (2004) § 16 intervention against concentrations
- Substantive standard
 - 2004 (1988) - 2016: SLC (uniquely Norwegian, total welfare)
 - 2016 - : SIEC (harmonized EUMR art. 2)
- NCA's substantive merger analysis
 - 2004 (1988) - ca. 2011
 - Structuralism
 - Market definition, market shares/-concentration, mv.
 - 2011 - 2017
 - Increased reliance on closeness of competition, diversion ratios and price pressure indices
 - Supplemented and replaced structural analyses
 - Unilateral effect, heterogeneous products or services

Closeness of competition, diversion ratios and price pressure indices

- Qualitative assessments of closeness of competition
 - How «close» competitors are the undertakings in the concentration?
 - How «close» competitors are third party undertakings?
 - Qualitative assessment of competition parameters (prices, product characteristics, geographical proximity)
- Diversion ratios
 - Quantification of closeness of competition
 - The proportion of customers/income captured by other suppliers as a result of a price increase or market exit
 - Customer surveys, churn-numbers, shock analyses, etc.
- Price pressure indices
 - Indicate the undertakings' incentives to increase price post merger
 - Diversion ratios, price-cost margins, efficiencies / marginal cost changes, relative price differences
 - UPP, GUPPI etc.

Background 2005-2010

- 2005 UK CC *Somerfield - Wm Morrison Supermarkets*
- 2007 Concentration *NorgesGruppen – Drageset*
- 2008 *Master thesis, Norges Handelshøyskole (NHH)*
- 2010 *Farrell & Shapiro*
- 2010 *Moresi*
- 2010 *US Horizontal Merger Guidelines*
- 2010 *Lars Sørgard: «Økonomisk analyse av fusjoner og oppkjøp: Markedsavgrensning vs konkurranseanalyse»*

NCA's practice 2011-2016

- *V2011-5, Norli - Libris*
 - Qualitative closeness of competition analyses in local book store markets
- *V2012-11, A-pressen - Mecom (Edda Media)*
 - Qualitative closeness of competition analyses in local advertising market for newspapers
 - Diversion ratios from customer surveys
- *V2012-18, Plantasjen - Oddernes Gartneri*
 - Qualitative closeness of competition analyses in local garden centre market
 - Diversion ratios from customer surveys
- *V2014-2, SATS - ELIXIA*
 - Qualitative closeness of competition analyses in local fitness centre markets
 - Diversion ratios from customer surveys
 - Price pressure analysis (GUPPI)

NCA's practice 2011-2016

- *V2015-1, TeliaSonera – Tele2 / Network Norway*
 - Diversion ratios from churn data in end user market for mobile communication services
 - Price pressure analysis (GUPPI)
- *V2015-24, Coop-ICA*
 - Structural «screening» of local grocery markets
 - Qualitative closeness of competition analyses
 - Diversion ratios from customer surveys
 - Price pressure analyses (GUPPI)

V2016-6, *Peppes Pizza–Dolly Dimple’s*

- National competition analysis (aggregate local effects)
- Local competition analyses
 - No clear market definition (product / geographic dimension)
 - No structural «screening»
 - Closeness of competition, entry barriers, diversion ratios from customer surveys, price pressure analyses (GUPPI)
- Rejection of structural analyses
 - «Partenes markedsandeler (...) [gir] svært begrenset informasjon om hvor nære konkurrenter partene er»
 - «tilsynet i liten grad vektlegger markedsandeler i inneværende sak»
- SLC in 10 local restaurant areas & 20 local take-away / home delivery markets
- Proposed remedies rejected
- Upheld by Ministry of economics (jan 2017)

Substantive issues

- SLC (-2016) – analytical flexibility and discretion for the NCA
 - No court precedents and few authoritative legal sources
- Dominance / SIEC (2016-) – A structuralist approach?
 - EUMR art. 2.1
 - «*the Commission shall take into account: (a) the need to maintain and develop effective competition (...) in view of, among other things, the structure of all the markets concerned (...);*»
 - EUMR, recital 32
 - «*Concentrations which, by reason of the limited market share [<25 %] of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market.*»
 - Case law
 - «*The control of concentrations aims, on the basis of a prospective analysis of the market structures, to prevent the implementation of a transaction which would significantly impede effective competition.*» (T-342/07, Ryanair)
 - «*a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition*» (C-68/94 & C-30/95, Kali & Salz, T-2/93, Air France, T-342/99, Airtours, T-151/05, NVV)
 - Commission policy

Evidentiary issues

- Qualitative closeness of competition
 - How «close» is «close»? Absolute or relative concept?
 - E.g. V2015-30, *Orkla – Cederroth*
 - Orkla (Dr. Greve) og Cederroth (Asan) «er hverandres eneste og nærmeste konkurrenter før foretakssammenslutningen.»
 - Contrast COMP/M.4439 Ryanair / Air Lingus
 - «The concept of "closeness of competition" [is] of limited added value on markets in which from the outset only two competitors are active (...), since both competitors in a duopoly are 'by nature. each other's closest competitors.»
- Diversion ratios and customer surveys
 - Framing, exit surveys, marginal vs average consumers etc.
- Price pressure analyses
 - Margins, efficiencies, relative price differences
 - Inferences and thresholds

Summary

- NCA's practice 2004 (1988) – 2011
 - Structuralist approach
- Theoretical foundation for policy change 2005-2010
- NCA's practice 2011-2017
 - Unilateral effects, differentiated products
 - Structuralism supplemented and gradually replaced by qualitative closeness of competition analyses, diversion ratios and price pressure indices
- Substantive and evidentiary legal questions