

“External dimensions of EU competition policy: The case of the EEA/Norway”

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Visiting at ULB-IEE

GR:EEN junior researchers conference

Brussels, 18-20 November 2014

This piece is not intended as a stand-alone paper, but as a chapter of my PhD research on external dimensions of EU competition policy. It is a first draft of the EEA/Norway case study, for which I conducted fieldwork in Bergen and Oslo in spring 2014. Comments are very welcome at this stage. In particular, I would appreciate some input on 1) how I should make this chapter more theoretically informed, i.e. how I can upscale beyond the empirics in a sensible manner and 2) whether or not I should include a section on energy (under 4.3.1).

Competition policy is a particularly relevant policy area to consider for the role of the EU in the world, since on the one hand it is the ‘core business’ of the EU, and on the other hand there is an increasing proliferation of competition regimes internationally (dramatic increase of competition authorities and networks over the last 25 years). The main research question of the thesis is therefore: what can the external dimensions of EU competition policy tell us about how the EU operates beyond its borders?

The theoretical framework of the thesis is provided by the EU as a regulatory state in global public policy on the one hand (Majone, 1994; Bach and Newman, 2007), and EU external governance on the other hand (Lavenex, 2008; Lavenex and Schimmelfennig, 2009; Sabel and Zeitlin, 2010). Although theoretically informed, the thesis follows a more bottom-up approach to see how EU competition policy plays out externally. Basic idea is to firstly discuss internal EU competition policy, and then to map external EU competition policy in three dimensions: the European Economic Area (EEA) with a focus on Norway; EU accession candidates with a focus on Turkey; and finally, international networks in competition policy with a focus on the OECD’s competition committee and the International Competition Network (ICN).

4. The European Economic Area

Extending the internal market

A first external dimension of EU competition policy occurs through the European Economic Area (EEA), a comprehensive extension of the EU's internal market without EU membership. The structure of this chapter is as follows. The first part of the chapter introduces the history and legal framework of the EEA. Also, it motivates the choice for Norway as a case study within the EEA and discusses the relation between Norway and the EU with a focus on sectors that are particularly sensitive in the relation between Norway and the EU: energy, agriculture and fisheries. The second part of the chapter highlights the multi-layered structure of competition policy in the EEA: it first discusses the enforcement and substance of competition law in the EEA and competition policy in Norway. The third part of the chapter zooms in on the food sector as a specific focus area. Although most food and fisheries products are excluded from the EEA agreement, the Norwegian competition authority is both nationally and at EU level active in this field. The final part of the chapter is devoted to a short discussion of the results.

4.1. The European Economic Area

The European Economic Area (EEA) is an externalization of the EU's internal market rules. It was established by the EEA agreement, which entered into force in 1994. The EEA currently consists of the EU plus three non-EU countries: Norway, Iceland and Liechtenstein, and extends the EU internal market regulation to these non-EU countries. As the non-EU countries in the EEA at present do not wish to accede to the EU, the EEA should be considered a separate track of EU integration that does not (necessarily) lead to accession. A first set of questions relates to what extent tensions in such an 'internal market only' extension of the EU play out in practice. This question is addressed in the first part of the subchapter. A second set of questions relates to the interests at stake in the relationship between Norway, currently the largest non-EU EEA country, and the EU. This question is addressed in the second part of the subchapter.

4.1.1. The EEA agreement

Background and membership

Shortly after the Treaty of Rome establishing the European Economic Community (EEC) had been signed, seven non-EEC countries including the UK, Switzerland and Norway established the European Free Trade Association (EFTA) in 1960.¹ Contrary to the EEC, EFTA was not a customs union and therefore did not have common external tariffs; EFTA was a free trade area, in which tariffs between the member countries were abolished. In the mid-1970s, a number of bilateral free trade agreements were concluded between the EEC and individual EFTA countries, in practice abolishing tariffs for most industrial products between EFTA countries and the EEC as well. When an increasing number of countries acceded to the EC in the 1970s and 1980s, and the internal market harmonization was given an impetus by the Single European Act (1986), the need was felt for instruments

¹ Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK were the 1960 signatories of EFTA. Later members include Iceland (1970), Finland (associated since 1961 / full member since 1986) and Liechtenstein (1991).

of further integration for the EFTA countries that were not, or not yet, ready for accession. To this end, the European Economic Area (EEA) agreement was signed in 1992 by the EC, the EC members and the EFTA countries that had not acceded to the EC at that time:² Austria, Sweden, Switzerland, Norway, Iceland, Finland and Liechtenstein. Once implemented, the agreement would extend the internal market to the territory of the non-EU countries part to the agreement. The EEA was thus conceived as a way towards further European integration and also potentially towards EC membership.³ It entered into force in January 1994. Already before that date however, all non-EC signataires except for Iceland and Liechtenstein had applied for full membership. Eventually Switzerland never ratified the EEA agreement and remained covered by EFTA only⁴ whereas Austria, Finland and Sweden became full EU members as soon as 1995. Since then, the EEA covers the EU member states plus non-EU countries Norway, Liechtenstein and Iceland. The EEA in its present form is therefore rather marginalized in terms of non-EU members, while EU membership has dramatically increased (from 12 member states in 1994 to 28 member states in 2014).

What is more, the EEA has now become something of a permanent alternative to EU membership; the three current non-EU EEA countries are choosing not to accede, although they would probably fulfill the EU's accession criteria. Norway voted against EU membership in 1972 and 1994 referenda; the Icelandic government had put EU accession negotiations on hold in 2013; and Liechtenstein never applied for membership. Recently, the EEA also emerged in the UK debate on Europe (although mainly concluding it will be a 'poor alternative' to full EU membership), and therefore, at least conceptually, is relevant as a model for countries that consider leaving the EU.⁵ The main permanent alternative in terms of EU integration without membership would be on the one hand the Swiss track of progress through bilateral agreements on a range of different topics, instead of an encompassing solution. This is however not an option favoured by the EU, as it may allow for cherry picking.⁶ On the other hand, there is the European Neighbourhood Policy (ENP) with enhanced association agreements. The EEA was actually one of the models discussed in the Convention on the Future of Europe, that ultimately led up to the ENP.⁷ The ENP however differs from the EEA and Swiss situation in that for most ENP countries it will be either hard to fulfill the EU's accession criteria in the short to medium term (ENP east), or it is geographically unlikely that these countries would accede at all (ENP south). At present, the EEA is still one of, if not the most ambitious and complete agreement the EU has with third countries.

² Three EFTA members had previously acceded to the EC: the UK and Denmark (in 1973) and Portugal (in 1986).

³ Delors (1989): http://www.cvce.eu/content/publication/2003/8/22/b9c06b95-db97-4774-a700-e8aea5172233/publishable_en.pdf.

⁴ In Switzerland, especially the issue of freedom of workers was a problematic issue that blocked further integration.

⁵ See for example: 'Insiders on the Outside: Swiss and Norwegian lessons for the UK' - Centre for European Reform (September 2012); 'It would be difficult to follow the "Swiss" or "Norwegian" models as an alternative to EU membership' - LSE Europ blog (January 28th, 2013); 'The "Norwegian Model" would be a poor alternative to EU membership for the UK' - LSE Europ blog (April 19th, 2013).

⁶ Insert reference.

⁷ The Praesidium of the Convention for the Future of Europe proposed to reflect about a clause "defining a privileged relationship between the Union and its neighbouring States" in its first preliminary draft of 22 October 2002 (see CONV 369/02, p. 16). See on the EEA as a model for the ENP also Vahl (2005); Sverdrup (2011).

Scope and structure of the agreement

The EEA is a way of enhanced economic integration, extending the EU's internal market - the former first pillar - beyond the EU but without full membership. In practice this means that the four freedoms of the EU's internal market (freedom of labour, capital, goods and services) (part II and III of the EEA agreement), competition policy (part IV of the agreement), and a number of horizontal policies in the area of social policy, consumer protection, environment, statistics and company law (part V of the agreement) are extended to the EFTA countries that participate in the EEA (hereafter: EEA EFTA countries). There is no common external trade policy and there are no common external tariffs: therefore, non-EU countries that are part to the agreement can impose tariffs on products from outside the EEA that already circulate within the internal market. Also, the common agriculture and fisheries policies do not fall in the scope of the EEA, although several parts of the agreement deal with trade in these sectors. In general this implies that Norway, Iceland and Liechtenstein remain free to impose tariffs on agricultural and fisheries products both from the EU and amongst each other.

The EEA agreement establishes a so-called 'two-pillar structure' with the EU on the one side, and the EEA EFTA states on the other side (fig. 1). The EEA agreement therefore created an extra layer of institutions between the existing EFTA and European institutions. When new European regulation relating to the internal market is adopted, the EEA joint committee transposes these rules to the (annexes and protocols of the) EEA agreement, at which point they become applicable to the EEA EFTA countries as well. Although this system ensures a certain level of flexibility, the EEA Joint Committee cannot revise the text of the agreement itself. That can become problematic when the treaty articles are revised (as happened in Amsterdam - 1997, Nice - 2001 and Lisbon - 2007), since many articles from the EEA agreement fully mirror the treaty articles as they were at the time of signature (i.e. May 1992). Also, the two-pillar setup implies that the adoption of internal market rules in EEA legislation will be structurally delayed. The European Commission report from 2012 elaborated on the issue of delays, estimating that the transposition from EU to EEA legislation normally takes around a year (but exceptionally even up to five years) and pointed out a large backlog in transposition.⁸ Elsewhere, it has been suggested that delays are used tactically by national governments to ease national political pressure.⁹

Since the agreement has been in force for 20 years now, in 2012/2013 a discussion took place on a potential revision. The European Commission,¹⁰ but also Norway¹¹ and Liechtenstein¹² on this occasion published reports on the functioning of the EEA. On the Norwegian side, it has been occasionally suggested that the EU has been reluctant to spend 'too much energy' on a proper revision of the agreement.¹³ On the EU side, there seemed to be a feeling that Norway is not making enough effort to ensure speedy and effective transposition of EU legal acts into the EEA legal framework. Eventually, it has been decided continue within the current legislative framework.¹⁴

⁸ European Commission (2012) section [B III].

⁹ Norwegian EEA Review Committee (2012), chapter 27.

¹⁰ European Commission (2012). See also Council of the European Union (2012).

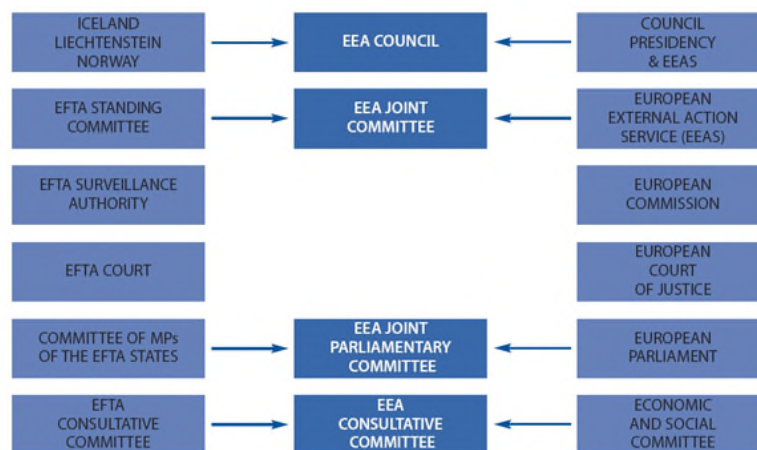
¹¹ Norway EEA Review Committee (2012).

¹² CEPS (2013).

¹³ Fenger (2006): 139.

¹⁴ EEA Joint Parliamentary Committee (2013).

The Two-Pillar EEA Structure



This diagram illustrates the management of the EEA Agreement. The left pillar shows the EFTA States and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle.

Fig. 1: The EEA's two-pillar structure (Source: EEA).

Internal market without EU membership

The extension of the internal market to EFTA countries via the EEA agreement raises a number of questions on how such an extension plays out in practice, i.e. what the implications of this 'internal market only' approach are.

First of all, there is a set of questions that relate to the distinction between the internal market and 'the rest' or the 'non-internal market.' In particular since the Maastricht Treaty, the EU's competences have broadened and deepened. Also, the EU's approach has become increasingly holistic, meaning there is a spillover from the 'non-internal market' issues to the internal market. At the broadest level, the horizontal goals of the EU Treaties have evolved;¹⁵ the EU increasingly pursues not only internal market objectives but also social and environmental goals. Although this impacts the way in which the internal market rules are applied and interpreted, it will be not always made explicit how and where these changes take place. An example that relates to such broadening of EU competences is the concept of citizenship, which was introduced by the Maastricht Treaty but is not included in the EEA. In practice, it is difficult to assess to what extent the ECJ takes this concept into account in cases on free movement of persons.¹⁶ Therefore, it has been pointed out that there is a widening gap between the EEA agreement and the EU treaties, where the question is to what extent the EFTA court can and should bridge this gap.¹⁷ The latter seems particularly risky in the light of broadening of EU objectives, as it may result in second guessing the ECJ's teleological interpretation by the EFTA court.

Secondly, there is a set of questions that relates to the 'semi-supranational' nature of the EEA agreement. In the legal sense, the EEA attempts to do the impossible: realizing a common internal market, but without supranationality.¹⁸ This creates an inherent tension within the agreement. Whereas the EU is a separate legal order in which community law is prioritized, the EEA agreement is an international agreement in which the status of EEA

¹⁵ Fenger (2006).

¹⁶ Fenger (2006): 143-144.

¹⁷ Fenger (2006); Fredriksen (2012b).

¹⁸ Sejersted (1997); Graver (2002). Borde (1997) remarks that it is 'a bit like trying to mix oil and vinegar.'

law in the EFTA EEA countries depends upon national law. For the current EEA countries, (partially) giving up sovereignty is considered politically and sometimes constitutionally unfeasible. Provisions from the EEA agreement need to be transposed to national law and cannot be directly invoked in national (Norwegian, Icelandic or Liechtenstein) courts. Nevertheless, there is state liability via the EFTA court for failure to implement, or to failure to implement correctly.¹⁹ Competition policy, discussed below, even has full direct effect. Therefore, the working of the EEA agreement in practice does move in the direction of supranationality.²⁰

A third set of questions relates to decision-making in the EEA. The role of the Joint Committee is reactive, and cannot go beyond adjusting existing community texts. This means that EEA EFTA countries are relatively one-sidedly ‘downloading’ the EU’s internal market rules without the same formal input in the decision-making process as full member states. To partially accommodate this issue, EEA EFTA states have been given an enhanced role in the consultation period when legislation is drafted by the European Commission.²¹ They also participate in a large number of EU agencies. Since in terms of decision-making, the Lisbon Treaty has shifted the emphasis in decision-making from the Commission towards the Council and the EP, possibilities for participation and input are understandably an issue of concern for the EEA EFTA members, who have no formal links to the Council and the EP.²² In the ultimate instance, EEA EFTA countries can veto legislation under 102 if it concerns a ‘serious problem (...) in an area which, in the EFTA states, falls within the competence of the legislator’. Such a situation results in the suspension of that part of the EEA agreement. It is not completely clear what this would mean in practice, also because it has not happened (yet): still, this is considered to be a highly unfeasible situation for all parties to the agreement.²³

4.1.2. Norway and the EU

¹⁹ See Mendez-Pinedo (2009): 145-175.

²⁰ Cf. Graver (2002): 85 – ‘realities certainly resemble the Community situation where the right to compensation follows from community law, and that individuals are entitled to invoke this right before their national courts.’

²¹ Articles 99-101 EEA Treaty.

²² Norwegian EEA Review Committee (2012): chapter 27; CEPS (2013): 52, 110; EEA Joint Parliamentary Committee (2013): 8-9.

²³ Although Norway initially refused to implement the third postal directive (2008/6/EC) completing liberalization in the postal sector, by the beginning of 2014 Norway eventually seemed prepared to proceed to the inclusion of the directive in the agreement.

The EEA as the 'Norwegian model'

When Austria, Sweden and Finland became full EU members in 1995 and Switzerland failed to ratify the EEA agreement, the EEA soon after entry into force became the 'Norwegian model' of EU integration. Compared to EEA EFTA countries Liechtenstein and Iceland, the Norway is by far the largest in terms of population and GDP. Already in 1997 'the agreement [had] to some extent become bilateral, regulating the relationship of Norway and the EU, with the marginal economies of Iceland and Liechtenstein trailing along.'²⁴ A 2012 report from the Norwegian government also remarks that the EEA: 'is the only international organisation in which Norway is a superpower, having a certain effect on Norway's self-image, extending so far as Norway viewing this as a "Norwegian" model, and not always treating its two fellow EFTA partners as fully equal cohorts in a common endeavor.'²⁵ Norway is, in terms of external trade, a highly relevant trade partner for the EU – ranking 5th in 2013, after the US, China, Russia and Switzerland.²⁶ In addition, Norway is an essential strategic partner for the EU in terms of energy supply. The thesis will therefore focus on Norway as a country case study within the EEA.

Norwegian reluctance to join the EU

The relationship between Norway and the EU has been marked by two referenda, in which the Norwegian population voted against full EU membership. The first referendum took place in 1972 (when 53,5% voted against); the second in 1994 (when 52,2% voted against). Large part of the literature on the relation between Norway and the EU focuses on accounting for the outcomes of these referenda. A number of authors focuses more in particular on the question of identity, and how the Norwegian national identity with its emphasis on the simple, rural, outdoor life opposed to the EU identity, which is more urban.²⁷ These authors point out that Norway's interests in fisheries and agriculture go beyond the economic: these sectors are part of a Norwegian way of life, which is potentially threatened by EU accession. In order to account for the Norwegian reluctance to join the EU, the studies also focus on Norway's historical struggle for independence, first from the Danish and then the Swedish kingdom, and underline the negative connotation of the word 'Union' which was also used for the Norwegian submission to the Swedish crown from 1814 until 1905.

Other studies consider the mobilization of sectors with specific economic interests for or against accession in explaining Norway's position outside the EU, or a combination of economic interests and identity.²⁸ According to Ingebritsen, the lack of necessity for greater opening of European markets to the Norwegian energy sector has led the agriculture and fisheries sectors to be much more prominent in the debate. The oil revenues allow Norway to engage in financial support for regional policies and agriculture and fisheries. It would be precisely groups benefitting from these advantages that mobilized against further European integration, whereas the oil sector would not gain particular advantages from EU membership and therefore remained largely absent in the debate.

²⁴ Sejersted (1997): 44-45.

²⁵ Official Norwegian Report (2012) – unofficial translation, chapter 27. It should be remembered that decisions in the EEA are taken by the EU on the one side, and the EEA countries (together) on the other side.

²⁶ http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf

²⁷ Nelsen (1993); Neumann (2002); Tanil (2012a).

²⁸ Ingebritsen (1998); also Tanil (2012b).

When considering the relation between Norway and the EU, it is important to emphasize that in a number of EU countries, EU membership has not been subject to referenda. In fact, if such referenda were held today, some of the older member states would perhaps be confronted a formidable opposition (France and the Netherlands were indeed confronted with 'no' votes on the proposed European constitution in 2005).²⁹ Therefore, it is arguably not so much the outcome of the referenda that makes Norway different from EU countries - especially since the 'no' side won twice with small majorities and divisions also occurred also within existing political parties. [add set of studies that focuses on the Europeanization in EEA countries suggests that there is little difference]³⁰ The literature relating to the Norwegian reluctance to join the EU however brings up two relevant messages. Firstly, the literature is unanimous in pointing out that energy, agriculture and fisheries turned out to be decisive topics in the relationship between Norway and the EC/EU, although there is disagreement on the extent to which the interests related to these sectors are economic in nature. Secondly, to an extent these studies suggest that, in a range of cases such as fisheries, but also democracy and gender issues, Norway tends to consider its own policies to be superior to the EU's.³¹

Energy, agriculture and fisheries

Oil and gas are a major source of income for Norway: this sector made up for 20% of GDP in 2013³² and account for around half of Norway's export revenues (48,7% in 2013)³³ making it by far the largest export sector of the country. Within the energy sector, a distinction should be made between oil, gas and electricity. Oil and gas are almost exclusively export products; gas is rarely used in Norwegian households and only sold in bottles (i.e. there are no gas pipelines for household consumption). Whereas oil is mainly shipped abroad, gas – with the exception of liquefied gas – requires pipelines in order to be transported; gas contracts are therefore less flexible, and often signed for long terms. Electricity in Norway is almost exclusively generated through hydropower and is the main source of domestic energy consumption. Norway's import-export ratio in electricity is balanced – there is no export or import surplus.³⁴ From the EU side, energy relations with Norway are of an economic and strategic interest since Norway is one of the most important oil and gas suppliers.³⁵ A number of pipelines connect Norway to the UK and the EU mainland (France, Belgium and Germany).

Although agriculture and fisheries are not crucial for Norway in purely economic terms (0,6% of GDP and 3.2% of exports in 2013),³⁶ the interests Norway has in these particular sectors are also of a symbolic and, to a lesser extent a strategic nature. Farming and fishing are widely held to be part of the Norwegian identity and the Norwegian way of life;³⁷ the impossibility to shield these sectors after EU accession has been considered an important factor for skepticism towards full EU accession. Norwegian farmers currently receive much more generous subsidies than they would as an EU member state (potentially

²⁹ Borring Olesen (2011).

³⁰ Trondal (2002), [add].

³¹ Fisheries: see Tanil (2012b): 151-152; Interview (11).

³² Excluding services relating to oil and gas. <http://www.ssb.no/178423/value-added-by-kind-of-main-activity-at-basic-values.current-prices.nok-million>

³³ <http://www.ssb.no/178442/exports-of-goods-and-services.current-prices.nok-million>

³⁴ Interview (5).

³⁵ Insert reference as to how important exactly.

³⁶ <http://www.ssb.no/178423/value-added-by-kind-of-main-activity-at-basic-values.current-prices.nok-million> ; <http://www.ssb.no/178442/exports-of-goods-and-services.current-prices.nok-million>

³⁷ Neumann (2002); Tanil (2012a) (2012b).

especially in the light of potential reforms in the CAP);³⁸ fishermen are worried about having to open their fishing territories to EU member states. Fish farmers on the other hand expect to benefit from increased EU integration and so do exporters of fish products.³⁹ From the EU side, the main interest in fisheries is that EU member states would like to have access to Norwegian waters. At the same time it is becoming ever more clear that the EU fisheries policy is not working out very well in terms of sustainability.

4.2. Competition policy

Competition law is part of the EEA internal market *acquis* and as such incorporated into the EEA agreement. Within the EEA, competition law has a special position because it has direct effect in practice, with the EFTA Surveillance authority able to rule on

³⁸ See OECD statistics in agricultural support.

³⁹ In the period 1998-2012, the value of Norwegian fish farming exports increased from 10 billion NOK to over 30 billion NOK (as compared to catch, which remained more or less stable around 20 NOK): Norwegian Ministry of Fisheries and Coastal Affairs (2013).

complaints in a similar manner to DG competition in the EU. The Norwegian competition authority applies EEA and Norwegian competition law much in the same manner as EU member states would do, with the difference that they apply EU competition law through the EEA link. Participation in the EU's competition network further reinforces the link between EEA EFTA and EU enforcement.

4.2.1 Competition policy in the EEA

Relevant provisions and homogeneity

Competition law is part of the EU internal market *acquis* and as such incorporated into the EEA agreement: Article 53 contains a cartel prohibition, Article 54 the abuse of dominance prohibition; Article 57 concerns mergers; Article 61 treats state aid. All mirror the relevant EU treaty provisions except for Article 57 on mergers, which instead refers to the relevant EU merger regulation (4064/89, now replaced by 139/2004). Implementing legislation, such as regulations and directives, are extended to the EEA via Article 102 through Annexes and Protocols (most notable Annex XIV on competition, Annex XV on state aid, and Protocols 21-26). To ensure further homogeneity between EU and EEA law, EEA law has to be interpreted in conformity with ECJ case law that dates from before the signing date of the agreement (which is May 1992);⁴⁰ case law after that date has to be taken into 'due' account.⁴¹

The homogeneity⁴² between EU and EEA law is most clearly challenged when Treaty provisions change, since the Joint Committee cannot change the EEA agreement itself. Although treaty articles in competition have rarely been adjusted, the relevant Article on state aid has been amended to include the promotion of culture and heritage conservation as a separate exemption. ESA does not apply the new provision by analogy, but instead continues to assess culture and heritage conservation under the old exemptions.⁴³ Inherent delays in the transplant of secondary legislation are a further challenge to homogeneity, which potentially disturb the 'level playing field' within the extended internal market. The implementation of Regulation 1/2003 for example entered into force in mid-2005 for the EEA, i.e. a year later than for EU member states.⁴⁴ In this context it is also relevant to point out a case where the transposition of an EC block exemption had not been realized in the EEA agreement at the time of proceedings; the EFTA court then ruled that the block exemption could not be relied upon, since it was for the Joint Committee to implement the community legislation.⁴⁵

Competition policy without EU membership

Coming back to the issues that were raised under (4.1.1.) relating to the extension of the internal market without EU membership (the distinction between the internal market and 'the rest'; supranationality; decision-making) these will now in turn be discussed for competition policy.

Although competition policy is clearly part of the internal market rules, the broadening of

⁴⁰ Article 6 EEA Agreement.

⁴¹ Article 3(2) Agreement on the establishment of ESA and the EFTA court.

⁴² Introduce this concept earlier.

⁴³ See Fenger (2006): 141-142. Decision 114/99/COL of 4 June 1999 (on the film industry Iceland); Decision 380/00/COL of 18 December 2000 (film industry Iceland); Decisions 32/02/COL and 169/02/COL of 18 September 2002 (film industry Norway).

⁴⁴ European Commission (2014): under 256.

⁴⁵ Case E-3/97, Jaeger [1998].

the EU's treaty objectives is still relevant in this area. It is not entirely clear how, and to what extent non-economic goals play a role in the application of EU competition law at present (see chapter 3).⁴⁶ It is therefore unclear to what extent horizontal goals of the EU, such as considerations relating to the environment and employment will eventually transpire in the application of competition law by the European Commission and the ECJ and consequently, in EEA law. Also questions arise relating to sectors where community legislation has significantly increased, or that do not fall under the EEA agreement. Although the energy sector is principle covered by the EEA the *acquis* has developed considerably in this area since the agreement entered into force, this creates tensions especially with regards to liberalization issues.⁴⁷ The common agriculture and fisheries policies on the other hand are excluded from the EEA, although parts of the agreement deal with trade in agriculture and fisheries (mainly Protocol 3 and 9).

The second issue relates to supranationality in the EEA. For competition law, the problem less relevant since ESA is directly competent to deal with cases against companies in competition cases, and therefore not only against infringements of the agreement by the contracting parties (i.e. the EU and EEA EFTA countries).⁴⁸ Therefore, there is something of a *de facto* direct effect of EEA competition law. The position of ESA and the EFTA court thus adds a layer in between the EEA EFTA competition authorities or EEA EFTA courts and DG Competition or European courts; a layer that is needed because formal supranationality cannot be achieved.⁴⁹ State aid is enforced by ESA vis-à-vis the EEA EFTA countries in a way that mirrors the enforcement of state aid by DG competition vis-à-vis EU member states. Competition authorities of EEA EFTA states also have to notify their decisions to ESA in a way that compared to the notification by NCA to DG competition in the EU.

The third issue, input in decision-making, also plays out differently for competition policy than for other areas of Community legislation. That is mainly because the shift in emphasis in policy-making from the Commission towards the EP and the Council is much less of an issue in competition policy than in other policy fields. Potentially more challenging is the increased practice of the Commission's DG competition to proceed through more informal instruments, such as guidelines. With Regulation 1/2003 and the partial decentralization of competition enforcement throughout the EU, the EEA EFTA competition authorities and ESA have become part of the enforcement network ECN. Although there are limitations to their participation on case enforcement and voting, they can participate in working groups and other fora that relate to policy-making. Therefore, a part from the formal input the EEA EFTA states can give in their capacity as EEA member when commission legislation is proposed,⁵⁰ ESA and EEA EFTA competition authorities therefore also participate in the mechanisms from the ECN, which increasingly inform policy-making at the EU level.⁵¹

⁴⁶ Article 3(3) TEU now reads: '[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (...).'

⁴⁷ CEPS (2002): 12-19.

⁴⁸ Insert reference.

⁴⁹ See Fredriksen (2012a) and (2014), who suggests that the EFTA court risks being sidestepped by Norwegian courts, who prefer to relate directly to the ECJ instead.

⁵⁰ Article 99-101 EEA Agreement; interview (1).

⁵¹ Danielsen and Yesiskagit (2014).

	EU competition law	EEA competition law	Norwegian competition law
Provisions substantive law	Art. 101 & 102 TFEU and Regulation 139/2004	Art. 53, 54 and 57 EEA agreement	Art. 10, 11 and 16 Norwegian competition act
	State aid: Article 107 TFEU	State aid: Article 61 EEA agreement	n/a
Enforcing agency	DG Competition with EU competition authorities	EFTA Surveillance authority (ESA) with EEA competition authorities ⁵²	Norwegian competition authority (KT) ⁵³
	State aid: DG competition	State aid: ESA	n/a
Relevant court	National EU courts and European Court of Justice	National EEA EFTA courts and EFTA court (for EEA EFTA states) ⁵⁴	Norwegian courts (with possibility to refer questions to EFTA court)
	State aid: European Court of Justice	State aid: EFTA court	n/a
When applied?	“EU dimension” (effect on trade between EU member states)	“EEA dimension” (effect on trade between EEA EFTA states) ⁵⁵	“Norwegian dimension” (trade between the EEA states is not affected)
	State aid from EU member states	State aid from EEA EFTA states	n/a

Fig. 2: Competition law in the EU, the EEA and Norway

4.2.2. Competition policy in Norway

Layered enforcement

⁵² All EEA competition authorities, meaning competition authorities in EU member states, in EEA EFTA states and DG competition.

⁵³ Formally, the competition authority of Norway is formed by the *Konkurransetilsynet* (KT) the parent ministry and the King together.

⁵⁴ For EU member states: national EU courts and European Court of Justice.

⁵⁵ In the application of Article 53 (cartels), ESA is competent when only trade between EEA EFTA states is affected, or when 33% of the EEA turnover is realized in the EEA EFTA states. In the application of Article 54 (abuse), ESA is competent when the abuse occurs only in the territory of the EEA EFTA states, or when 33% of the EEA turnover is realized in the EEA EFTA states. In the application of Article 57 (mergers), ESA is competent when the relevant thresholds are fulfilled in the EEA EFTA states. (See Article 56 and 57 EEA agreement.)

In Norway, the relevant EEA articles on competition have been implemented in the Norwegian competition act of 2004. Therefore, when thinking of competition policy in Norway, there are three institutional layers: DG competition, ESA and the Norwegian competition authority (see fig. 2). When cases have an EU dimension (i.e. when there is an effect on trade between EU member states), DG competition is normally competent to deal with the case. When the case has an EEA dimension (when the infringement only affects the EEA EFTA states, or more than 33% of the EEA turnover is realized in EFTA states), ESA is competent. When the case is Norwegian in scope (when trade in the EEA is not affected), the Norwegian competition authority is competent and will apply either Norwegian competition law or EEA law. In practice, this means that most of the cases relating to Norway (except for state aid) are dealt with either by either DG competition or the Norwegian competition authority.

Although the current Norwegian competition act in substance mirrors EU legislation in cartels, abuse and mergers, until 2004 the Norwegian competition act was actually significantly different from EU competition law in several ways.⁵⁶ [add here a few lines on how it was different]. In 2014, the 2004 competition act has been revised. Changes include increase of the merger thresholds, inclusion of leniency (formerly dealt with by a separate regulation) and a marker system; dawn raids; and finally, remedies (e.g. formalization of commitments).⁵⁷

Formally, the competition authority of Norway is formed by the *Konkurransetilsynet* (KT) the parent ministry and the King together. The current parent ministry is the Ministry of Trade, Industry and Fisheries,⁵⁸ the role of the ministry in enforcing competition law however is in decline with respect to the relevant agency – the KT. While previously the parent ministry was the appeal body for all the KT's decisions, since 2004 fines have to be appealed in courts. Although currently the ministry is still responsible for appeals in merger cases, that is likely to change in the short run, since a working group has been set up to create either an independent appeal board or let the appeals be handled by existing appeal board.⁵⁹ Although the KT can still be instructed to take up a case by the ministry and be overridden in exceptional cases,⁶⁰ in practice this hardly ever happens.

That the KT is the main actor in competition policy is also revealed by the relative numbers of staff members; while the ministry has a competition unit with a staff of around 20-30, the KT had 110 employees in 2014 - this number varying in the period 2000-2014 between 90 (2008) and 135 (2001).⁶¹ Unlike the Ministry itself, which is located in Oslo, the KT was relocated to Bergen in 2007. The move was part of a larger scheme of moving agencies away from the capital, and had besides a regional policy component also the intention to increase the independence of the agencies.⁶² In organizational terms, the KT consists of three market divisions plus KOFA (*Klagenemnda for offentlige anskaffelser*) (fig. 3); the latter is a separate division that deals with public procurement complaints.⁶³ Economic sectors have been split between three the market divisions, which deal with infringements and market monitoring in these clustered sectors. The market divisions are supported by three

⁵⁶ OECD (2004).

⁵⁷ Schjodt (2013); OECD (2013).

⁵⁸ Previously the KT fell under the ministry of Government Administration, Reform and Church Affairs.

⁵⁹ Informant (c) and interview (6).

⁶⁰ Article 13 and 21 Norwegian competition act.

⁶¹ <http://www.nsd.uib.no/polsys/data/en/forvaltning/enhet/1168/ansatte?vis=1&lk=a>

⁶² Whether agency autonomy and agency location are actually correlated remains to be seen: Egeberg and Trondal (2011).

⁶³ Informant (f) and interview (8).

horizontal units: the investigation department, the economics department and the legal department. Before adoption of an infringement decision, the envisaged decision is sent to ESA for comments by the legal department. This system is comparable to the submission of national decisions to DG competition in the ECN.

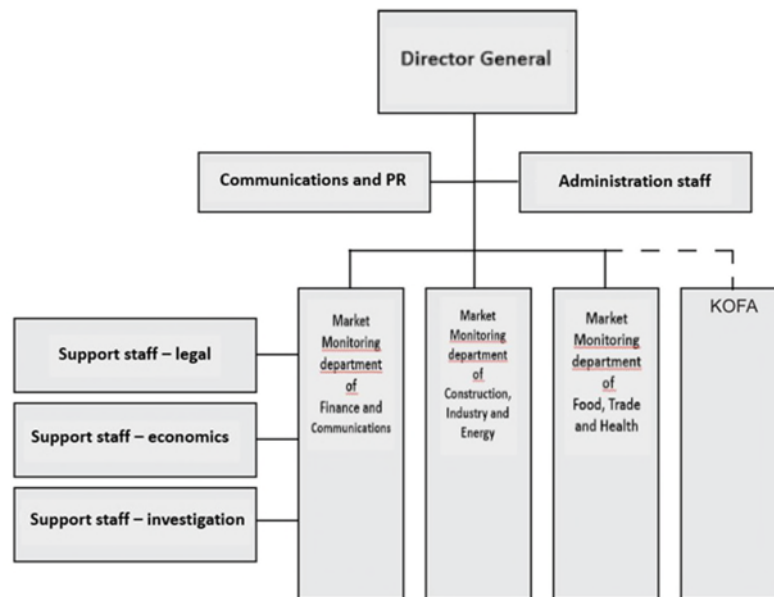


Fig. 3: The divisions of the KT (Source: KT)

The Norwegian competition authority in an EU context

As discussed above, EEA EFTA states formally have the possibility to be involved in the preparatory decision-making stage at the Commission. What has fundamentally changed practice in competition policy however has been the introduction of Regulation 1/2003. Besides traditional ways of involvement in decision-making, which usually took place by the ministries and sometimes with the involvement of the EEA EFTA missions at the EU, now also more structural (and potentially increasingly bottom up) cooperation with European competition authorities in the network of European competition authorities (ECN) that was established by Regulation 1.

Together with the competition authorities of Iceland and Liechtenstein and the ESA, the KT can participate in the ECN. That being said, ESA and EEA EFTA states cannot participate in the decentralized enforcement of EU competition policy itself, and therefore participation is limited to ‘horizontal’ discussions only (i.e. not related to cases). The differences with full EU member states therefore mostly occur in the area of practical case cooperation, most notably in dawn raid assistance and the exchange of confidential case information.⁶⁴ Also, EEA EFTA members do not have a vote in the advisory committee when the Commission decides on a case, although they can attend the meetings.⁶⁵ Since the advisory committee meetings usually decide with an unanimous vote of approval, it seems that the actual possibility of voting is not crucial in the participation process

⁶⁴ Article 12 and 22 of Regulation 1/2003 (respectively the exchange of confidential information and the possibility to request dawn raid assistance) are not extended to ESA and the EEA EFTA states.

⁶⁵ Article 58 EEA agreement and Article 6 of Protocol 23 on cooperation between the surveillance authorities.

(Chapter 3). Also the absence of decentralization in the EEA pillar means that there is no notification requirement to DG comp and the others for EEA EFTA competition authorities. KT instead notifies to ESA.

Despite these limitations, the KT is actively participates as an ECN member. Since a number of amendments to EEA Protocol 23 in 2007, the KT can also receive case-related information when is relevant for a policy discussion. The KT reports back to their ministry the issues that are related to policy development; however, these are then the ‘washed’ minutes, without case-related information.⁶⁶ The KT also participates in ECN working groups on topics where it can make a contribution, such as most notably the energy and the food groups, which will be discussed in more detail below.⁶⁷ Norwegian cases are included in the ECN Bulletin. Also, the KT is involved in social activities.⁶⁸ Finally, under the EEA agreement Norway can second officials to DG competition and regularly makes frequent use of this possibility.⁶⁹

In practice, the ECN is the most relevant international point of reference for the KT.⁷⁰ However, there are a number of other international networks in which the KT interacts with EU counterparts. Most importantly, these are the ECA, the Nordic cooperation, the OECD and the ICN. ECA (European Competition Authorities) used to be the main European network of competition authorities before the ECN was set up. The network deals with a number of practical issues and also some policy discussions. ECA also has a notification system for mergers, which are not regulated by the ECN notification scheme. In addition, the KT actively participates in the Nordic network, a political cooperation forum for the Nordic countries that has existed since the 1950s. The competition authorities of Norway and Iceland meet regularly with member state authorities from EU member states Sweden, Finland and Denmark, and publish an annual substantive report on relevant issues in the Nordic countries. This is not so much a forum for case cooperation, but more for policy-development. Similarly, the KT interacts with a number of ECN members in the OECD and in the ICN, both of which will be further discussed in (Chapter 6).

4.3. Focus areas: energy and food markets

⁶⁶ Interview (3); Laegreid and Stenby (2010).

⁶⁷ Interviews (3); (4); (7). See also Laegreid and Stenby (2010). Norway tries to venture out with its expertise in hydropower, both in general and in competition matters, see interviews (4) and (13).

⁶⁸ ... such as the ECN soccer competition. Interview (a).

⁶⁹ Informant (f) and interview (8) > <http://www.efta.int/eea/efta-national-experts> . That despite the fact that apparently Norwegian civil servants are not very keen on coming to Brussels (See interviews (11) and (12)).

⁷⁰ Interview (3). Danielsen (2013).

This subchapter further discusses competition policy the food sector. I am in doubt of whether I should the energy sector in this chapter as well. This would allow me to compare two sectors in which specific interests play a role that relate to EU-Norway relations; also it allows for the comparison of one sector that is covered by EU/EEA competition rules (energy) and one that is not (food). The food sector is chosen for a number of reasons. Firstly, it is a sector in which specific Norwegian dynamics or interests play a role vis-à-vis the EU; secondly, it is a sector in which in recent years a number of competition issues and cases have arisen both at Norwegian level and in a European context; thirdly, although this sector is not covered by the EEA rules, there is a spill-over in the European competition network..

4.3.1. Energy?

The energy sector is in principle covered by the EEA agreement, which means that EEA competition policy normally applies. Although discrimination of non-Norwegian firms in the supply to the oil sector has been prohibited since the EEA entered into force, EU energy legislation in the area of petroleum and gas at the time of the signature of the agreement was still in a very initial stage. Since then several EU liberalization packages have taken place in the energy sector.⁷¹ Although the role of the Norwegian government in the oil and gas is sector arguably changing as a result of the EEA agreement,⁷² state involvement in the Norwegian gas and petroleum remains considerable. The Norwegian government owns a majority share in Statoil ASA (the main supplier of petroleum and gas) and in the main network company Gassco/Gassnet (gas pipelines). Since oil and gas are almost totally an export scenario for Norway, in terms of competition enforcement these would normally fall under the jurisdiction of either ESA or DG competition and not of the Norwegian competition authority. Indeed, several cases in the past have been concluded in the oil and gas industry. DG competition settled a case with Norwegian gas producers Statoil and Norsk Hydro (before these merged into Statoil ASA) regarding the joint sale of Norwegian gas in 2002, and an investigation in oil and biofuels sector was carried out in 2013 by DG competition.

In electricity in the other hand, liberalization in both the EU and Norway is most relatively advanced. Norway is integrated in the EU markets through the creation of the Nordic electricity market and liberalization of both generation and retail (in line with the electricity directives). The Norwegians and the EU and ESA in principle apply that. Cartel case that concerned the Norwegian electricity exchange Nordpool in 2014, where there has been also an exchange of staff from the Norwegian competition authority to DG competition. In hydropower, Norway considers itself as a forerunner and is actively participating at the EU level in order to 'cash' this advantage. They are also quite active in the ECN energy group on this topic. Also Nordic report on electricity markets (2007). However, Norwegian government still owns a majority share in Statkraft (the major supplier of hydropower) and Statnett (electricity grid).

4.3.2. Food markets

Agriculture and fisheries have been excluded from the EEA agreement – as has been discussed above, a number of partially economic, partially non-economic interests were crucial in this area. The non-inclusion in the EEA has an impact on competition policy in Norwegian food markets in several ways. It means, first of all, that in Norway, Norwegian competition policy is applied to these sectors, instead of EEA competition law. Secondly,

⁷¹ See more comprehensively: Claes (2002).

⁷² Austvik (2012).

it also means that custom tariffs can be charged for most food products that enter Norway. Although Norway and the EU have bilaterally concluded some duty reductions for fruit, vegetables and plants, seasonal duties remain an issue.⁷³

Since ESA and DG competition are normally not competent to deal with cases that relate to agriculture and fisheries, there have been a number of referrals from DG competition to the KT where DG competition handles the EU dimension of the merger while the KT handles the Norwegian dimension (i.e. the case is ‘split’). This happened for example in Orkla/Rieber, where the Norwegian part of the takeover of Rieber by Orkla (both Norwegian companies in the food sector) was cleared by the KT after a referral requested.⁷⁴ In the area of fisheries, the proposed Austevoll/Kvefi JV was assessed by DG competition for the EU part and in Norway for the Norwegian part.⁷⁵ As mentioned above, the 2004 Norwegian competition act also provides for the possibility of intervention from the ministry, when larger societal goals are at stake; in practice, article 21 (the exemption for merger cases) was once applied to allow an agricultural merger that was prohibited by the KT.⁷⁶

In addition, there are several effects that tariffs have on the domestic food market. For fruit and vegetables, Norwegian products are favoured through taxation of products from abroad. This high taxation however only occurs in the (Norwegian) harvest season, resulting in the odd situation that consumers may actually end up paying less for products off-season. High tariffs can also more indirectly raise entry barriers. Retailers will have to go through a lot of trouble, especially when they sell composed products such as ready-made meals, where sometimes recipe or stock adjustments are necessary.⁷⁷ In relation to the taxes on cheese, including quark, dairy companies may have to adjust their recipes in order to be competitive on the Norwegian market.⁷⁸ The Norwegian dairy sector is particularly concentrated with the main player, Tine, having a market share as high as 95%. Also butter shortage in 2011, when milk production in Norway had decreased while demand was rising, resulting in high prices and empty shelves – this even led to a (temporary) decrease in import tax.⁷⁹ The KT has unsuccessfully tried to challenge Tine’s bargaining power in the cheese segment. After imposing a fine for abuse of dominance in 2007, the decision was ultimately overturned by the Supreme Court in 2011.⁸⁰

Norwegian food markets thus tend to be characterized by relatively high prices (fig. 4), limited consumer choice and high concentration levels. The KT has been relatively early and active in identifying these problems in its domestic market, although it has been so far less successful in actually challenging market players under Norwegian competition law. The KT issued a report on shelf space in supermarkets in 2005; the Nordic competition authorities chose food as the topic for their annual report in 2005 as well. This resulted in a comprehensive report on competition in the food sector in the Nordic countries,

⁷³ Nordic food market report: 97; agreement from 2003.

⁷⁴ Interviews (7) and (12). See DG competition’s decision of non-opposition to the Danish and Swedish aspects of the merger, Case COMP/M.6753.

⁷⁵ Interview (12). See DG competition’s decision of non-opposition to the EU aspects of the merger, Case COMP/M.7035, 19.12.2013.

⁷⁶ Interview (6). <http://www.konkurransetilsynet.no/no/Vedtak-og-uttalelser/Vedtak-og-avgjorelser/Prior-Norge-BA---Norgarden-AS---vedtak-om-inngrep/>

⁷⁷ Lidl tried to accede the market (2005-2008) but failed. Informant (a) and interview (11).

⁷⁸ It seems that Danone had to adjust their product (Danonino) for the Norwegian market in order to make it qualify for a competitive tariff, as the continental version of it contains a high percentage of fresh cheese or quark (as opposed to the Norwegian variant which, indeed, contains only pasteurized milk).

⁷⁹ <http://www.theguardian.com/world/2011/dec/14/norwegian-butter-crisis-shortage-christmas>

⁸⁰ <http://www.konkurransetilsynet.no/en/news/archive/Tine-upheld-by-the-Norwegian-Supreme-Court/>

concluding that although competition was increasing, compared to continental Europe there was a long way to go.

Ensuring competition in (retail) food markets is however not a concern that is unique to Norway: in recent years, competition in food markets has become an issue for most competition authorities in Europe. Although problems that occur on markets highly differ per product and per country, there are a number of common problems that competition authorities face. A main concern is the issue of buyer power of supermarkets vis-à-vis their suppliers. In such cases there are no clear-cut enforcement scenario's, since the buyer power of large retail chains may in the short run result in lower prices for consumers, but in the long run squeeze competitors out of the market, or even jeopardize the quality of the product.⁸¹ The latter is especially a problem for private label tenders, which may be so competitive that the production price is lower than the costs. Another shared concern stems from the relationship between competition law and sector-specific exemptions in agriculture.

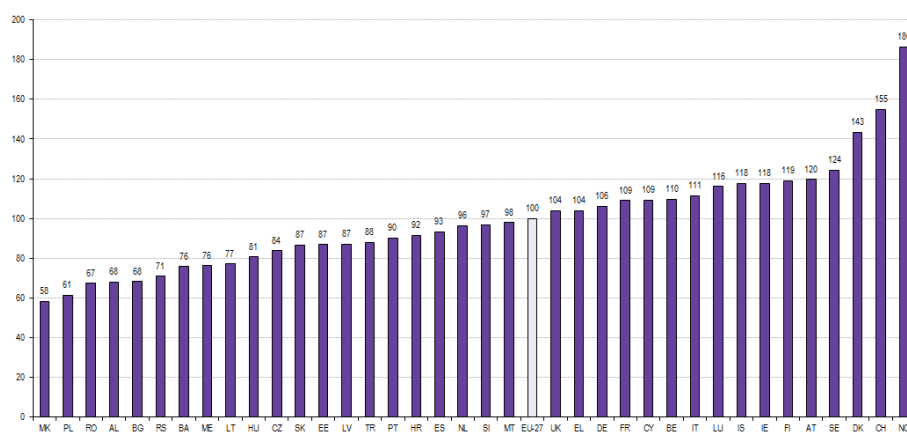


Fig. 4: EU comparative food prices, 2012 (Source: Eurostat)

Food markets therefore also emerged as a hot topic for competition authorities at the EU level, with a commission staff working document on competition in the food supply chain being published in 2009, leading up to an ECN report on the food sector in 2012 and a follow-up report commissioned by DG competition on innovation and choice in the food sector in 2014. Alongside, the EECS published a report on unfair trading practise in the food sector. The OECD picked up the topic with a roundtable in October 2013. Norway has been particularly active in the food sector at the ECN level, mainly by participation in the ECN working group on food that produced the 2012 report. [add more on Norway in food group]. Also domestically, the sector remained an area of high interest both in terms of research (see fig. 5) and of enforcement.⁸²

09/2014	DG Competition (commissioned) report: 'The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector'
10/2013	OECD roundtable: 'Competition Issues in the Food Chain Industry'

⁸¹ Recent example: commitment decision in Italy concerning the setup of a purchase supercenter by supermarket chains (centrale italiana) – 17.09.2014 ; see also UEA Centre for Competition policy annual meeting, Norwich 2014 on problem markets (session: Competition with divergent public policy concerns).

⁸² In 2014 Norgesgruppen / ICA joint purchasing agreement (buyer power of supermarkets), which raised objections by the KT: <http://www.konkurransetilsynet.no/en/news/archive/Warns-that-the-agreement-between-Ica-and-Norgesgruppen-may-be-blocked/>; also in 2014, proposal of Coop to acquire ICA: <http://www.konkurransetilsynet.no/en/news/archive/Coop-acquires-Ica-Norge/>.

04/2013	Norway: Inquiry commission recommends fair trading practices in the food chain
01/2013	European Commission Green paper: 'Unfair trading practices in the B2B food and non-food supply chain in Europe'
05/2012	ECN report food sector
04/2011	Norway report: 'The powerful and the Powerless in the Food Supply Chain' (in Norwegian)
10/2009	Commission staff document: 'Competition in the Food Supply Chain'
11/2005	Nordic countries report: 'Nordic food markets: A Taste For Competition'
2005	K'T report: 'Payment for shelf space' (in Norwegian)

Fig. 5: EU and Norwegian reports on competition in the food sector (2005-2014)

4.4. Discussion

In the case of the EEA/Norway, competition policy is extended both in terms of competition rules, by the implementation via the EEA in national law, and via cooperation in EU networks, most importantly by participation of the Norwegian competition authority in the ECN. The EEA/Norway case highlights a number of issues regarding the externalization of the EU's competition policy.

First, that the externalization in the EEA dimension takes place in a way (the same rules and network) that is very similar to the internal dimension. In EU competition policy, that means a relatively closed set of rules in a relatively hierarchical (supranational) network - although there is more flexibility to the rules and more bottom-up elements to the ECN than commonly thought. This generally confirms the EU external governance literature in the sense that hierarchical extensions tend to enhance effectiveness. Secondly, in the case of Norway, and more in particular in food markets, the empirical material suggests that the common rules and networks can also be extended to areas where there is no hierarchical push (although this does not mean that the rules and networks in that case necessarily work in the same way as when hierarchy is present). This also confirms the external EU governance literature, which propose that networks can enhance effectiveness in the absence of hierarchy.

In the EEA/Norway, it seems that the relatively hierarchical extension of regulatory systems has enabled bottom-up interaction also in areas that go beyond rule extension as such. This suggests in my view that external EU governance in competition policy – and consequently, the effectiveness thereof, should not be regarded merely as transfer of rules, networks/institutions and processes beyond the EU's borders, but more as the extension of these rules, networks and processes which then enable the interaction between the EU and non-EU systems - where the main issue is the identification or formulation of common problems. Although not fully experimentalist, in the sense that this does not necessarily result in the actual formulation of common policy goals, this finding can still be helpful in (re)conceptualizing external EU competition policy as such.

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Interviews

Informants		
Bergen 05/05/14	Case handler Norwegian competition authority	a
Bergen 9/05/14	Academic, Bergen University	b
Bergen 9/05/14	Academic, Bergen University	c
Oslo 20/05/14	Academic, ARENA centre for European studies	d
Oslo 20/05/14	Academic, ARENA centre for European studies	e
Brussels 7/10/14	National expert, DG competition	f
Interviews		
Brussels 30/04/14	Norway mission to the EU	1
Bergen 8/05/14	Case handler Norwegian competition authority	2
Bergen 13/05/14	International unit Norwegian competition authority	3
Bergen 14/05/14	Two case handlers Norwegian competition authority	4
Bergen 14/05/14	Case handler Norwegian competition authority	5
Bergen 15/05/14	University of Bergen, academic	6
Bergen 16/05/14	Case handler Norwegian competition authority	7
Bergen 16/05/14	Norwegian complaints board for Public Procurement (KOFA)	8
Bergen 16/05/14	University of Bergen, academic	9
Oslo 19/05/14	Dutch Embassy Norway	10
Oslo 21/05/14	EU delegation to Norway	11
Brussels 16/05/14	Industry interest organization	12
Brussels 27/05/14	EFTA surveillance authority	13