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Ministry of Trade, Industry and Fisheries  
Department of Competition Policy  
PO Box 8090 Dep  
NO-0032 Oslo  
Norway

**Subject: Lack of right of appeal for the Competition Authority  
against decisions of the Competition Appeals Tribunal**

Dear Sir/Madam,

I refer to the meeting between the Minister of Trade and Industry and two of ESA's College Members, President Bente Angell-Hansen and Frank J. Büchel, in Oslo on 24 October 2019, where this issue was raised.

When the Norwegian Competition Authority (NCA) finds an infringement of Article 53 or 54 of the EEA Agreement, *Konkurransklagenemnda* (the Competition Appeals Tribunal) may take a decision on appeal against that finding. In turn, the undertaking(s) concerned by a decision of the Competition Appeals Tribunal on appeal may bring this decision before *Gulating lagmannsrett* (the Court of Appeals situated in Bergen). The NCA, however, has no such right. In other words, the NCA, representing public interests in a competition case, does not have the same legal remedy – it does not have the same right to (what is effectively) an “appeal” – that is afforded to the private party or parties to the case.

This asymmetry in the protection of the interests at stake in competition cases appears difficult to defend in substance, and gives rise to concerns as to the overall effectiveness of the enforcement of Articles 53 and 54 EEA in Norway. Indeed, as also reflected in case law such as *Vebic*, the objective is for the NCA to ensure that the competition rules are applied effectively in the general interest, and procedural rules for legal proceedings brought against the NCA's decisions cannot be allowed to jeopardise this objective.<sup>1</sup>

It was also against this background that ESA decided to submit amicus curiae observations<sup>2</sup> to the Competition Appeals Tribunal in their Case No 2019/34 Telenor/Telenor ASA, noting that:

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<sup>1</sup> Grand Chamber judgment of 7 December 2010 in *Vebic*, C-439/08, EU:C:2010:739, paras 56–57.

<sup>2</sup> Available at: <http://www.eftasurv.int/competition/national/co-operation-with-national-courts/>

“The Authority’s usual practice when acting as amicus is to await and review the relevant first instance court judgment and to submit any amicus curiae observations before the Court of Appeal. The Authority makes these amicus curiae observations before Konkurransklagenemnda, as first instance court, because the Authority understands that Konkurransetilsynet has no right to appeal against Konkurransklagenemnda’s rulings. The Authority must therefore make observations at this stage because, due to the lack of appeal rights, cases in which the Authority would ordinarily have made observations in the Court of Appeal may in fact never come before that court.”

The implication being that ESA will see the need to submit amicus curiae observations in more cases than it would if there were a right of appeal for the NCA equivalent to what is afforded to private parties.

Moreover, looking to the future, the ECN+ Directive<sup>3</sup> would appear to explicitly require that the NCA have the right to appeal any decision by the Competition Appeals Tribunal on appeal against a fine imposed by the NCA, see Article 30(2) and (3) of the Directive on the role of NCAs before ‘national courts’. The Competition Appeals Tribunal would be a ‘national court’ within the meaning of the Directive, see the definition contained in Article 2(1)(7), as it under the applicable case law clearly is a ‘court or tribunal’ having the right to ask for an advisory opinion from the EFTA Court under Article 34 of the Surveillance and Court Agreement.<sup>4</sup>

I would appreciate the Ministry engaging in a dialogue on the issue raised in the present letter, with a view to resolving it, and I suggest that this be conducted at the appropriate level and as expediently as possible.

Yours faithfully,

Gjermund Mathisen  
Director  
Competition and State Aid Directorate

*This document has been electronically authenticated by Gjermund Mathisen.*

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<sup>3</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>4</sup> Which corresponds to Article 267 TFEU.