

FIRST NORWEGIAN JUDGMENT APPLYING THE COMPETITION ACT IN A DISPUTE BETWEEN PRIVATE PARTIES

On 17 March 2009, a Norwegian High Court held that a non-compete clause in an agreement regarding quarrying rights was contrary to the prohibition against anti-competitive agreements. The High Court held that the non-compete clause had the object of restricting competition and consequently was void. This is the first court case in which Norway's 2004 Competition Act has been applied in a dispute between two private parties.

Mesta, a Norwegian state-owned road and highway construction group, had quarrying rights on a property in Lødingen in Northern Norway under an agreement with Lødingen Stenindustri AS, a local quarrying company. The agreement gave Mesta an exclusive right to quarry stone from a specific part of the property for the purpose of making crushed stone (gravel) and asphalt. The agreement contained a non-compete clause which prohibited the local quarrying company from carrying out such production on the remaining part of the property and also from entering into agreements with other quarrying companies regarding such production on the remaining part of the property.

When the local quarrying company initiated cooperation with Lemminkäinen, a Finland-based construction group, regarding production on the property, Mesta objected and argued that the production infringed the non-compete clause. Mesta initiated legal proceedings against the local quarrying company to stop Lemminkäinen's production. The local quarrying company did not dispute that the production was contrary to the non-compete clause, but argued that the clause was void and unenforceable. The District Court found in favour of Mesta, but on appeal this judgment was overturned by the High Court (Hålogaland lagmannsrett). The local quarrying company was awarded costs.

Section 10 of the Norwegian Competition Act, which corresponds to Article 81 of the EC Treaty, prohibits agreements that have as their object or effect the restriction of competition. The High Court held that the non-compete clause had the object of restricting competition in the market for crushed stone (gravel). Mesta's argument that the purpose of the non-compete clause was to protect its investments on the property was not accepted. The High Court took the view that Mesta's investments were protected by provisions in the agreement entitling Mesta to take out an agreed volume of gravel from the property and that the non-compete clause could not have any other object than restricting competition.

Further, the High Court found that the non-compete clause restricted competition appreciably. The agreement had been entered into between competing companies and high quality gravel was in short supply in the region. With reference to the

judgment of the Court of First Instance in European Night Services (case T-374/94), the High Court noted that agreements that have an anti-competitive object will in practice often be considered to restrict competition appreciably.

Mesta's claim that the agreement was covered by the block exemption on vertical agreements (Regulation 2790/1999, which has been implemented in Norwegian legislation by Regulation of 17 August 2004 No. 1196) was not accepted, as the agreement had been entered into between competing companies.

Finally, the High Court added that although the non-compete clause was void, the remainder of the agreement was valid and enforceable.

Wikborg Rein acted on behalf of the successful appellant.

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