# SUPREME COURT OF NORWAY

**J U D G M E N T**

given on 16 February 2023 by a division of the Supreme Court composed of

Justice Hilde Indreberg
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Wenche Elizabeth Arntzen
Justice Knut Erik Sæther

**HR-2023-299-A, (case no. 22-076582SIV-HRET)**
Appeal against Gulating Court of Appeal 23 March 2022

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|---|---|
| The State represented by<br>the Competition Authority | (The Office of the Attorney General<br>represented by Lisa-Mari Moen Jünge<br>Assisting Counsel Pål Erik Wennerås) |
| v. | |
| Schibsted ASA | (Counsel Håkon André Cosma Størdal)<br>(Assisting Counsel Stephan Lange Jervell) |

(1) Justice **Matheson:**

## Issues and background

### *General remarks*

(2) The case concerns the validity of a decision issued under section 16 of the Competition Act to prohibit Schibsted ASA's purchase of the majority of the shares in Nettbil AS.

*About Schibsted and Finn*

(3) Schibsted ASA is a Nordic media group. The company owns a number of marketplaces, media houses and technology companies both in and outside Scandinavia.

(4) Schibsted is the majority shareholder in Finn AS (Finn). Finn operates "Finn.no", which is an online marketplace for various types of advertisements for the purchase and sale of goods and services. The advertisements are divided into many different categories – also called classified advertisements. Second-hand cars is one of them. Both private individuals and car dealers use Finn.no for advertising cars for sale.

(5) Anyone who wishes to buy a second-hand car – whether it is a private individual or a car dealer – can buy an advertising space on Finn.no of varying visibility and duration. When buying the advertising service, the customer gets access to a digital purchase contract and a message service for communicating with interested parties. The customer creates its own advertisement and may apply a price calculator on Finn.no. The calculator shows the asking prices of similar cars on the same marketplace.

(6) All work in connection with the sale, such as the grooming of the car, is carried out by the seller. If a purchase contract is concluded, settlement arrangements are made by the seller and the buyer. Finn is not involved in any part of the selling process, and is not a party to the transaction. The seller thus carries the credit risk and liability for possible complaints – not Finn.

(7) The average price for private classified advertisements on Finn.no is NOK 918 for cars with a selling price exceeding NOK 50 000, and NOK 440 kroner for cars of less value. The price depends on the visibility and duration the customer chooses for the advertisement. Payment is made upon the creation of the advertisement and without regard to whether the car is sold.

*About Nettbil*

(8) Nettbil AS was founded in 2017. Before Schibsted's acquisition of the shares, Nettbil was owned by Aller Media AS (Aller) and Tjuvholmen Ventures AS, as well as the three entrepreneurs Anders Espelund, Erik Thorsen and Thomas Oland Hage. The company operates "Nettbil.no", an online marketplace for second-hand cars sold by private individuals to car dealers through an online auction. The same platform also offers a solution for businesses that seek to sell cars to car dealers.

(9) For private car sellers, Nettbil offers a compound service: After having registered the car on the Nettbil's website, the seller immediately receives a computer-generated selling price. Customer service then contacts the seller and gives an indicative valuation. In the next step, Nettbil arranges a technical control with the Norwegian Automobile Association (NAF) or Viking Control. The vehicle is brought to a test centre, but pickup directly from the seller is also available in selected areas. Once the control is completed, Nettbil takes photographs of the car before putting it out for sale on the digital platform.

(10) The Supreme Court has been informed that the website on which the car is advertised is only available for dealers that have registered with Nettbil. Such registration requires a second-hand trade licence and access to Autosys. Autosys is the information system of the Norwegian Public Roads Administration for vehicles, "EU tests", taxes and more.

(11) As soon as the car is put out for sale, the car dealers may submit a bid on a closed and digital auction.

(12) If the bid is accepted, Nettbil buys the car from the seller and resells it to the dealer. However, the resale is a temporary transaction before the vehicle is purchased from the seller. By organising the transaction as a purchase from the seller to Nettbil and a resale from Nettbil to the dealer, it is *Nettbil*, and not the car seller, that carries the credit risk and liability in the event of complaints. If a sale comes through, the seller receives the settlement from Nettbil within two days.

(13) The car seller pays nothing for Nettbil's service if a sale does not come through. That is also the case if the seller declines the bid. Alternatively, the car seller may buy the NAF/Viking Control test from Nettbil.

(14) In the event of a sale, Nettbil gets paid by deducting the company's costs and a profit from the sales price obtained from the auction. The amount varies in proportion to the auction price. In its bid, the car dealer considers a margin from the resale to the consumer. The parties to the case have provided somewhat different figures for the car seller's effective costs of using of Nettbil's service. The State has indicated an amount around NOK 9,000, while Schibsted has estimated that the costs may exceed NOK 30,000. In other words, the amounts reflect the difference between the price that may be obtained on Finn.no and the price that the seller is left with after a sale through Nettbil.

*Other players in the market for advertising and sale of second-hand cars*

(15) There are several other players in the market for online and physical dealing in second-hand cars. I will confine myself to highlighting "Facebook Marketplace" as the biggest among the digital advertising services. The Facebook platform has a separate section for motor vehicles, and the service is free.

*The merger and the notification to the Competition Authority*

(16) After having settled the 2018 accounts with a negative result of NOK 6.3 million, Nettbil needed funding in the range of NOK 20–30 million. It turned out difficult to find new investors. Eventually, one succeeded in concluding a combined share purchase and

investment agreement with Schibsted, under which the latter acquired 57 percent of the shares in Nettbil from Aller and Tjuvholmen Ventures. At the same time, a capital increase was completed by way of a private placement of NOK 30 million whereby Schibsted's ownership in Nettbil increased to 67 percent. The agreements were entered into on 13 December 2019, after which Schibsted became the sole proprietor of Nettbil.

(17) The transaction also included a number of other services from Schibsted. Among other things, Nettbil was given the opportunity to exploit free advertising space in Schibsted's numerous channels at subsidised prices. Thus, Nettbil could reduce its marketing expenses considerably.

(18) According to section 16 of the Competition Act, the Competition Authority shall prohibit any concentration between undertakings that will significantly impede effective competition. Since Schibsted through the transaction obtained sole control of Nettbil, a merger exists within the meaning of section 17 subsection 1 (b) of the Competition Act.

(19) As a step in the control of mergers, the Competition Act contains provisions on the duty to notify and the Competition Authority's right to order a notification of the merger. On 12 March 2020, the Competition Authority ordered Schibsted to report the concentration, see section 18 subsection 3 of the Competition Act.

*The Competition Authority's decision*

(20) On 11 November 2020, the Competition Authority made this decision:

> "The concentration between Schibsted ASA and Nettbil AS is prohibited. The decision is effective immediately."

(21) Schibsted was ordered within six months to "sell all of its shares in Nettbil to an independent and suitable buyer…". A number of requirements are made as to who may be the buyer of the shares. Requirements are also made for the execution of the selling process, the operation of the company and the relationship between Schibsted, Nettbil and Finn until the imposed sale has taken been completed.

(22) The background to the decision is that the concentration gives Schibsted sole control of Nettbil in addition to the sole control it already has in its wholly owned subsidiary Finn. The Competition Authority finds that Nettbil's and Finn's advertised products are in the same product market, and that the merger gives "incentives to offer services at higher prices and of lower quality" than otherwise possible. In the Competition Authority's view, the concentration will also reduce the parties' incentives to develop new products and services, see paragraph 497 of the decision.

(23) On 13 November 2020, the execution of the intervention was suspended until a possible appeal had been decided.

(24) On 21 December 2020, Schibsted and Nettbil appealed against the decision to the Competition Tribunal.

*The Competition Tribunal's decision*

(25) On 27 May 2021, the Competition Tribunal unanimously made the following decision:

> "The Competition Authority's decision is upheld."

(26) The Competition Tribunal found, like the Competition Authority, that Finn's and Nettbil's advertising services are in the same relevant product market.

(27) It concludes that "Finn has strong incentives to increase its quality-adjusted price as a result of the concentration between enterprises", see paragraph 318, and that the concentration "significantly impedes effective competition", see paragraph 321. The Tribunal does not address whether the appellants, if the concentration had not taken place, would have developed new products or services that would make them closer competitors, see paragraph 228.

(28) Upon Schibsted's request, the Tribunal decided, on 8 June 2021, to suspend the execution of the intervention until a possible final judgment.

## The proceedings

*Action in the Court of Appeal*

(29) On 27 August 2021, Schibsted brought an action in Gulating Court of Appeal as mandatory venue, see section 39 subsection 3 see subsection 4 of the Competition Act. The company asked that the Competition Tribunal's decision be set aside.

(30) On 23 March 2022, Gulating Court of Appeal ruled as follows:

> "1. The Competition Tribunal's decision in case V03-2021 is set aside.
>
> 2. The State represented by the Competition Tribunal will pay costs in the Court of Appeal to Schibsted ASA of NOK 8 371 104,85 within two weeks of the service of the judgment."

(31) The Court of Appeal disagrees with the Tribunal that Finn's and Nettbil's products are in the same product market. Nonetheless, it makes an analysis of the concentration's effects on competition, but finds unlike the Tribunal no clear indications that the merger will lead to Finn increasing its prices or to a halt in the development of Nettbil.no or Finn's car advertising services.

*The appeal to the Supreme Court*

(32) On 4 May 2022, the State represented by the Competition Authority appealed against the Court of Appeal's judgment to the Supreme Court. With reference to section 29-3 subsection 1 of the Dispute Act, the appeal is stated to challenge the judgment in its entirety; that is, the findings of fact, the application of the law and the procedure.

(33) The Supreme Court has received written statements regarding the competitive effects of the concentration from Schibsted's expert witness, Miguel de la Mano, and from the State's expert witness, Professor Kurt Brekke. The Supreme Court has also received statements from Anders Espelund, general manager in Nettbil, and from Eddie Sjølie, general manager in Finn.

(34) In accordance with order HR-2022-2386-F issued on 14 December 2022, evidence has been presented behind closed doors in accordance with statutory rules on confidentiality.

(35) Otherwise, the case is similar to that in the Court of Appeal.

**The parties' contentions**

(36) The appellant, *the State represented by the Competition Authority*, contends:

(37) According to established practice, the courts should be reluctant to review a specialist agency's decision, such as that of the Competition Tribunal.

(38) The Competition Tribunal has defined the market in accordance with the prevailing guidelines for market definition, and has therefore applied the law correctly.

(39) A so-called SSNIP test is not required to define the product market; that is, an examination or assessment of whether it would be profitable for a hypothetical monopolist to increase prices by 5–10 percent. The Court of Appeal's demand for an assessment of the possible outcome of a 5–10 percent increase in the relative prices is therefore erroneous. Internal documents show, however, that Finn and Nettbil in any case consider each other as competitors in the same relevant market.

(40) Evidence also shows that Nettbil had a large potential for growth and would have continued to grow in the market if the concentration had not taken place.

(41) The Court of Appeal incorrectly bases its competitive assessment on the question whether Finn one-sidedly may increase its advertising prices by 5–10 percent. The negative answer is a consequence of the Court of Appeal's error in finding that Finn's and Nettbil's products are not part of the same relevant market.

(42) Whether or not the concentration will significantly impede effective competition depends on an overall assessment of various factors, and not on a SSNIP test. Since the concentration will remove competition between Finn and Nettbil and give increased market power, this is likely to result in increased prices or reduced quality, and to harm innovation.

(43) The condition that competition must be "significantly impede[d]" sets a threshold that will be reached if the impediment is big enough to harm competition. That is the situation in the case at hand.

(44) The State represented by the Competition Authority asks the Supreme Court to rule as follows:

> "1. The Supreme Court rules in favour of the State represented by the Competition Authority.
>
> 2. In the alternative: Gulating Court of Appeal's judgment 23 March 2022 is set aside.
>
> 3. In all events: The State represented by the Competition Authority is awarded costs."

(45) The respondent, *Schibsted ASA*, contends:

(46) The case does not raise any issues suggesting that the court should limit its review.

(47) Finn's and Nettbil's products represent interchangeable procedures for the sale of second-hand cars. However, that does not necessarily mean that the products are substitutable within the meaning of competition law.

(48) Although a SSNIP test is not required for defining the relevant market, it is a flaw that no assessment is made of whether substitution will occur following small price increases. This is particularly the case when the Tribunal finds that damage to competition will occur in the form of price increases.

(49) The qualitative analysis that the Tribunal has chosen instead, independent of the SSNIP framework, is in any case based on fundamental misconceptions and an incorrect assessment of what internal documents demonstrate.

(50) Since the Court of Appeal found that Finn and Nettbil are not in the same relevant market within the meaning of competition law, it was neither necessary nor correct to carry out a competitive assessment. The situation might be different for so-called harm to innovation, as the State has submitted as an alternative damage theory.

(51) However, the Court of Appeal has carried out a correct competitive assessment when finding that Nettbil most likely would have continued as a niche player in constant need of capital supply.

(52) The condition that competition must be "significantly" impeded means that the concentration, in a case like this, must both eliminate a considerable competitive constraints between the parties and reduce the same constraints on the other competitors. This is also relied on by the ECJ in a judgment that is not yet final. The condition is not met.

(53) In any case, it cannot be substantiated that Finn by a moderate price increase will make customers switch to the much more expensive services supplied by Nettbil. There is also no evidence that the concentration will harm innovation.

(54) Schibsted asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. Schibsted ASA is awarded costs."

## My opinion

### *Introduction*

(55) The Competition Authority is obliged under section 16 subsection 1 of the Competition Act to prohibit concentrations between undertakings that will significantly impede effective competition. The question is whether the Act's requirements for prohibiting the transaction are met.

### *Legal framework under section 16 of the Competition Act*

*The application of competition rules of EEA/EU law*

(56) According to its preparatory works, section 16 of the Competition Act must be interpreted in the same way as Article 2 (3) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation), see Proposition to the Storting 37 L (2015–2016) page 56. The article reads:

> "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

(57) In the Proposition, it is assumed that the application of the law under the harmonised statutory provision is to follow existing and future case law and administrative practice by the ECJ, the EU Commission (the Commission) and the EFTA Surveillance Authority (ESA), respectively. The case law referenced here is rooted in the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03). The Commission has also prepared a notice on the definition of the so-called relevant market in competition law. This notice has been "mirrored" and made applicable also in the EEA, see ESA's notice on the definition of the relevant market for the purpose of competition law within the European Economic Area (EEA) of 4 March 1998.

(58) The Norwegian harmonisation of the law entails that the Commission's guidelines for the assessment of horizontal mergers and ESA's notice on the definition of the relevant market must be relied on when interpreting and applying the rules in the Competition Act.

(59) On 8 November 2022, the Commission issued draft revised guidelines for market definition, see "Commission Notice on the definition of the relevant market for the purposes of Union competition law". The document is an update in the light of the last 20 years of case law. It is therefore also relevant in the case at hand, even though it is only a draft.

(60) Statements regarding the Commission in quotes from the documents I have just mentioned will apply correspondingly to the competition authorities.

*Jurisdiction, intensity of the review etc.*

(61) According to section 39 subsection 3 second sentence of the Competition Act, the court may in the event of a dispute regarding the Competition Tribunal's decision consider all aspects of

the case. This means that the courts may review the facts, the procedure, the application of the law and judicial assessment, see Rt-2011-910 *Tine* paragraph 51.

(62) The State contends that the courts should be reluctant to set aside the public authorities' decisions when they are based on special knowledge or professional expertise, see the Supreme Court rulings in Rt-1975-603 *Swingball* page 606 and Rt-2008-1555 *Biomar* paragraph 38, which concerned decisions by the Patent Office. This doctrine also applies outside the area of patent law. Here, I only mention the Supreme Court rulings HR-2021-2552-A *Young and disabled* paragraph 32 and HR-2022-718-A *Cabin quarantine* paragraph 75–76, both of which involved medical assessments.

(63) The members of the Competition Tribunal are lawyers and business economists trained in competition law and competition economy. The Tribunal's special professional knowledge and case law make it an expert agency.

(64) How reluctant the courts should be in reviewing a competition decision is dealt with, for instance, in a judgment by the General Court of the ECJ of 22 June 2022 in Case T-584/19 *hyssenkrupp* paragraph 276 with further references. It is set out that "it is not for the Court to substitute its own economic assessment for that of the Commission". In other words, the Court is not to replace the competition authorities' economic analyses by its own. The following is then set out in paragraph 277:

> "However, as indicated in paragraph 35 above, although the Commission has a measure of discretion with regard to economic matters, that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must it, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

(65) So, a limited court review does *not* mean that the court must desist from re-examining the competition authorities' interpretation of information of an economic nature. The courts must also be able to examine the reliability and consistency of the evidence, whether it contains sufficient information to decide the case and whether it may substantiate the conclusion.

(66) In my view, these principles and guidelines should also be instructive for Norwegian courts when examining particular competitive assessments of an economic nature in the Competition Tribunal's decision.

*Evidence, findings of fact and standard of proof*

(67) The question at hand is whether the concentration "will" significantly impede effective competition. A positive answer requires that it is *more likely than not* that such impediments will occur. A possibility is therefore not sufficient.

(68) The object of proof concerns future circumstances. This puts the findings of fact to a special test. There is a general requirement that prognoses must be appropriate at the time they are made, see for instance Rt-2012-1985 *Long-staying children* in paragraph 77 with further references. In paragraph 77 of the Commission's draft revised guidelines for market

definition, an extensive case law from the ECJ on the requirements for forward-looking assessments in merger cases is summarised as follows:

> "Where the case calls for a forward-looking assessment and when market definition is based on changes in competitive dynamics within the time period considered, such changes must be supported by reliable evidence showing with a sufficient level of certainty that the expected changes will indeed materialise."

(69) Information provided in the parties' internal documents must be interpreted according to the document's purpose and assessed in its proper context, see judgment from the General Court of 12 December 2018 in case T-691/14 *Servier* paragraph 1470. There, it was pointed out that "the content of those messages must be analysed in the light of their promotional purpose". In other words, one cannot necessarily rely on what an internal document expresses according to its wording, but its meaning and probative value must be established in a broader context.

(70) The General Court's judgment of 18 May 2022 in Case T-251/19 *Wieland-Werke*, describes in paragraph 117 which factors may render internal documents particularly credible, and mentions documents that are "drawn up in close connection with the events or by a direct witness of those events". This accentuates, among other things, the significance of contemporaneous evidence, see Rt-1998-1565 page 1570 with further references. The probative value of a party's own statements that "run counter to the interests of the declarant" – i.e. a party's unfavourable statements about its own case – must also be regarded as high.

### *The conditions for intervention under section 16 of the Competition Act*

*Introduction*

(71) Section 16 subsection 1 first sentence of the Competition Act reads:

> "The Competition Authority shall prohibit any concentration between undertakings that will significantly impede effective competition, particularly as a result of a dominant position being created or strengthened."

(72) As expressed, it is a condition for intervening against a concentration between undertakings that it will "significantly impede effective competition". The Commission's Guidelines for the assessment of horizontal mergers describe methods for clarification. In paragraph 10 of the Guidelines, a two-stage procedure is presented:

> "a) definition of the relevant product and geographic markets;
>
> b) competitive assessment of the merger."

(73) In other words, both a *market definition* and a *competitive assessment* are required.

(74) The main purpose of such market definition is to identify "in a systematic way the immediate competitive constraints facing the merged entity". In paragraph 2 of ESA's notice, market definition is defined as "a tool to identify and define the boundaries of competition between firms."

(75) The *relevant market* under competition law has a product dimension as well as a geographical dimension. As the parties agree that the relevant geographical market is Norway, I will not address issues related to the definition of such a market, neither generally nor in relation to this case. My further discussion will therefore only concern the definition of the relevant *product market*.

(76) Market definition is only one step in the analysis of a transaction's possible anti-competitive effects. The definition is thus not a goal in itself, which also follows from paragraph 13 of the Commission's draft revised guidelines for market definition. However, if the test demonstrates that the products are not in the same product market, it is difficult to see that the criteria for intervention in the Competition Act are met.

(77) I will first discuss the method for defining the relevant product market.

*Definition of the relevant product market*

(78) In paragraph 7 of ESA's notice on the definition of the relevant market, a "relevant product market" is defined as follows:

> "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

(79) It is primarily the risk of the customer seeking a substitutable product – so-called *demand substitution* – that constitutes "the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions", see paragraph 13 of ESA's notice. Therefore, the assessment of demand substitution remains, in principle, the most effective assessment criterion, see judgment of 4 July 2006 of the Court of First Instance in case T-177/04 *EasyJet* paragraph 99. It is set out in paragraph 13 of ESA's notice that one must then identify "the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers." Then it is stated in in paragraph 15:

> "The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of determining this can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase."

(80) The following must be answered according to paragraph 17:

> "whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical, small (in the 5 to 10 % range) but permanent relative price increase in the products and areas being considered."

(81) The term SSNIP is often used for this test. SSNIP is an acronym for Small but Significant Non-transitory Increase in Prices. If the test shows that a sufficient number of customers are likely to switch to an alternative product in the event of a small price increase, which would make such increase unprofitable, the products are deemed to be in the same product market and to be competing.

(82) A SSNIP test may be carried out as either a quantitative or a qualitative test.

(83) When carrying out a *quantitative test,* questions are directed primarily at customers on how they would react to a small price increase. The competition authorities thus seek to obtain empirical data for the market's reactions. In paragraph 40 of ESA's notice, it is stated that "[r]easoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance 5 to 10 %) are taken into account when they are sufficiently backed by factual evidence."

(84) A *qualitative test*, on the other hand, may be carried out as a "speculative experiment", see paragraph 15 of ESA's notice, evaluating customers' *likely reactions* to a small price increase. This is in fact a theoretical analysis based on the idea of a quantitative SSNIP test, also described as a test carried out within the *SSNIP framework*.

(85) However, these are not the only ways to identify demand substitution. When, in paragraph 15 of the notice, it is stated that "one way of determining this can be viewed as a speculative experiment", it shows that the approach to market definition is rather open.

(86) This is confirmed in paragraph 25 of ESA's notice, which points out that "[t]here is a range of evidence permitting an assessment of the extent to which substitution would take place." The same is established in the case law of the ECJ, see *thyssenkrupp* paragraph 75–76, with reference to the General Court's judgment of 11 January 2017 in Case T-699/14 *Topps* paragraph 82. There, it is set out that the Commission may also take into account other tools, such as market studies or an assessment of consumers' and other competitors' points of view. I refer to paragraph 33–35 of ESA's notice, describing the process of gathering and categorising evidence that the competition authorities deem necessary to determine the issue of demand substitution.

(87) A type of documents that is not expressly mentioned in ESA's notice are internal documents that may shed a light on the market definition. ECJ case law contains many examples of the relevance of information in such documents. This is also emphasised in paragraph 79 of the Commission's draft revised guidelines for market definition, stating that this type of documents "are particularly relevant where these have been prepared in the ordinary course of business…" As for the determination of their content and probative value, I refer to my previous statements regarding internal documents.

(88) Ways of determining the likelihood of demand substitution that are not part of a SSNIP test have been described by the State in the Supreme Court as entirely qualitative analyses *independent of the SSNIP framework.*

(89) There appears to be no disagreement between the parties regarding my account thus far of the definition of the relevant product market.

*Markets with differentiated products – the significance of large price differences*

(90) In merger cases, a distinction may be made between transactions where the parties offer homogenous products and transactions where they offer differentiated products. Differentiated products are products that the customers do not consider identical, although

they have common core features. The Commission states in note 32 to its Guidelines on the assessment of horizontal mergers that differentiation may be based on the brand image, technical specifications, quality or level of service. If the differences are significant for the customer's choice, the question is whether the products are in the same relevant market after all.

(91) The State seems to believe that differentiated products with very large price differences may be in the same product market if the price difference has a plausible reason that may motivate the customer's choice. In the State's view, such a reason may be a large difference in quality between the products. The customer may then make an informed choice based on economy and personal preferences.

(92) Firstly, I note that price differences according to the Commission's case law may warrant separate market definition, see quote in a judgment of the then Court of First Instance of 6 June 2002 in Case T-342/99 *Airtours* paragraph 28. The Commission had found that differences between the average price of a long-haul package holiday and that of a short-haul package could warrant separate market definition, despite a degree of convergence between prices. The convergence was that the supplier of long-haul packages also offered holidays in the same price-range as the short-haul packages. However, in that particular case, the convergence was not such that "the two products may be regarded as substitutes or that the prices of one constrain prices of the other". The Court found that the Commission's assessment was "well founded", see the judgment's paragraph 37.

(93) In support of its view that large price differences nonetheless do not warrant separate product markets, the State has invoked a judgment of the General Court of 23 May 2019 in Case T-370/17 *KPN* paragraph 76. The question there was whether the difference in price of two pay TV channels with large quality differences in content confirmed that they were not substitutable. The Court stated in paragraph 76 that it was not necessary for demand substitution that they be offered at the same price, but added:

> "A low quality product or service sold at a low price could well be an effective substitute to a higher quality product sold at a higher price. What is important is the likely responses of consumers following a relative a price increase."

(94) Like Schibsted, I cannot see that the judgment supports the State's view. *KPN* paragraph 76 clarifies that differences in price *are* a factor relevant to assessing whether two products are substitutable depending on the consumers' likely responses to a relative price increase. Hence, to diverge from the principle that large differences in price are relevant to determine substitutability, it must be *likely* that the customer will switch to the more expensive product following a moderate increase in the price of the cheaper product.

(95) To me, it is self-evident that the customer's assessment of what "he gets for his money" by switching to a far more expensive product following a small price increase will depend on the size of the price difference. In other words, substitutability depends on how much more the customer is willing to pay "in kroner", regardless of the quality of the product he gets in return. In the absence of other evidence, it is unlikely that a quality product at *a much higher price* may function as a substitute to a low-price product if the price increase of the latter is moderate. If the price differences between the products are smaller, the situation may be another.

(96) In my view, paragraph 86 of the Commission's draft revised guidelines for market definition does not alter this analysis. It sets out that when products are differentiated, *market shares* may provide a less reliable indicator of market power. As part of its competitive assessment, the Commission will then normally analyse whether the undertaking(s) involved and other suppliers compete closely. This may reduce the importance of market shares "and hence that of market definition". See also Ryssdal and Størdal, *Norwegian competition law*, Volume II (2018) page 166, setting out that it appears "to be an accepted view that market definition has limited value in cases involving differentiated products". In my view, the statement in the Commission's draft merely expresses that it may be difficult to define the relevant market for differentiated products, and that other parameters are relevant in the competitive assessment. However, this does not change the principle that high-quality products at a very high price may constitute a separate relevant product market.

*Market definition - summary*

(97) Market definition is based on a test whose purpose is to determine the competiveness of a product. The most common procedure is to carry out an empirical or theoretical test of whether the customers, following a moderate price increase, would switch to a different product, taking into account the products' characteristics, area of use and price differences. In that case, the products are in the same product market. However, the product market may also be defined by other methods and sources of information, for instance market analyses or analyses of the views of consumers and competitors with regard to substitutability.

(98) If the products are differentiated, large price differences will not necessarily make them non-substitutable. It is, however, unlikely that the products then belong to the same product market.

*The competitive assessment – general remarks*

(99) According to section 16 of the Competition Act, a criterion for intervention against a concentration between undertakings is that it will "significantly impede effective competition". It follows from the provision that intervention may be particularly relevant where the concentration results in "a dominant position being created or strengthened".

(100) The competitive effect of the concentration is analysed through a so-called *competitive assessment*. To which extent the merger will "impede" effective competition is an effect issue, while the condition that it will do so "significantly" is a threshold issue. To which extent competition will in fact be impeded in such a scope is a probative issue. This is also a question of standard of proof.

(101) I will now address the effect issue and the threshold issue. With regard to the probative issue, I refer to my previous discussion.

*Analysis of the effect issue*

(102) Paragraph 9 of the Commission's Guidelines on the assessment of horizontal mergers sets out that in assessing how a merger will affect competition, one must compare "the competitive

conditions that would result from the notified merger with the conditions that would have prevailed without the merger." Whether competition will be significantly impeded must, in other words, be assessed based on what, at the time of the transaction would be *the alternative situation*; i.e. the situation if there had been no merger. This situation must then be compared to the most likely result of the transaction. This comparison must normally be based on the competition conditions at the time of the merger.

(103) A judgment of the ECJ's General Court of 28 May 2020 in Case T-399/16 *CK Telecoms* is the first to deal with control of concentrations between undertakings on a so-called oligopolistic market where the transaction does not create or strengthen a dominant position, see paragraph 85 of the judgment. An oligopolistic market is a market where most of the services are supplied by a few large undertakings, which is very similar to the situation in the case at hand. In the mentioned judgment, the Court found that control in such cases require that the transaction, in addition to eliminating the competitive constraints that the parties exert upon each another, must *also* reduce the competitive constraints on the remaining players. This is rooted in the statements in paragraph 25 of the Preamble to the Merger Regulation. However, the judgment is not final, pending the outcome of the Commission's appeal. As will appear from my individual assessment in the case at hand, I do not need to take a stand as to the issues currently reviewed in the ECJ. It would be inappropriate in such a situation if the Supreme Court should comment on this.

*The threshold requirement – "significantly impede"*

(104) The condition for control is, as repeatedly stressed, that the merger will "significantly impede effective competition".

(105) The threshold for what lies in "significantly" is impossible to state exactly. The State contends that the wording in section 16 contains a requirement that the impediment must be *big enough* to harm competition. As I understand the State, it finds that in order to intervene, it is sufficient that the impediment is not trivial, often referred to as "de minimis".

(106) In my view, the wording alone opposes such an interpretation. Nor is the interpretation supported by other language versions of the Regulation, for instance "significantly" in the English version, "erheblich" in the German version and "påtagligt" in the Swedish version.

(107) Also the Norwegian preparatory works prescribe a sufficiently strong effect, see Proposition to the Storting L 37 (2015–2016) page 56 with a reference to Norwegian Official Report 2012: 7 page 107:

> "According the wording in Article 2 (3) of the Merger Regulation, the effect of the concentration must be sufficiently large to be declared incompatible with the common market/the EEA Agreement, even if competition is significantly impeded before the concentration. In Article 20 of the Commission's Guidelines, it is clearly expressed that a small increase in concentrations is unlikely to raise competition concerns, even in concentrated markets. In its case law, the Commission has taken as a fact that a very small increase in concentrated markets cannot create or strengthen a dominant position."

(108) In the same preparatory works, it is stressed that the threshold for intervention is high, and that any control is in fact an "expropriation-like measure", see Norwegian Official Report 2012: 7 page 104 with references to previous reports. Until the amendment in 2016, the

wording of the Competition Act required that the concentration would result in "considerable restriction of competition". Proposition to the Storting L 37 (2015–2016) page 56 sets out that the amendment is not meant to regulate which concentrations to control. Against this background, the Competition Act must be interpreted according to its wording on this point.

*Competitive assessment – summary*

(109) In a competitive assessment, one must compare the competition situation with and without the concentration between undertakings. It is a criterion for intervention that the merger will significantly impede competition, compared to what would be the case without the transaction. The requirement of "significantly" means that the effect must be sufficiently harmful and thus exceed a certain threshold. This threshold cannot be identified in either general or exact terms, but must be assessed individually.

(110) In an oligopolistic market, control may sometimes also be exercised against concentrations that do not create or strengthen a dominant position. The extent to which intervention is subject to particular requirements in such situations is disputed and currently under review in the ECJ. However, it is unnecessary, and therefore inappropriate, to address this issue in the case at hand.

***Individual assessment***

*Starting points*

(111) The Competition Tribunal states in paragraph 91 of its decision that it will assess "whether Nettbil and Finn operate in the same relevant market". Under the heading "The appellants' overlapping business", the following is stated in paragraph 95:

> "When assessing whether the products are close substitutes, the Tribunal has carried out an qualitative analysis to assess whether the products are sufficiently close substitutes, and not a traditional SSNIP based on a potential increase in the price of the products."

(112) The Tribunal adds that it considers the procedure to be in line with the framework for market definition and ESA's notice on the definition of the relevant market.

(113) I find it unclear why the Tribunal, in its assessment of whether Finn and Nettbil operate in the same relevant product market, includes the degree of *overlap* between the products, as the chapter's headline indicates. The "overlap" approach is even more prominent in the Competition Authority's decision, see paragraph 5. "Overlap" does not answer the question of whether the products are substitutable "by reason of the products' characteristics, their prices and their intended use", see paragraph 7 of ESA's notice on the definition of the relevant market. In addition, "overlap" also includes *interchangeable* products. Interchangeable products are not necessarily substitutable according to the criteria in ESA's notice. I will return to the significance of this later. In any case, the decisive factor as the case stands in the Supreme Court is whether it may be considered substantiated, as the State contends, that Finn's and Nettbil's products are in the same relevant market under competition law.

(114) The Court of Appeal finds that the Competition Tribunal has failed to give "persuasive arguments for Finn and Nettbil operating in the same product market" and that "too many conclusions have been drawn from the merging parties being referred to as competitors in internal documents". In the Court of Appeal's view, it has not been substantiated that "such competitive closeness existed before the concentration that a moderate price increase in Finn would have made a larger number of customers switch to Nettbil".

(115) I will now examine this and related issues. Since Schibsted contends that the Tribunal's failure to carry out a SSNIP test must be significant for the validity of the decision, I will discuss that first.

*The significance of the lack of a SSNIP test*

(116) As I have previously explained, it is clear that the competition authorities have no legal obligation to carry out a SSNIP test when defining the relevant market. Nor is this disputed between the parties. Other criteria and evidence may also be used to determine the relevant market. Therefore, the lack of a SSNIP test in the case at hand is not in itself a basis for invalidity.

(117) However, Schibsted seems to be of the view that the Competition Tribunal in order to define the relevant market correctly, *should* have applied the conceptual framework for a SSNIP test. In other words, it should have analysed how the customers would have reacted to a price increase – which the Tribunal expressly states that it has not done. In connection with this, Schibsted contends that such analyses constitute the rule rather than the exception in the Competition Authority's practice.

(118) It is not necessary for me to consider whether restraint should be exercised in reviewing the *method* used by the competition authorities to define the relevant market. As previously explained, the courts may assess whether the evidence on which the definition is based gives sufficiently grounds for – or is suited to – substantiate a specific conclusion. When assessing the evidence, the courts should be able, as normal, to emphasise any uncertainty created by the lack of information that is naturally sought. I will return to the implications of this in the case at hand.

*Product, product characteristics and prices as a basis for market definition*

(119) I have previously described the respective services supplied by Finn and Nettbil. Although both companies supply an advertisement service for the sale of second-hand cars, the contents of their products are very different and offered at very different prices.

(120) The Competition Tribunal has described these differences in paragraphs 96–98 of its decision, emphasising that Finn's product is primarily an advertising service. Nettbil, on the other hand, is also involved in the auction sales process and offers a swift car sale with a "no-risk and… secure settlement" directly from the company. The Tribunal also points out the differences in price between the solutions and on the fact that Nettbil sells to a dealer and not to an end-customer. This has the effect that the customer when conducting a sale on Finn.no normally obtains a higher price for the car.

(121) Despite these differences, the Tribunal's conclusion is that both supply "services that constitute transaction activities necessary for the sale of second-hand cars for private individuals", but that Finn supplies only some of these services, see paragraph 99.

(122) The "transaction activities" that both Finn and Nettbil supply an advertising service and a digital standard purchase contract. To which extent Finn's price calculator may be compared to Nettbil's price estimate after direct contact with the customer is not entirely clear, but is in any case of minor significance.

(123) In my view, the Tribunal's approach does not do full justice to the product difference. By basing itself on "transaction activities" offered by both undertakings, the Tribunal masks the fact that Finn's product for all practical purposes is limited to the classified advertisement service, while Nettbil's product is not the inherent advertising service, but the entire car sale, including the credit risk and liability for defects that the customer otherwise would have carried towards the car buyer.

(124) The Tribunal's reference to differences in advertising prices and realistic selling prices also underplays the actual price differences between the products. As mentioned, the average price of an advertisement on Finn.no is NOK 918 for cars in the category exceeding NOK 50,000, while the comparable costs in Nettbil may total between NOK 9,000 and NOK 30,000, which is 10 to 30 times more.

(125) In my perception, the factors I have now highlighted challenge the Competition Tribunal's conclusion that the products are substitutable. What the Tribunal has emphasised to reach that result is set out in paragraph 100:

> "The Competition Tribunal emphasises the customer's underlying need, which is to sell a second-hand car at the best possible price. Whether the customers wish to conduct a large or small part of the sales process is not decisive for the substitutability of the products. As described above, there are large price differences between the various solutions, which is also the case between classified advertisers such as Facebook Marketplace and Finn. However, the large price differences between the latter do not prevent the appellants from considering these players as players in the same relevant product market."

(126) It is unclear what is meant by the customer's need for the best possible price. The price expectations in the two sales channels will be different for the same reasons as those pointed out by the Tribunal. It is thus not a question of two different paths to the same price expectation. The price goal is different. In addition, the Tribunal's arguments show that it has primarily sought to identify any factors *preventing* that the products are substitutable. This cannot be a correct approach. It is substitutability that must be demonstrated. As previously pointed out, the Tribunal seems to have taken as its starting point that the products *overlap.* Again, however: overlap is not necessarily the same as substitutability under competition law. Against this background, I cannot see that the Tribunal through its initial arguments has substantiated that the products are substitutable.

(127) The Tribunal also holds that since both Finn's and Facebook Marketplace's are in the same relevant market, despite the large price differences, it is not unreasonable that the products of Finn and Nettbil, which also have large price differences, are in the same relevant market. I also disagree with this approach. The difference between the free service at Facebook Marketplace and the average price with Finn is NOK 918. The cost of using Nettbil is 10 to 30 times higher than the cost of using Finn. Based on ECJ case law, I have previously

explained that it is unlikely that a high-quality product at a much higher price will substitute a low-price product following a moderate price increase. The price differences we are dealing with are of such a scope. Therefore, I cannot see that the evidence presented by the Tribunal is suited to substantiate the conclusion that the products are in the same product market despite the large price differences.

*Customer surveys as a basis for market definition*

(128) In paragraph 102 of its decision, the Competition Tribunal mentions that internal surveys carried out by Nettbil show that "a sufficiently large number of customers view the products for private sale of second-hand cars through Nettbil and Finn as substitutes".

(129) In my view, Nettbil's surveys among its customers are of limited relevance to the question whether Finn and Nettbil operate in the same product market. The surveys merely say that *Nettbil's* customers would have chosen Finn if Nettbil did not exist. They tell us nothing about the effect a moderate price increase of Finn's product would have had on the customers' choice of sales channel. The question is whether an increase in Finn's prices from NOK 918 to slightly above NOK 1,000 gives the customer an incitement to switch to a product of higher quality at an effective cost between NOK 8,000 and NOK 29,000 or more. In the absence of evidence suggesting the opposite, I find this unlikely. I note that the EFTA Court's ruling of 5 May 2022 in Case E-12/20 *Telenor* sets out in paragraph 117 that in the case of asymmetric substitution, "substitution from fixed to mobile broadband does not necessarily prove an ability to substitute from mobile to fixed broadband". The statement in the report from the State's expert witness that it is unlikely that customers diverge in only one direction is not further explained. Against this background, I cannot see, on this point either, that the Tribunal has based its decision on anything that sufficiently substantiates its conclusion.

*The parties' internal documents as a basis for market definition*

(130) The Tribunal states in paragraph 102 of its decision that it in its market definition has emphasised that Nettbil and Finn refer to each other as competitors in their own internal documents.

(131) The statements in question have been thoroughly examined in the Supreme Court. They are mainly in the form of bullet points in internal PowerPoint presentations. Neither the documents nor the listed prices after Nettbil was launched in 2017 show that Schibsted or Finn has considered Nettbil a competitive threat having necessitated countermeasures in some form. It has been submitted that Finn's prices have been stable during the whole period and only follow the general price development.

(132) In the documents where Nettbil is identified as a potential investment object, the company is primarily considered an opportunity to add a new product to the portfolio. Here, I refer to the description "complementary to the current portfolio" in Business Plan for Norway, which Schibsted prepared in November 2019. Characteristics such as "acquisition opportunity" in several other documents must be interpreted in the light of this. A presentation to Schibsted's group management on 6 December 2019 sets out:

> "In Norway, acquiring Nettbil is not perceived as a strategic imperative. Nettbil fits well into FINN's strategy to get closer to the transaction, but there are no indications as of today that Nettbil or other similar models will radically change the dynamic in the market or FINN's profitability potential."

(133) I have difficulties reading this strategy document in any other way than as a confirmation that Schibsted, immediately prior to the transaction, did not consider Nettbil a competitor to Finn.

(134) This view is confirmed in Schibsted's presentation to the Norwegian Motor Trade Association 12 December 2019; that is, the day before the transaction. The presentation states among other things:

> "We wish to develop an exciting niche and offer a supplement to the current P2P solution
> …
> An alternative/supplement to those who struggle finding buyers on FINN"

(135) In support of its view, the State has stressed that Schibsted in an internal document estimated a so-called "cannibalization effect", which means the economic effect of Finn's losing a second-hand car sale to Nettbil. From the estimate, the State contends, one may deduct that Schibsted's perspective has been that a substantial share of Nettbil's sale will generate from customers who have moved from Finn.

(136) Apart from the potential uncertainty of the documents' status and the estimate as such, one cannot conclude from this that Schibsted has considered Nettbil exert competitive constraints on Finn that the transaction will eliminate, with the consequence that Finn's customers move to Nettbil. A cannibalisation is more likely to result from the fact that Nettbil's product has an advantage and will attract an increased number of customers after Schibsted's entry as owner.

(137) The State also contends that an internal e-mail in Schibsted immediately prior to the transaction confirms that the general view in the company was that Finn and Nettbil operated in the same product market. It expressed that "[i]f we do not go for this, Nettbil (or similar concepts) will in any case grow in the market and eat shares from the PtP market over time", i.e. from the market for second-hand car trade between private individuals. It is also stated:

> "Our market position will be gradually weakened. Facebook from the bottom. Nettbil in the middle – and passive brand dealers on the top are not the recipe for long-term positioning."

(138) According to information provided, the e-mail summarises the meeting between Schibsted and the Norwegian Motor Trade Association on 12 December 2019, which I have previously mentioned. The purpose of the meeting was to hear the brand dealers' opinion on Schibsted's possible purchase of Nettbil, as the members of the association are large advertisers Schibsted's various platforms. The development of Nettbil.no could challenge the brand dealers' business foundation, and counteractions could pull significant advertisement and commercial assets away from Schibsted.

(139) The statements in the e-mail are not self-explanatory. However, most of them suggest that the focus has not been on Finn's competitiveness. This is confirmed by the statements read in the light of Schibsted's presentation during the meeting, which I have already referenced. What is set out in the e-mail is in any case unsuited to alter the other evidence emerged related to the definition of the relevant market.

*The relevant product market – conclusion*

(140) Against this background, I have concluded that it cannot be considered substantiated that Finn's and Nettbil's products are in the same product market. The reason is that an analysis based on qualitative factors does not with a sufficient degree of probability demonstrate that the products are close enough to be substitutes.

*The competitive assessment – general remarks*

(141) As mentioned, market definition is merely an analytical tool in the competitive assessment. Sometimes, the assessment must be made without a beforehand clarified definition due to difficulties with the demarcation.

(142) The situation at hand, however, is that both the Competition Authority and the Competition Tribunal, despite the challenges, have found to include market definition in their analyses. When the final answer is that the products are not in the same product market and may thus not be considered to compete with each other, the basis for a competitive assessment is lost. The State also agrees to this and refers to its appeal that sets out in paragraph 4.2, that "[i]f Finn and Nettbil do not even operate in the same market, there will be no basis for assessing whether the transaction will significantly impede competition under section 16 of the Competition Act."

(143) I note that the Court of Appeal, in its judgment, used a different approach when refuting Schibsted's opinion on the same. The Court of Appeal therefore carried out a competitive assessment. In my view, that is neither necessary nor correct when it comes to price and quality.

(144) Consequently, based on my conclusion that Finn's and Nettbil's products are not in the same relevant product market, there is no reason to consider whether the merger will significantly impede effective competition as concerns price and quality. I add that the Tribunal's qualitative assessment in connection with the market definition, which I have refuted, will nonetheless be a main element in a possible analysis of how closely the merging parties compete. Therefore, I cannot see how a competitive assessment might lead to a different result.

*Competitive assessment of harm to innovation*

(145) When it comes to the issue of competition restrictions in the form of harm to innovation, market definition will not necessarily serve as an analytical tool for a competitive assessment in the current relevant product market. Innovation is in the future. The competitive assessment must then be linked to whether it can be established with a sufficient degree of probability that, in a situation without the concentration, innovation would have occurred that the concentration will now prevent.

(146) In its decision, the Competition Authority took as a fact that the concentration would reduce the parties' incentives to develop new products and services, see paragraph 497. The Competition Tribunal, in turn, found no reason to elaborate on this, see paragraph 228. However, during the hearing, the State has maintained the view of the Competition Authority

that the concentration will harm innovation in the form of reduced product development in both Schibsted and Nettbil.

(147) The Court of Appeal has refuted this. I agree that there is no evidence that Nettbil in the future would have developed classified advertisement services competing with Finn. Nor is there any evidence that Finn would have developed its own competing concept. The transaction journey described in parts of the internal documentation does not substantiate the State's view. Statements such as "create a complete user transaction journey for vehicle sales" cannot be interpreted to mean that Finn's ambition was to develop a platform on its own in competition with Nettbil. On the contrary, the documentation shows that Finn's business strategy has been to acquire complementary platforms rather than developing something similar from scratch. The presentation to the Norwegian Motor Trade Association immediately prior to the transaction confirms this:

> "- It is not an alternative to acquire control without developing the concept….
> …
> - An alternative represented by supplement to those who struggle finding buyers on FINN"

***Conclusion and costs***

(148) Against this background, I have concluded that the appeal must be dismissed. Schibsted has won the case in the whole and is to be awarded costs, see section 20-2 subsection 1 of the Dispute Act. I cannot see that the exception rule in section 20-2 subsection 3 is applicable.

(149) Schibsted has demanded to be awarded costs in the Supreme Court of a total of NOK 8,098,950. The amount is divided on NOK 6,891,767 in legal fees and NOK 1,207,181 in fees to the expert witness and for the expert report. The State holds that the amount claimed is far too high.

(150) From the statement of costs, it appears that a total of six advocates have performed work in the case. A total of 1,465.75 billable hours have been entered until the appeal hearing and 177.75 hours until the end of the proceedings, which gives a total of 1,643.50 hours. The hourly rates mostly vary between NOK 5,697 and NOK 3,033, depending on which advocate in the team has performed the work. Counsel have claimed fees for a total of 733 hours' work.

(151) In the Court of Appeal's judgment, Schibsted was awarded costs of NOK 8,371,105. Schibsted's total claim in connection with the review of the Competition Tribunal's decision, therefore amounts to NOK 16,470,055.

(152) In its ruling HR-2020-1515-U paragraph 21 et seq, with reference to the preparatory works to the Dispute Act, the Appeals Selection Committee mentions the courts' responsibility to control the level of costs in civil cases. The Committee states among other things that the total costs must be measured against a proportionality limitation, that counsel's fees must be calculated based on both hourly rate and the number of hours spent, and the costs for particularly expensive advice cannot, as a clear rule, be claimed from the counterparty. What constitutes particularly expensive advice will, according to the Committee, "depend on a discretionary assessment of the circumstances in the relevant case, and what a normally skilled advocate would likely have demanded in such a case". Among the other factors

mentioned, I highlight the economic value of the subject matter of litigation and that work in one instance should be expected to be reused to a significant degree in the next instance with the same counsel.

(153) I base my ruling on costs on the starting points in HR-2020-1515-U.

(154) The case at hand has raised issues of a particularly legal nature, involving large and complex international sources of law. The subject matter is not only of a high value, but it also concerns Schibsted's possibility to continue the development of Nettbil's business potential in the company's portfolio.

(155) At the outset, these factors justify a larger number of people participating in the preparations and proceedings, a high number of billable hours, and particularly expensive assistance from specialist advocates based on hourly rates. It must also be accepted that such a complex matter may also require work that is not directly reflected in what is finally contended and presented in court.

(156) In my view, it will nonetheless be contrary to the proportionality limitation to award costs by merely multiplying the number of hours spent by a high hourly rate. With the vast number of billable hours generated from such a complex matter through a large team of legal representation, it is self-evident that not all hours are equally efficient or specialised and that not all parts of the work have been necessary. Work performed during the period from the start-up of the hearing and until the termination illustrates this. The appeal hearing stretched over four court days, but compensation is claimed for more than 177 hours' work. There was nothing during the execution of the hearing that necessitated such an amount of work. Against this background, I have concluded, based on an overall assessment, that the fee should be reduced by NOK 1,000,000.

(157) When it comes to the fee to the expert, I cannot see that this work was necessary for the proceedings in the Supreme Court. As concerns the market definition, this mainly raised legal issues only. During the appeal hearing, the report was used only to a very limited extent, and it is unclear to me how, after the Court of Appeal's judgment where Schibsted was the successful party, it was necessary to supplement the report already prepared, and for which fees have already been charged in the same amount as that claimed. Against this background, I find that costs should not be awarded to Schibsted's expert in the Supreme Court.

(158) For the sake of simplicity, the awarded amount is rounded to the nearest hundred kroner.

(159) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. The State represented by the Competition Authority will pay costs to Schibsted ASA of NOK 5,891,800 within two weeks from the service of this judgment.

(160) Justice **Bull:** I agree with Justice Matheson in all material respects and with his conclusion.

(161) Justice **Sæther:** Likewise.

(162) Justice **Arntzen:** Likewise.

(163) Justice **Indreberg:** Likewise.

(164) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. The State represented by the Competition Authority will pay costs to Schibsted ASA of NOK 5,891,800 within two weeks from the service of this judgment.