JUDGMENT OF THE COURT

17 September 2018*

(Article 53 EEA – Article 54 EEA – Principle of equivalence – Principle of effectiveness – National rules on the limitation period for claims for damages)

In Case E-10/17,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in a case pending before it between

Nye Kystlink AS

and

Color Group AS and

Color Line AS

concerning the interpretation of the principles of equivalence and effectiveness in the context of national rules on the limitation period for claims for damages in cases where fines have been imposed under Articles 53 and 54 of the Agreement on the European Economic Area,

THE COURT,

composed of: Páll Hreinsson, President and Judge-Rapporteur, Per Christiansen and Bernd Hammermann, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Nye Kystlink AS ("Kystlink" or "the appellant"), represented by Erlend L. Solberg and Jon Midthjell, Advocates;

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* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- Color Group AS and Color Line AS ("Color Line" or "the defendants"), represented by Gunnar Sørlie and Helge Stemshaug, Advocates;

- the Norwegian Government, represented by Ketil Bøe Moen, Advocate, and Lisa-Mari Moen Jünge, Associate, Office of the Attorney General (Civil Affairs), and Carsten Anker, Ministry of Foreign Affairs, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Erlend M. Leonhardsen and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Sergio Baches Opi, Fructuoso Jimeno Fernández and Gero Meeßen, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the appellant, represented by Erlend L. Solberg, Jon Midthjell and Sivert Lund, Advocates; the defendants, represented by Gunnar Sørlie, Helge Stemshaug and Henrik Nordling, Advocates; the Norwegian Government, represented by Ketil Bøe Moen and Lisa-Mari Moen Jünge; ESA, represented by Claire Simpson and Erlend M. Leonhardsen; and the Commission, represented by Sergio Baches Opi, Fructuoso Jimeno Fernández and Gero Meeßen at the hearing on 24 April 2018,

gives the following

Judgment

I Legal background

EEA law

1 Article 53 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*
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> > *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

2 Article 54 EEA reads:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3 The first paragraph of Article 25 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Surveillance Authority shall, in accordance with Articles 53 to 60 and 109 of, and Protocols 21 to 25 and Annex XIV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 4 to the present Agreement, give effect to the provisions of the EEA Agreement relating to the implementation of the competition rules applicable to undertakings as well as ensure that those provisions are applied.

4 Article 23(1), (2) and (5) of Chapter II of Protocol 4 SCA reads:

1. The EFTA Surveillance Authority may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,

- they fail to rectify within a time limit set by the EFTA Surveillance Authority an incorrect, incomplete or misleading answer given by a member of staff, or

- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the EFTA Surveillance Authority have been broken.

2. The EFTA Surveillance Authority may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 53 or Article 54 of the EEA Agreement; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

…

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

National law

5 In Norway, limitation periods are regulated by the Act of 18 May 1979 No 18 relating to the limitation period for claims (*Lov om foreldelse av fordringer*) ("the Limitation Act"). According to the referring court, Section 9(1) of the Limitation Act contains the main rule concerning the limitation period for claims for damages. The first sentence of that provision reads as follows:

> *A claim for damages or redress lapses three years after the date on which the injured party obtained or should have procured necessary knowledge about the damage and the responsible party.*

6 The referring court states that it follows from Norwegian case law that the limitation period for claiming damages under this provision starts to run from the time that the injured party had or should have procured knowledge about the factual circumstances to enable him to bring an action "with the prospect of a positive outcome". Another expression of this rule is that the injured party must be in possession "of such information that, despite uncertainty about the outcome of a court case, he has reasonable grounds for having the question of liability assessed by the courts". This test is of a discretionary nature and requires a concrete assessment of the circumstances in each individual case.

7 According to the referring court, the wording "should have procured necessary knowledge" entails that the injured party has a duty to act or investigate. This means that the injured party, to a reasonable extent, must conduct investigations in order to procure knowledge about the factual circumstances. The limitation period runs from the time that the injured party, by complying with his duty of investigation, would have procured necessary knowledge to bring an action for damages with the prospect of a positive outcome. This could have the consequence that the limitation period expires before the injured party has actually gained the knowledge necessary for bringing an action for damages.

8 According to the referring court, the extent of the duty of investigation in an individual case will depend on a concrete overall assessment in which the nature and scope of the investigations must be balanced against, inter alia, the costs and the possibility of a positive outcome. Investigations are only required if they can bring about the necessary information "without unreasonable difficulty".

9 Section 11 of the Limitation Act lays down a special rule for claims that arise from a criminal offence. Such claims become time-barred no earlier than one year after the judgment of conviction became final. The provision reads as follows:

> *Even if the limitation period has expired, claims for damages, redress and confiscation arising from a criminal offence may be filed during criminal proceedings where the debtor is found guilty of the offence whereby liability is incurred. Such claims may also be filed in a separate action, instituted within one year after the criminal conviction became final. This applies correspondingly where the debtor accepts a fine ["forelegg"] for offences as mentioned.*

10 The referring court states that if no criminal proceedings are instituted for the offence, or if the criminal proceedings are dismissed or end with acquittal, the action for damages must be brought within the ordinary limitation period of three years in accordance with Section 9(1) of the Limitation Act. According to the wording of Section 11, the provision applies to cases where a traditional criminal sanction has been imposed by a judgment or a fine.

11 According to the referring court, the main rationale for extending the limitation period is that it may be perceived as offensive if a person who is convicted for a criminal offence would be able to evade liability for damages by invoking the expiry of the limitation period.

12 For the sake of order, the referring court adds that the second paragraph of Section 34 of the Act of 5 March 2004 No 12 on competition between undertakings and control of concentrations (*lov om konkurranse mellom foretak og kontroll med foretakssammenslutninger*) ("the Competition Act") has been amended with effect from 1 January 2014. That provision now provides that claims arising from infringement of competition law, including Articles 53 and 54 EEA, can be filed by bringing a separate action within one year of the date of a final decision or final judgment in the case. However, this provision did not apply at the relevant time.

II Facts and procedure

13 The appellant, Nye Kystlink AS, is a Norwegian company and the successor of two former Norwegian ferry companies, Kystlink AS and Nye Kystlink AS. It is not necessary for the purposes of the present case to distinguish between these three companies. For the sake of simplicity, the joint term "Kystlink" will be used to refer to all three Kystlink companies. The defendants, Color Line AS and its parent company Color Group AS, are also Norwegian companies (jointly referred to as "Color Line" or "the defendants"). Color Line operates ferry services inter alia between Sandefjord in Norway and Strömstad in Sweden, and between Larvik in Norway and Hirtshals in Denmark.

14 Color Line has operated ferries between Sandefjord in Norway and Strömstad in Sweden since 1986. In 1991, Color Line entered into a harbour agreement with the Municipality of Strömstad on exclusive access to an area at Torskholmen that was reserved for ferry operations. The agreement was valid for a period of 15 years from 1 January 1991 to 30 December 2005 and included an option for Color Line to extend it by 10 years.

15 In 2000, Kystlink started a ferry service between Langesund in Norway and Hirtshals in Denmark, which was intended to compete with Color Line's service between Larvik and Hirtshals.

16 In November 2003, Kystlink initiated a project to establish a new passenger ferry service between Langesund in Norway and Strömstad in Sweden. This service was intended to compete with Color Line's service between Sandefjord and Strömstad. The strategy entailed that the same vessel would sail Langesund – Hirtshals – Langesund at night, and Langesund – Strömstad – Langesund during the day, so that the vessel's capacity was utilised 24 hours a day. Kystlink sought permission from the Municipality of Strömstad to use the port for ferry activities between Langesund and Strömstad. Furthermore, the company needed a vessel that was suitable for the triangular route and entered into negotiations with another shipping company with a view to purchasing the vessel M/S Thjelvar.

17 Kystlink's application to the Municipality of Strömstad triggered discussions between Color Line and the municipality, in which Color Line invoked the exclusivity clause in the harbour agreement and notified of possible legal action to enforce it. Color Line also requested a ten-year extension of the harbour agreement based on the option for extension.

18 On 21 December 2005, just before the 15-year contract period under the harbour agreement expired, the Municipality of Strömstad decided to grant Kystlink access to the port for a trial period of two years from the start-up date, since the municipality was concerned about whether the exclusivity clause was compatible with competition law. The municipality also denied Color Line's request for an extension of the harbour agreement. The ferry service between Langesund and Strömstad started in November 2006.

19 On 20 December 2005, Kystlink lodged a complaint with the Norwegian Competition Authority against Color Line's harbour agreement in Strömstad and its conduct in relation to Kystlink. In its complaint, Kystlink requested immediate assistance from the Norwegian Competition Authority to follow up infringements of the prohibition on abuse of a dominant position.

20 In its complaint, Kystlink raised three points. First it argued that Color Line had used the harbour agreement with the Municipality of Strömstad to seek to prevent Kystlink from gaining access to the port. Second, Kystlink referred to the fact that, in November 2003, Color Line had chartered the vessel M/S Thjelvar from a shipping company with which Kystlink was in the process of concluding negotiations. It was argued that Color Line chartered the vessel with a view to preventing Kystlink from establishing a service to Strömstad. Kystlink requested that the Norwegian Competition Authority demand access to the investment decision relating to M/S Thjelvar. Third, Kystlink argued that Color Line had engaged in aggressive price reductions in the form of predatory pricing in order to drive Kystlink out of the market.

21 The complaint stated that Kystlink had meetings with the Norwegian Competition Authority in autumn 2005 and that it had submitted various documentation before the complaint was lodged. It was also stated that Kystlink had further documentation that could be submitted to the Norwegian Competition Authority if needed.

22 Because the case had cross-border implications, the Norwegian Competition Authority transferred the case to ESA.

23 On 16 December 2009, ESA issued a statement of objections to Color Line. ESA's preliminary conclusion in the statement was that Color Line had infringed Articles 53 and 54 EEA by its long-term exclusivity agreement with the Municipality of Strömstad, which had made it possible to prevent potential competitors from gaining access to the relevant market.

24 ESA adopted a decision in the case on 14 December 2011 (387/11/COL). In its decision, ESA only assessed the exclusivity clause in the harbour agreement with the Municipality of Strömstad, and not the other issues addressed in Kystlink's complaint.

25 In its decision, ESA stated that "the relevant market was likely limited to the provision of short-haul passenger ferry services with tax-free sales between ports" in the two municipalities of Strömstad and Sandefjord. ESA left open the question of whether the relevant geographical market could be more widely defined, but did not find it necessary to assess this as it was not decisive for the case, "since Color Line was, in any event, the sole supplier of short-haul passenger ferry services with tax-free sales between Norway and Sweden during the period from 1 January 1994 to 20 December 2005".

26 In its decision, ESA concluded that Color Line, by the harbour agreement, had infringed Articles 53 and 54 EEA during a period from 1 January 1994, and that the infringement had lasted until "at least" 20 December 2005, when the Municipality of Strömstad

decided to grant Kystlink access to the Port of Strömstad. ESA summarised its conclusion as follows:

> *The Authority concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskholmen in Strömstad had the effect of preventing, restricting or distorting competition within the meaning of Article 53(1) EEA. The Authority further concludes that Color Line has not shown that the conditions laid down in Article 53(3) EEA are satisfied.*
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> *The Authority also concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskholmen in Strömstad were, at the very least, capable of restricting competition. The Authority further concludes that Color Line has not shown that there was any objective justification for maintaining its exclusive rights in force from 1 January 1994 until 20 December 2005, and that Color Line therefore abused its dominant position on the relevant market within the meaning of Article 54 EEA.*
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> *Therefore, Color Line's conduct constituted an infringement of Articles 53 and 54 EEA.*

27 The decision imposed a fine on Color Line in the amount of EUR 18 811 000 for infringement of the EEA competition rules. The decision was not brought before the Court and became final on 14 February 2012. The fine has been paid.

28 On 14 December 2012, Kystlink filed a complaint against Color Line with a conciliation board, including a claim for damages. Pursuant to Norwegian law the complaint interrupted the limitation period.

29 By a writ of 26 February 2014 to Oslo District Court (*Oslo tingrett*), Kystlink brought an action against Color Line claiming damages for financial losses limited upwards to NOK 1 300 000 000 for infringement of Articles 53 and 54 EEA. Kystlink invoked all the circumstances that had been mentioned in its complaint to the Norwegian Competition Authority. Kystlink also invoked circumstances that had occurred after the Municipality of Strömstad's decision of 21 December 2005, more precisely that Color Line had attempted to impede Kystlink's operations in the Strömstad port area.

30 Color Line requested the court to find in its favour, arguing, inter alia, that the claim for damages was time-barred pursuant to Section 9(1) of the Limitation Act.

31 Oslo District Court decided to split the case so that it would first decide the question of whether Kystlink's claim against Color Line was time-barred. The question of whether the conditions for awarding damages were satisfied and the assessment of any such damages was postponed.

32 By Oslo District Court's judgment of 30 November 2015, Color Line was acquitted of the claim for damages. The point of departure for that judgment was that the limitation

period was interrupted by Kystlink's complaint on 14 December 2012 to the conciliation board. The question was whether, more than three years before that time, that is before 14 December 2009 ("the cut-off date"), Kystlink had or should have had necessary knowledge of the factual circumstances to be able to file a claim for damages with the prospect of a positive outcome.

33 Oslo District Court concluded that, before the cut-off date, Kystlink already had necessary knowledge to be able to file a claim for damages against Color Line with the prospect of a positive outcome. In that court's view, this finding applied in relation to all the acts of abuse that were invoked. Oslo District Court therefore concluded that Kystlink's claim for damages was time-barred.

34 Kystlink has appealed that judgment to the Borgarting Court of Appeal. The appeal case is also limited to the question of whether Kystlink's claim for damages for infringement of Articles 53 and 54 EEA is time-barred. By letter of 23 November 2017, registered at the Court on 8 December 2017, the Borgarting Court of Appeal requested that the Court give an advisory opinion.

35 The referring court notes that the parties disagree as to what knowledge Kystlink had, should have had, or needed access to, regarding the circumstances that give rise to liability, in order to be able to bring an action for damages with a reasonable prospect of success. The referring court states that it is not in a position to reach a finding on the facts before the oral hearing in the main proceedings. This has influenced the wording of the referral to the Court, in particular the wording of the second and third questions concerning the EEA law principle of effectiveness. Those questions are based on Kystlink's pleas concerning information asymmetry. The referring court emphasises that it has not assessed at this stage whether these pleas will succeed.

36 The following questions were referred to the Court:

> *1. Does it follow from the EEA law principle of equivalence that a national limitation rule that lays down a separate limitation period of one year for bringing an action for damages arising from a criminal offence that has been established by a final criminal conviction must be applied correspondingly in connection with an action for damages for infringement of Articles 53 and 54 EEA that has been established by a final decision by ESA imposing a fine?*
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> *2. Does the EEA law principle of effectiveness restrict the EEA States' right to apply a limitation period of three years for bringing an action for damages for infringement of Articles 53 and 54 EEA, when this limitation period is combined with a duty of investigation on the part of the injured party that could lead to the limitation period expiring before ESA has reached a decision in a case concerning infringement of Articles 53 and 54 EEA based on a complaint from the injured party?*
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> *3. What elements should be given weight in the assessment of whether the application of the national limitation period, as mentioned in Question 2, is*

compatible with the EEA law principle of effectiveness in competition cases of a nature and scope like the present one?

37 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Answers of the Court

Preliminary remark

38 The regulatory framework in Norway concerning limitation periods in cases concerning actions for damages arising from infringement of competition law, including Articles 53 and 54 EEA, was amended in 2014. However, the relevant facts in the present proceedings took place before that amendment entered into force. The Court must thus address the questions referred in light of the previously applicable legislation.

The first question

39 By its first question, the national court asks whether it follows from the EEA law principle of equivalence that a national limitation rule that lays down a separate limitation period of one year for bringing an action for damages arising from a criminal offence that has been established by a final criminal conviction must be applied correspondingly in connection with an action for damages for infringement of Articles 53 and 54 EEA that has been established by a final decision by ESA imposing a fine.

Observations submitted to the Court

40 *The appellant* maintains that it would be unrealistic to expect that it should have been able, on its own and without recourse to the significant investigative powers and organisation of ESA, to successfully try the damages claim in national court before ESA concluded its investigation.

41 The appellant acknowledges that Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) ("the Damages Directive") has not been incorporated into the EEA Agreement and is not applicable in the case. The appellant maintains, however, that the result should not be materially different under the principle of effectiveness and the principle of equivalence, which apply to the case.

42 With regard to the first question referred, the appellant refers to the referring court's description of the main rationale behind Section 11 of the Limitation Act.

43 The appellant, Kystlink, submits that ESA's infringement decision, in this case imposing a fine of EUR 18.811 million, must be regarded as similar to other fines in national law

for criminal (punishable) offences in relation to a national provision such as Section 11 of the Limitation Act.

44 Furthermore, the principle of equivalence requires, according to the appellant, that a national limitation rule governing actions for safeguarding rights which individuals and economic operators derive from EEA law must not be less favourable than those governing similar domestic actions. This requires a consideration of their purpose, cause of action and essential characteristics (reference is made to Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 735, paragraphs 69 and 73; Case E-11/12 *Koch and Others* [2013] EFTA Ct. Rep. 272, paragraphs 121 and 124; and the judgment in *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 27).

45 The appellant submits that this entails a double comparison. First, an identification of comparable proceedings or actions and, second, an assessment of whether EEA law-based actions are treated less favourably than comparable national law-based actions. In order to determine whether the principle of equivalence has been complied with, it is necessary to verify objectively, in the abstract, whether the rules at issue are similar, taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules (reference is made to the Opinion of Advocate General Bobek in *Dimos Zagoriou*, C-217/16, EU:C:2017:385, points 40 and 41). Where actions are determined to be similar on that basis, they must be treated similarly.

46 The main rationale for Section 11 of the Limitation Act is, according to the appellant, that it may be perceived as offensive if a person who is convicted of a criminal offence would be able to evade liability for damages by invoking the expiry of the limitation period.

47 The appellant argues that in providing the referring court with guidance on the essential characteristics of EEA law that are of particular relevance and importance when considering the status and the nature of a final infringement decision, whereby ESA has imposed a fine for infringements of Articles 53 and 54 EEA, the Court should take into account: i) the objective of the EEA Agreement in Article 1 EEA; ii) the establishment of ESA; iii) the division of powers between ESA, on the one hand, and the national competition authorities and courts, on the other; iv) ESA's significant investigative powers; v) ESA's significant powers to impose fines on undertakings in cases concerning infringements of Articles 53 and 54 EEA; vi) that fines imposed by ESA cannot be made tax deductible in an EEA State (reference is made to the judgment in *X*, C-429/07, EU:C:2009:359, paragraph 39); vii) that undertakings which become subject to ESA's investigations receive significant rights of defence and procedural protection (reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 248, paragraphs 88, 90, 91, 93 and 100); and viii) that any individual has a right to claim damages for loss caused by conduct liable to restrict or distort competition (reference is made to the judgments in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 28 and case law cited; *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 43; *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22; and *Donau Chemie and Others*, cited above, paragraph 21). Such claims are not only a matter of private interest, but also of public

interest since they can make a significant contribution to the maintenance of effective competition in the EEA. This thereby also benefits consumers (reference is made to Case E-14/11 *DB Schenker* v *ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1181, paragraph 132; Case E-5/13 *DB Schenker* v *ESA* ("*DB Schenker V*") [2014] EFTA Ct. Rep. 306, paragraph 134; and the judgments in *Akzo Nobel and Others* v *Commission*, T-345/12, EU:T:2015:50, paragraph 84; *Schenker* v *Commission*, T-534/11, EU:T:2014:854, paragraph 92; and *Agria Polska and Others* v *Commission*, T-480/15, EU:T:2017:339, paragraph 83).

48 The appellant concludes that those who seek compensation under EEA law for the harm incurred, following ESA's decision to impose a fine for the infringement of Articles 53 and 54 EEA, should not be treated differently from those who seek damages after other punishable offences that are subject to national law. The appellant adds that in most EEA states a fine of EUR 18.811 million is likely be considered a very significant fine and, in many cases, also substantially higher than the fines received for most violations of national criminal law.

49 *The defendants*, Color Line, submit that, in the absence of harmonising EEA legislation, it is for the internal legal order of each EEA State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from EEA law. Accordingly, it is on the basis of national rules that injured parties must apply to obtain compensation for the consequences of the loss or damage caused due to a violation of EEA rules. This is nonetheless contingent on the conditions for bringing a claim for damages laid down by national law, including time-limits, being not less favourable than those relating to similar domestic claims (the principle of equivalence) and being not so framed as to make it in practice impossible or excessively difficult to obtain compensation (the principle of effectiveness) (reference is made to the judgments in *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 31, and *Francovich*, C-6/90 and C-9/90, EU:C:1991:428, paragraphs 42 and 43).

50 Color Line submits that the principle of equivalence does not require an EEA State to extend its most favourable rules to all actions brought in a certain area of law (reference is made to the judgment in *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 31). This principle can only curtail the procedural autonomy of the EEA States if it leads to the application of less favourable conditions for bringing a claim for damages for a breach of EEA law than those relating to similar domestic claims.

51 According to the defendants, there is no favouritism towards domestic claims with regard to the application of Section 11 of the Limitation Act, as this provision is not applicable where the Norwegian Competition Authority has adopted a final decision under national law. Since the referring court mentions the new Section 34 of the Competition Act, which was not applicable at the relevant time, Color Line adds that the adoption of that provision underlines the inapplicability of Section 11 of the Limitation Act to the facts of the present proceedings.

52 The defendants maintain that compliance with the principle of equivalence requires that the national rule in question applies without distinction to actions based on infringement of EEA law and those based on infringement of national law having a similar purpose and cause of action (reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 42).

53 According to the defendants, it is for the referring court, which alone has direct knowledge of the procedural rules governing limitation periods related to damages claims stemming from criminal actions, to determine whether the procedural rules, which are intended to ensure that rights derived by individuals from EEA law are safeguarded under domestic law, comply with the principle of equivalence and to consider both the purpose and the essential characteristics of allegedly similar domestic actions.

54 *The Norwegian Government* submits that the EEA law principle of equivalence requires that the rules safeguarding the rights which individuals derive from EEA law must not be less favourable than those governing similar domestic actions (reference is made to *Koch and Others*, cited above, paragraph 121, and the judgment in *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 62).

55 Furthermore, the Norwegian Government argues that it is established case law that it is for the referring court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to verify whether the procedural rules, which are intended to ensure that the rights derived by individuals from EEA law are safeguarded under domestic law, comply with the principle of equivalence. In performing its assessment, the referring court should consider both the purpose and the essential characteristics of allegedly similar domestic actions (reference is made to the judgments in *Preston and Others*, C-78/98, EU:C:2000:247, paragraph 49; *Levez*, C-326/96, EU:C:1998:577, paragraph 43; and *Koch and Others*, cited above, paragraph 124).

56 A claim such as the one in the present proceedings must not, according to the Norwegian Government, be treated less favourably in a procedural manner compared to claims for compensation for infringement of national competition rules established by national competition authorities. No such differentiation exists in the present case with regard to the application of Section 11 of the Limitation Act. Furthermore, these types of claims are treated in the same manner as claims that derive from other administrative decisions. The principle of equivalence is not to be interpreted as requiring EEA States to extend their most favourable rules to all actions (reference is made to the judgment in *Bulicke*, C-246/09, EU:C:2010:418, paragraph 27).

57 With regard to the Court's case law, according to which a decision by ESA imposing a fine must be deemed to constitute a criminal sanction in relation to Article 6 of the European Convention on Human Rights ("ECHR"), the Norwegian Government states that this merely reflects that the procedural guarantees established to protect a defendant in a criminal case are enshrined in the EEA Agreement so as to protect undertakings accused of violating Articles 53 and 54 EEA (reference is made to *Posten Norge* v *ESA*,

cited above, paragraph 88). Such fundamental procedural guarantees are not relevant in an action for damages in cases like the present one.

58 *ESA* submits that it follows from the EEA law principle of equivalence that national procedural rules governing actions for safeguarding the rights which individuals derive from EEA law must not be less favourable than those governing similar domestic actions. Where the purpose and cause of action are similar, the national rules must also be applied without distinction, irrespective of whether the alleged breach is of EEA law or national law (reference is made to *Koch and Others*, cited above, paragraphs 121 and 122; the judgment in *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 29; and the judgment in *Manfredi and Others*, cited above, paragraphs 62 and 81).

59 The most relevant comparator for the purposes of equivalence is, according to ESA, not any domestic criminal offence, but more specifically a domestic criminal competition law offence, to which the rule in Section 11 of the Limitation Act applies. Four factors lead to this conclusion.

60 First, the purpose of a private law action for damages, whether for a breach of Articles 53 and 54 EEA or of domestic criminal law is, in both cases the same or similar (reference is made to the judgment in *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraphs 35 and 36). Second, the cause of action is also similar in both instances, as demonstrated by the new Section 34 of the Competition Act. Third, the case law of the Court and the Court of Justice of the European Union ("ECJ"), as well as that of the European Court of Human Rights ("ECtHR") and the Oslo District Court indicates that an infringement of Articles 53 and 54 EEA, is, or at least may be, sufficiently similar to a Norwegian law criminal (competition) offence (reference is, in particular, made to *Posten Norge* v *ESA*, cited above, paragraphs 86 and 88 to 90, and the judgment in *Hüls* v *Commission*, C-199/92 P, EU:C:1999:358, paragraph 150). Fourth, the relevant procedural rules must not be examined in isolation but in their general context, taking into account the role played by those rules in the procedure as a whole, as well as the operation and any special features of the procedure before the national court (reference is made to *Koch and Others*, cited above, paragraph 124). Such an examination must involve an objective comparison, in the abstract, of the procedural rules at issue (reference is made to the judgment in *Preston and Others*, cited above, paragraph 62).

61 *The Commission* argues that the principle of equivalence requires that the national rule in question must be applied without distinction regardless of whether the infringement alleged is of EEA law or national law, where the purpose and cause of action are similar. National procedural rules must remain neutral in relation to the origin of the rights invoked (reference is made to *Koch and Others*, cited above, paragraphs 122 and 123, and *Bulicke*, cited above, paragraphs 25 and 26).

62 The Commission maintains that it is for the national court, which alone has direct knowledge of the procedural rules governing actions in national civil law cases, to perform this assessment, which must be made by reference to the role of the provision in the procedure, its conduct and its special features, viewed as whole, before the various

national bodies (reference is made to the judgments in *Bulicke*, cited above, paragraph 28; *Preston and Others*, cited above, paragraphs 56 and 61; and *Pontin*, C-63/08, EU:C:2009:666, paragraphs 45 and 46).

63 The central question is hence, according to the Commission, whether the purpose and cause of a damages action for breach of the competition rules of the EEA Agreement, following a sanctioning decision by ESA, is similar to a damages action for a breach of criminal law following a conviction by a criminal court.

64 The Commission argues that it does not follow from the principle of equivalence that a national limitation rule that lays down a separate limitation period of one year for bringing an action for damages arising from a criminal offence must be applied correspondingly in connection with an action for damages for an infringement of Articles 53 and 54 EEA that have been established by a final decision of ESA.

65 In this regard, the Commission maintains that despite common characteristics as regards the applicability of procedural guarantees emanating from equivalent fundamental rights standards, there are still marked differences between criminal law in the narrow sense, in particular the conviction by a criminal court for a violation of criminal law, on the one hand, and an administrative fine for non-criminal offences, on the other.

66 The Commission adds that while it is true that certain infringements of competition law could also be regarded by the legislator as particularly grave offences warranting a criminal sanction, this is not the case in the context at hand since the conduct at stake was not subject to a conviction by a court in criminal proceedings.

67 Furthermore, the Commission refers to Article 23(5) of Chapter II of Protocol 4 SCA, according to which decisions by which ESA imposes fines on undertakings for violations of Articles 53 and 54 EEA shall not be of a criminal law nature.

68 Against this background, the Commission argues that the Norwegian legislature's reason for enacting Article 11 of the Limitation Act may be considered not – or at least not to the same degree – to apply to offences sanctioned by a mere administrative fine.

69 The Commission adds that the principle of equivalence is not to be interpreted as requiring EEA States to extend their most favourable rules to all actions (reference is made to the judgments in *Bulicke*, cited above, paragraph 27; *Levez*, cited above, paragraph 42; and *Pontin*, cited above, paragraph 45).

70 The Commission concludes that it does not appear that actions for damages, such as the present one, are treated differently than actions for damages arising out of infringements of national competition rules with an administrative fine by the national competition authority. This finding is not called into question by the fact that for the purposes of the application of fundamental rights, the ECtHR has developed a wider notion of criminal proceedings which covers certain proceedings of administrative nature. In fact, the ECtHR has found that such administrative proceedings differ from the hard core of

criminal law. That finding is also supported by case law of the Court (reference is made, in particular, to *Posten Norge* v *ESA*, cited above, paragraphs 88 and 89).

Findings of the Court

71 The present case concerns a damages claim raised by Kystlink against Color Line, based on the latter's breach of Articles 53 and 54 EEA. Those provisions encompass a right for an individual to claim damages for loss caused by conduct liable to restrict or distort competition (see Case E-6/17 *Fjarskipti*, judgment of 30 May 2018, not yet reported, paragraph 29 and case law cited).

72 The Court recalls that private enforcement of Articles 53 and 54 EEA ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers (see *Fjarskipti*, cited above, paragraph 30 and case law cited).

73 Since the Damages Directive has not been incorporated into the EEA Agreement, there is no obligation in the EEA to apply the provisions laid down in that directive, including the rules on limitation periods. Furthermore, in so far as the Damages Directive lays down rules that are not a codification of EEA-relevant case law, there is no obligation in the EEA to ensure the same result as in the EU under that directive. Consequently, EEA law does not set out the procedural rules concerning the right to claim damages for breaches of Articles 53 and 54 EEA. In the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the procedural rules governing actions for safeguarding rights that individuals and economic operators derive from EEA law. However, such rules must respect the principles of equivalence and effectiveness in EEA law. This means that those rules must not be less favourable than those governing similar domestic actions and they must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (see *Fjarskipti*, cited above, paragraph 31). In other words, the principle of equivalence extends the general principle of equality to the law of remedies (see *Koch and Others*, cited above, paragraph 123). Specifically, in the area of competition law, the national rules governing actions for safeguarding rights derived from EEA law must not jeopardise the effective application of Articles 53 and 54 EEA (compare, the judgment in *Donau Chemie*, cited above, paragraph 27 and case law cited).

74 It follows from the principle of equivalence that national procedural law must remain neutral in relation to the origin of the rights invoked (see *Koch and Others*, cited above, paragraph 123).

75 With regard to compliance with the principle of equivalence in the main proceedings, it is for the referring court, which alone has direct knowledge of the procedural rules governing actions in the relevant field of national law, to consider the purpose, cause of action and the essential characteristics of allegedly similar domestic actions. Moreover, every case in which the question arises, as to whether a national provision is less

favourable than those concerning similar domestic actions, must be analysed by the referring court by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies (see *Casino Admiral*, cited above, paragraph 73 and case law cited).

76 The present case concerns a damages claim based on a breach of EEA competition law established by an ESA decision which has become final. Such a damages claim appears to have the same purpose, cause of action and essential characteristics as a damages claim based on a breach of national competition law that has been finally established by national authorities. In both instances, the injured party seeks to enforce competition rules that have been infringed, and to restore, as far as possible, equal conditions of competition. A damages claim based on a breach of EEA competition law that has been finally established by ESA must therefore not be treated less favourably than a damages claim based on a breach of national competition law that has been finally established by national authorities.

77 It appears from the request from the referring court that damages claims based on a breach of national competition law that had been finally established by national authorities, were at the relevant time treated differently depending on whether the breach had been established by a criminal sanction in the strict sense, or by an administrative sanction. More precisely, pursuant to Section 11 of the Limitation Act, where a breach had been established by a criminal sanction, a damages claim based on that breach could be filed within one year after the criminal conviction became final, even if the general limitation period of three years had expired. However, this option was not available in cases where a breach had been established by an administrative sanction, such as a fine imposed by the Norwegian Competition Authority.

78 The principle of equivalence is not to be interpreted as requiring EEA States to extend their most favourable rules to all actions (compare the judgment in *Bulicke*, cited above, paragraph 27). Therefore, a damages claim based on a breach of EEA competition law that has been finally established by ESA should not automatically benefit from the limitation rule laid down in Section 11 of the Limitation Act. Rather, it must be assessed whether a damages claim based on a final decision by ESA should be equated with a similar damages claim based on a national criminal conviction or with a similar damages claim based on a national administrative sanction.

79 It may be noted that pursuant to Article 23(5) of Chapter II of Protocol 4 SCA ESA's decisions to impose fines on undertakings in the field of competition shall not be of a criminal law nature. This classification has not prevented the Court from holding that proceedings concerning the validity of such a decision fall within the criminal sphere for the purposes of Article 6 ECHR (see *Posten Norge* v *ESA*, cited above, paragraph 88 and case law cited). However, that finding is based on an undertaking's need for fundamental procedural guarantees when faced with a sanction imposed by ESA. Those considerations do not apply to a case concerning damages based on a breach that has already been finally established.

80 What is decisive is whether it can be established that the breach – by virtue of its severity or other features – is such that it may be considered similar to a criminal offence under national law. If that is the case, the principle of equivalence requires that a damages claim based on such a breach benefit from a limitation period such as provided for in Section 11 of the Limitation Act in Norwegian law. When making that determination, the referring court must take into account, in particular, the nature of the breach, including its severity, as established by ESA or as upheld by the Court, as the case may be, the national provisions governing administrative and criminal sanctions for breaches of competition law, and any practice that may shed light on the national authorities' choice between administrative and criminal sanctions for such breaches.

81 At the oral hearing, the representatives of Color Line and the Norwegian Government stated that only certain domestic infringements of competition rules are subject to a criminal sanction under Norwegian law. For example, abuse of a dominant position, which is prohibited by Article 54 EEA, is not penalised as a criminal offence under Norwegian law. However, the present case also concerns conduct prohibited by Article 53 EEA. It is for the referring court to ascertain whether infringements similar to those subject to ESA's decision in the present case would be subject to a sanction equivalent to a criminal sanction or an administrative fine under national law. If infringements subject to such ESA decisions are considered similar to infringements for which criminal sanctions would apply, the same should apply to the decisions by ESA.

82 The referring court may find that the damages claim in the present case is similar to a damages claim following a national administrative fine. In that event, the Court notes that Section 9(1) of the Limitation Act, which establishes a limitation period of three years for claims for damages, appears to apply equally to both actions for damages based on a breach of EEA competition law that has been finally established by ESA, on the one hand, and actions for damages based on a breach of national competition rules that has been finally established by a national competition authority imposing an administrative fine, on the other. This would be in conformity with the principle of equivalence.

83 The same rationale would also seem to apply to Section 11 of the Limitation Act, which according to the referring court lays down a special limitation period of one year for claims that arise from a criminal offence. It appears that, at the relevant time, the provision applied neither to actions for damages based on a breach of national competition rules that had been finally established by a national competition authority, nor to damages actions based on a breach of EEA competition law that had been finally established by ESA. It is for the referring court to ascertain whether that was the case. If Section 11 did not apply to damages actions based on a decision by a national competition authority, then it would be in conformity with the principle of equivalence if the same provision correspondingly did not apply to damages actions based on a decision by ESA, provided that these two types of actions are considered similar by the referring court.

84 In the light of the above, the answer to the first question is that the principle of equivalence requires that a national limitation rule that lays down a separate limitation

period of one year for bringing an action for damages arising from a criminal offence that has been established by a final criminal conviction must be applied correspondingly to an action for damages for infringement of Articles 53 and 54 EEA that has been established by a final decision by ESA imposing a fine, in so far as those actions have similar purpose, cause of action and essential characteristics.

The second and third questions

85 The second and third questions may appropriately be addressed together. The national court asks, first, whether the EEA law principle of effectiveness restricts the EEA States' right to apply a limitation period of three years for bringing an action for damages for infringement of Articles 53 and 54 EEA, when this limitation period is combined with a duty of investigation on the part of the injured party that could lead to the limitation period expiring before ESA has reached a decision in a case concerning infringement of Articles 53 and 54 EEA based on a complaint from the injured party. Second, the referring court asks what elements should be given weight in the assessment of whether the application of such national limitation periods is compatible with the EEA law principle of effectiveness in competition cases of a nature and scope such as the present one.

Observations submitted to the Court

86 The appellant, Kystlink, maintains that the principle of effectiveness precludes a national limitation rule that expires before ESA has reached a final decision concerning infringement of Articles 53 and 54 EEA, based on a complaint from an injured party, except in straightforward matters, inter alia, where it has not been necessary for ESA to conduct an unannounced inspection to search for evidence, the investigation has been limited, and has not resulted in the imposition of any fines.

87 Furthermore, the principle of effectiveness requires that a national limitation rule must not render it practically impossible or excessively difficult to exercise the right to claim damages for infringements of Articles 53 and 54 EEA (reference is made to the judgments in *Manfredi and Others*, cited above, paragraphs 77 to 82; *Courage and Crehan*, cited above, paragraph 29; *Pfleiderer*, cited above, paragraph 24; *Donau Chemie and Others*, cited above; *Kone and Others*, cited above, paragraph 25; *Casino Admiral*, cited above, paragraph 69; and *Koch and Others*, cited above, paragraph 121).

88 The appellant adds that the principle of effectiveness must also be read in the light of the principle of legal certainty, which requires that claimants must be able to determine the applicable limitation period with a reasonable degree of certainty. It follows that such rules must be clear and precise and their application should be predictable for those subject to them (reference is made to the judgments in *Danske Slagterier*, cited above, paragraph 33; *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, paragraph 44; Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 22, paragraph 156; and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 99).

89 According to Kystlink, a national limitation rule such as the one at issue comes into conflict with these principles for several reasons. For example, the limitation period may expire before an injured party has actually gained the knowledge necessary for bringing an action for damages. Moreover, the limitation period may also expire before ESA's investigation has been completed. Furthermore, national courts are not obliged to stay proceedings in cases subject to investigations by ESA. Thus, an injured party has no guarantee that a comprehensive and costly process of disclosure will take place.

90 Finally, the appellant argues that in cases such as the present one, the presumption should be that it would be practically impossible or excessively difficult for an injured party to prevail in a stand-alone damages action, until a final infringement decision has been made and the injured party has received reasonable time thereafter to file the claim. The principle of effectiveness should be understood as establishing a minimum limitation period of one year after ESA's infringement decision has become final to file the claim.

91 The defendants submit that the second question referred has been answered in the case law of the ECJ. The principle of procedural autonomy is the rule, whereas the principle of effectiveness is the exception. It is therefore for the domestic legal system of each EEA State to prescribe the limitation period for seeking compensation for harm caused by behaviour falling under the prohibition in Article 53 EEA. In order for the application of national procedural rules to transgress the principle of effectiveness they must, in the case of limitation periods, render it virtually impossible or excessively difficult to obtain reparation (reference is made to the judgments in *Manfredi and Others*, cited above, paragraph 81, and *Palmisani*, C-261/95, EU:C:1997:351, paragraph 27). Thus, the principle of effectiveness cannot be used to compensate for a complainant's deficiencies or idleness (reference is made to the judgment in *Austurcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 47).

92 According to the defendants, a limitation period of three years that is known in advance does not, in itself, violate the principle of effectiveness since limitation periods that lay down reasonable time-limits are, in principle, in the interest of legal certainty (reference is made to the judgments in *Aprile*, C-228/96, EU:C:1998:544, paragraph 19, and *Marks & Spencer*, C-62/00, EU:C:2002:435, paragraph 35). In fact, the ECJ has found limitation periods ranging from two to five years to be reasonable (reference is made to the judgments in *Camarotto and Vignone*, C-52/99 and C-53/99, EU:C:2001:112, paragraph 30; *Haahr Petroleum*, C-90/94, EU:C:1997:368, paragraph 49; *Barth*, C-542/08, EU:C:2010:193, paragraph 28; and *Edilizia Indistriale Siderurgica*, C-231/96, EU:C:1998:401, paragraph 39). Furthermore, it follows explicitly from the wording of Section 9(1) of the Limitation Act that the limitation period is three years. This fully complies with the principle of legal certainty.

93 The defendants argue that combining the limitation period with a duty of investigation does not, in itself, render the exercise of procedural rights impossible or unnecessarily difficult. In this regard, making the triggering of a limitation period contingent on what a claimant "knew, or ought to have known" is in line with the principle of effectiveness (reference is made to the judgment in *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52).

Furthermore, the duty of investigation imposed on the claimant under Section 9(1) of the Limitation Act is within the scope of procedural autonomy. The extent of the knowledge that an injured party must have in order for a limitation period to be triggered has not been defined by the ECJ. Rather, it is for the national courts to determine whether a knowledge requirement is such as to make the exercise of EEA rights virtually impossible or excessively difficult.

94 Furthermore, the defendants maintain that a limitation period can expire before a final binding public law decision has been handed down in the same matter. This is in line with long-standing case law stating that reparation of loss or damage cannot be made conditional upon the requirement that there must have been a prior court finding of an infringement of EEA law (reference is made to the judgments in *Factortame*, C-213/89, EU:C:1990:257; *Brasserie du pêcheur*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 93 to 96; and *Dillenkofer and Others*, C-178/94, C-179/94, and C-188/94 to C-190/94, EU:C:1996:375, paragraph 28). An individual can therefore bring an action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until an EEA institution adopts a final decision. The defendants add that case law confirms that a limitation period can expire prior to a decision being adopted by an EEA institution, without this being contrary to the principle of effectiveness (reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 39).

95 The defendants emphasise that the third question is based on disputed facts. In determining the factors that are to be taken into account in answering the question, three key elements must be considered. These are, first, the reasonableness of the limitation time period, second, the triggering mechanism for the limitation period, and third, whether these elements were known in advance.

96 All of this may require the referring court to take into account the fact that the investigation was triggered by Kystlink's own complaint to the Norwegian Competition Authority. Therefore, the contents of that complaint should be considered when assessing whether the knowledge element in the limitation period's triggering mechanism has been met. An additional aspect to consider would be the degree of information that was available to Kystlink before the cut-off date. Ultimately, the task of the referring court is to assess whether any of the requirements imposed under national law renders the application of EEA law practically impossible or excessively difficult (reference is made to the judgment in *Bulicke*, cited above, paragraph 35). That threshold is high.

97 With regard to the second question, the Norwegian Government maintains that each case that raises the question of whether a national procedural provision renders application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies (reference is made to *Koch and Others*, cited above, paragraph 132; and the judgments in *Schijndel*, C-430/93 and C-431/93, EU:C:1995:441, paragraph 19; and *Radlinger*, C-377/14, EU:C:2016:283, paragraph 50). The ECJ has recognised that it is compatible with EU

law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty (reference is made to the judgments in *Willy Kempter*, C-2/06, EU:C:2008:78, paragraph 58; *Barth*, cited above, paragraph 28; and *Q-Beef*, C-89/10 and C-96/10, EU:C:2011:555, paragraph 36). Moreover, it is for the referring court to apply national rules on limitation periods and decide whether the result is compatible with the EEA law principle of effectiveness (reference is made to the judgment in *Manfredi and Others*, cited above, paragraph 81).

98 The Norwegian Government adds that the ECJ has on several occasions ruled that limitation periods shorter than the limitation period in Section 9 of the Limitation Act are not incompatible with the protection of rights conferred on individuals by EU law (reference is made to the judgment in *Rewe-Zentral*, C-33/76, EU:C:1976:188, and *Palmisani*, cited above). A limitation period of three years must therefore generally be regarded as compatible with the principle of effectiveness.

99 In further support of this conclusion, the Norwegian Government mentions that the starting point of the limitation period in Section 9 of the Limitation Act relies on flexible and discretional conditions where different aspects, such as information asymmetry and other obstacles to enforcing competition rules, can be taken into account. Furthermore, if the limitation period has started, there are other provisions in national law, inter alia in the Limitation Act, that may provide additional time. For example, limitation periods will be interrupted when the creditor takes legal steps against the debtor in order to obtain a judgment. This interruption can be made by an application for conciliation proceedings which, in complex cases such as the present one, will provide one additional year to submit the case to court. Another option is to ask a court to stay the proceedings pending the result of an assessment by ESA or national competition authorities.

100 In any case, the Norwegian Government submits that the principle of effectiveness does not as such prohibit national limitation periods that expire before the competition authorities have reached a decision in the relevant case (reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 39). In that regard, it is emphasised that the Damages Directive does not lay down rules of EEA law, as it has not been made part of the EEA Agreement.

101 With regard to the third question, the Norwegian Government states that the ECJ has held that it is for the national court to apply national rules on limitation periods and decide whether the result is compatible with the EEA law principle of effectiveness (reference is made to the judgment in *Manfredi and Others*, cited above, paragraph 81). The referring court should specifically consider whether the application of the national limitation period makes it excessively difficult to bring an action for damages for infringement of Articles 53 and 54 EEA.

102 Finally, the Norwegian Government argues that, when applying the national limitation period, the referring court should have particular regard to the special features that typically appear in competition cases. One important factor is the complexity of the case. The more complex a case is, the less strictly should the injured party's duty to investigate be applied. The national court will also have to take into account the injured party's

possibility to obtain information and evidence, and to conduct economic analysis to the extent necessary and sufficient to bring an action with the prospect of a positive outcome. The duty must not, in practice, render it excessively difficult for the injured party to claim damages.

103 ESA maintains that the second question referred is a matter for the referring court to assess. ESA adds, however, that a strict application of Section 9 of the Limitation Act could render ineffective the rights of natural or legal persons to claim compensation from those who have breached EEA competition rules. Among the factors relevant to the referring court's assessment should be the difficulty facing private litigants who bring damages actions in competition cases. This difficulty has been addressed at the EU level by the Damages Directive, which has not been incorporated into the EEA Agreement. Furthermore, the lack of resources and means to uncover competition infringements may lead private litigants to wait until the relevant national competition authority has ruled on the issue of infringement. In many cases it may be more effective – and even necessary – for private litigants to wait for such results.

104 While a limitation period of three years is normally not problematic, ESA considers that an uncertain starting point for the limitation period and a duty to act or investigate, coupled with the length of time it typically takes ESA to investigate competition law infringements, may in practice be contrary to the principle of effectiveness (reference is made to the judgments in *Donau Chemie and Others*, cited above, paragraph 21; *Courage and Crehan*, cited above, paragraph 26; *Manfredi and Others*, cited above, paragraph 60; *Otis and Others*, cited above, paragraph 41; *Kone and Others*, cited above, paragraph 26; and *Taricco and Others*, C-105/14, EU:C:2015:555, paragraphs 47, 49 and 58). This will ultimately depend on how Section 9 of the Limitation Act is interpreted by the referring court.

105 Turning to the third question, ESA argues that Section 9 of the Limitation Act should be interpreted and applied in such a way as to ensure that in a complex competition case, where the investigation of the relevant competition authority is likely to take a number of years, the duty to investigate is not applied in such a way as to require the claimant to investigate a matter beyond the information that is otherwise readily available and reasonably accessible. The referring court should therefore consider, inter alia, whether the duty to investigate is applied in a way which fairly recognises the information asymmetry that exists in many such cases. In this regard, while in practice ESA will usually make its statement of objections available to a claimant, the issue of whether this will give the claimant enough information to reasonably base its damages claim on will depend on the facts of each case.

106 Addressing the second and third questions together, the Commission maintains that, in order to assess whether a particular national limitation regime complies with the principle of effectiveness, it is not enough to look at its constituent elements (starting point, duration, potential grounds of suspension or interruption) in isolation. Rather, the referring court must assess whether these elements considered together render the exercise of the alleged right practically impossible or excessively difficult.

107 According to the Commission, a limitation period of three years, such as the one in question, cannot be considered particularly short. However, the duty to procure knowledge of the necessary factual elements of liability, may not be interpreted too broadly and should not go beyond the procurement of information that the claimant can reasonably be expected to be able to obtain from readily accessible sources. In this regard, the possibility to request information from potential defendants, third parties or competition authorities can be taken into account. In any event, the duty to investigate must not be interpreted in such a way as to become excessively burdensome for the claimant to comply with.

108 In the Commission's view, the possibility of the limitation period expiring before ESA has reached a decision in a case based on a complaint from the injured party is not, in itself, prone to render the exercise of the right to damages practically impossible or excessively difficult. In particular, the principle of effectiveness does not require that, once a complaint has been lodged, the complainant can wait for the outcome of the administrative proceedings.

109 As a general proposition, the Commission states that referring to the point in time when the injured party had or should have procured knowledge about the factual circumstances to enable him to bring an action "with the prospect of a positive outcome" does not appear as such to be problematic in the light of the principle of effectiveness.

Findings of the Court

110 The principle of effectiveness entails that national procedural rules governing actions for safeguarding rights, which individuals and economic operators derive from EEA law, must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (see *Fjarskipti*, cited above, paragraph 31 and *Casino Admiral*, cited above, paragraph 69 and case law cited).

111 It is settled case law that the question of whether a national procedural provision makes the application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (see *Koch and Others*, cited above, paragraph 132 and case law cited).

112 In order to further the principle of legal certainty it is compatible with EEA law to lay down reasonable time-limits for bringing proceedings. Such periods are not liable by their nature to make it virtually impossible or excessively difficult to exercise the rights conferred by EEA law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought. The ECJ has held, for instance, that a time-limit of three years under national law to be reasonable (compare the judgment in *Q-Beef*, cited above, paragraph 36 and case law cited). In the present case, the Court

considers that a limitation period of three years is not in itself incompatible with the principle of effectiveness.

113 In order for a limitation period to serve its purpose of ensuring legal certainty, it must be fixed in advance so as to allow individuals to determine the applicable limitation period with a reasonable degree of certainty. Otherwise, a situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because it may render it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered (compare the judgment in *Danske Slagterier*, cited above, paragraph 33 and case law cited). In the present case, also this point appears not to raise any issues concerning the compatibility of the limitation rule with the principle of effectiveness.

114 It is settled case law that an individual or economic operator may bring an action for damages before a national court on the basis of a breach of Articles 53 and 54 EEA, as those provisions are sufficiently clear, precise and unconditional (see Case E-8/00 *Norwegian Federation of Trade Unions and Others* ("*LO*") [2002] EFTA Ct. Rep. 114, paragraphs 39 and 40, and *Fjarskipti*, cited above, paragraphs 27 to 29). However, where there are continuous or repeated infringements of competition law, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action (compare, the judgment in *Manfredi*, cited above, paragraph 79). In that regard, national procedural rules, including those relating to limitation periods, should not unduly hamper the bringing of such actions for damages brought on the basis of breaches of EEA competition law.

115 Consequently, the determination of the starting point of the limitation period must also be assessed. According to the referring court, the limitation period in Section 9(1) of the Limitation Act starts to run from the time that the injured party had or should have procured knowledge about the factual circumstances to enable him to bring an action "with the prospect of a positive outcome". Another expression of this rule, according to the referring court, is that the injured party must be in possession "of such information that, despite uncertainty about the outcome of a court case, he has reasonable grounds for having the question of liability assessed by the courts". Furthermore, with regard to the duty of investigation, it is a condition that the investigations can uncover the necessary information "without unreasonable difficulty". The referring court concludes that this test is discretionary in nature and requires a concrete assessment of the circumstances in each individual case.

116 In principle, to make the triggering of a limitation period contingent on what a claimant knew, or ought to have known, is compatible with the principle of effectiveness (compare the judgment in *eVigilo*, cited above, paragraph 52). Similarly, combining a limitation period with a duty of investigation does not, in principle, render the exercise of procedural rights impossible or excessively difficult. The precise result in such instances will depend on the nature of the duty of investigation as it applies in national law. In that regard, the principle of effectiveness must be interpreted as requiring that a

national limitation rule entailing a duty of investigation must enable national courts to take into account the individual facts and circumstances of each case.

117 The Court holds that the special characteristics of competition cases, in particular large and complex cases, and the aim of effective enforcement are relevant factors under the principle of effectiveness and therefore in the referring court's assessment.

118 Another factor of relevance is the degree of information and evidence available to an injured party from potential perpetrators, competition authorities or third parties. The duty of investigation should be based on considerations of due care. The duty should not go further than to require the procurement of information that the claimant can reasonably be expected to obtain from readily accessible sources. ESA has stated that the rights of claimants to request information from ESA during an ongoing investigation are limited, even for those whose complaints initiate ESA's investigation. The potential for information asymmetry, in terms of both information and evidence, may make it difficult even for those injured parties who have proven to have suffered harm to quantify the extent of the harm suffered in order to obtain damages. Other considerations include the potential for a claimant to conduct economic analysis to the extent necessary and sufficient to bring an action with the prospect of a positive outcome. It will depend on the facts of the individual case whether information provided by ESA upon request will suffice for the claimant reasonably to build a damages claim action.

119 Furthermore, in addition to the duration and starting point of the limitation period, it is relevant to look at potential grounds for its suspension or interruption. If a national limitation rule imposes a short limitation period that is not capable of being suspended, that could make it practically impossible to exercise the right to seek compensation (compare the judgment in *Manfredi*, cited above, paragraph 78). In the present case, the three-year duration is not overly short and there appear to be possibilities under national law to interrupt or suspend the limitation period, as submitted by the Norwegian Government. It is for the national court to ascertain whether such options are available in practice, and whether they contribute to the necessary compliance with the principle of effectiveness.

120 Finally, the referring court has requested guidance on whether the principle of effectiveness requires that Article 53(3) EEA must be taken into account in the assessment under Section 9 of the Limitation Act. Article 53(3) EEA lists possible grounds of justification for an arrangement that would otherwise be prohibited under EEA law. Under that provision, the burden of proof lies with the defendant. Whether a claimant has knowledge about the non-existence of, or possible grounds for, justification, which may be raised by a defendant, cannot normally be either relevant or necessary in assessing whether the claimant had or ought to have had the knowledge required by Section 9 of the Limitation Act. Thus, it is, in principle, compatible with the principle of effectiveness if the limitation period starts to run without the claimant having procured information about the possible grounds of justification under Article 53(3) EEA.

121 Taking into account the information provided by the referring court, it appears that the limitation rule laid down in Section 9(1) of the Limitation Act does not make it impossible or excessively difficult to bring an action for damages for infringement of EEA competition rules. This is, however, ultimately a matter for the referring court to determine.

122 The answer to the second and third questions is therefore that the principle of effectiveness does not restrict the EEA States' right to apply a limitation period of three years for bringing an action for damages for infringement of Articles 53 and 54 EEA, when this limitation period is combined with a duty of investigation on the part of the injured party that could lead to the limitation period expiring before ESA has reached a decision in a case concerning infringement of Articles 53 and 54 EEA based on a complaint from the injured party, as long as the application of such a limitation period does not make it impossible or excessively difficult to bring an action for damages for infringement of EEA competition rules. That assessment must take into account the special characteristics of competition cases.

IV Costs

123 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Borgarting Court of Appeal hereby gives the following Advisory Opinion:

1. **The principle of equivalence requires that a national limitation rule that lays down a separate limitation period of one year for bringing an action for damages arising from a criminal offence that has been established by a final criminal conviction must be applied correspondingly to an action for damages for infringement of Articles 53 and 54 EEA that has been established by a final decision by the EFTA Surveillance Authority imposing a fine, in so far as those actions have a similar purpose, cause of action and essential characteristics.**

2. **The principle of effectiveness does not restrict the EEA States' right to apply a limitation period of three years for bringing an action for damages for infringement of Articles 53 and 54 EEA, when this limitation period is combined with a duty of investigation on the part of the injured party that could lead to the limitation period expiring before the EFTA Surveillance Authority has reached a decision in a case concerning infringement of Articles 53 and 54 EEA based on a complaint from the injured party, as long as the application of such a limitation period does not make it impossible or excessively difficult to bring an action for damages for infringement of EEA competition rules. That assessment must take into account the special characteristics of competition cases.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 17 September 2018

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President