REPORT FOR THE HEARING
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 the case between

Nye Kystlink AS

and

Color Group AS and

Color Line AS

concerning the interpretation of the EEA law 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.

I Introduction

1. By a letter of 23 November 2017, registered at the Court on 8 December 2017, Borgarting Court of Appeal (*Borgarting lagmannsrett*) made a request for an Advisory Opinion in a case pending before it between Nye Kystlink AS ("Nye Kystlink" or "the appellant") and Color Group AS and Color Line AS (referred to collectively as "Color Line" or "the defendants").

2. The case before Borgarting Court of Appeal concerns the appellant's claim for damages against the defendants for an infringement of Articles 53 and 54 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA"). The defendants contest this claim and argue, inter alia, that the claim has lapsed. In response to this argument, the appellant submits that the EEA law principles of equivalence and effectiveness preclude such a finding.

II Legal background

EEA law

3. Article 1 EEA reads:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*
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> *2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:*
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> *(a) the free movement of goods;*
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> *(b) the free movement of persons;*
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> *(c) the free movement of services;*
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> *(d) the free movement of capital;*
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> *(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as*
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> *(f) closer cooperation in other fields, such as research and development, the environment, education and social policy.*

4. Article 53 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.

5. 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.

6. Article 25 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") provides that the EFTA Surveillance Authority ("ESA") shall give effect to the provisions of the EEA Agreement relating to the implementation of the competition rules applicable to undertakings as well as to ensure that those provisions are applied. Protocol 4 SCA sets out the functions and powers of ESA in the field of competition. Article 23(1) and (2) of Chapter II of Protocol 4 SCA empowers ESA to impose fines on undertakings in the field of competition. Article 23(5) of that protocol reads:

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

National law[1]

7. Limitation periods are regulated by the Act of 18 May 1979 No 18 relating to the limitation period for claims ("the Limitation Act").[2]

8. 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.

9. 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 very much of a discretionary nature and requires a concrete assessment of the circumstances in each individual case.

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1 Translations of national provisions are unofficial.

2 *Lov om foreldelse av fordringer*. LOV-1979-05-18-18.

10. According to the referring court, it also follows from the provision that the injured party has a duty to act or investigate ("should have procured necessary knowledge"). 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.

11. However, case law does not, according to the referring court, provide a basis for any general statement concerning what specific acts the duty of investigation requires of the injured party. It 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. It is a condition that the investigations can succeed "without unreasonable difficulty". In other words, this test is also very much of a discretionary nature.

12. Section 11 of the Limitation Act lays down a special rule for claims that arise from a criminal offence. Such claims lapse 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.*

13. 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 ["forelegg"].

14. 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.

15. For the sake of order, the referring court adds that the Act of 5 March 2004 No 12 on competition between undertakings and control of concentrations ("the Competition

Act")[3] was amended with effect from 1 January 2014 by the inclusion in Section 34 of a provision based on Section 11 of the Limitation Act. The provision in Section 34, second paragraph, now makes it clear 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.

III Facts and procedure

16. Color Line AS is a Norwegian company currently operating four ferry services between Norway and Sweden (Sandefjord – Strømstad line), Denmark (Larvik – Hirtshals line and Kristiansand – Hirtshals line) and Germany (Oslo – Kiel line), respectively. The parent company is Color Group AS.

17. The appellant is another Norwegian company. Three Kystlink companies are mentioned in the case. The relationship between these companies can be briefly summarised as follows. Kystlink AS was declared bankrupt in May 2006. Prior to this, the company transferred its activities to another company, which, changed its name to Nye Kystlink AS. This is not the same company as the appellant in the present case. The first company bearing the name Nye Kystlink AS was merged into the parent company Boa Offshore in 2010. The appellant, Nye Kystlink AS, was formed in 2012. It is, however, undisputed in the case that the appellant succeeded to the former Kystlink companies' possible claim for damages against the defendants. For the sake of simplicity, the joint term "Kystlink" is hereinafter used to refer to all three Kystlink companies.

18. Color Line has operated ferries between Sandefjord in Norway and Strømstad in Sweden since 1986. On 26 March 1991, Color Line (at the time, Scandi-Line AS) entered into a harbour agreement with the Municipality of Strømstad 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.

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

20. In November 2003, Kystlink initiated a project to establish a new passenger ferry service between Langesund in Norway and Strømstad in Sweden, intended to compete with Color Line's service between Sandefjord and Strømstad. The strategy entailed that the same vessel would sail Langesund – Hirtshals – Langesund at night, and Langesund –

[3] *Lov om konkurranse mellom foretak og kontroll med foretakssammenslutninger*. LOV-2004-03-05-12.

Strømstad – Langesund during the day, so that the vessel's capacity was utilised 24 hours a day.

21. Kystlink needed permission from the Municipality of Strømstad in order to use the port for ferry activities between Langesund and Strømstad. In November 2003, the company sent an application for such permission to the Municipality of Strømstad. 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.

22. Kystlink's application to the Municipality of Strømstad 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.

23. On 21 December 2005, just before the 15-year contract period under the harbour agreement expired, the Municipality of Strømstad 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 Strømstad started in November 2006.

24. On 20 December 2005, Kystlink lodged a complaint with the Norwegian Competition Authority against Color Line's harbour agreement in Strømstad 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 abusing a dominant position.

25. Three different complaints were put forth by Kystlink.

26. First, it was argued that Color Line had used the harbour agreement with the Municipality of Strømstad to seek to prevent Kystlink from gaining access to the port.

27. Second, Kystlink referred to the fact that, in November 2003, Color Line had chartered the vessel M/S Thjelvar from a shipping company that Kystlink was in the process of concluding negotiations with. It was argued that Color Line chartered the vessel with a view to preventing Kystlink from establishing a service to Strømstad. Kystlink requested that the Norwegian Competition Authority demand access to the investment decision relating to M/S Thjelvar.

28. 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. Kystlink referred to the submitted calculation models that, according to the complaint, were based

on its own calculations, budgets from the owners of M/S Thjelvar and its own knowledge of the market, and urged the Norwegian Competition Authority to demand access to Color Line's calculations for operation and its major customer agreements in order to assess, inter alia, Color Line's price level and loyalty discounts.

29. 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.

30. The parties disagree regarding the importance of the complaint and pertaining documentation in relation to the question of whether the limitation period has expired.

31. Because the case had cross-border implications, the Norwegian Competition Authority referred the case to ESA.

32. 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 Strømstad, which had made it possible to prevent potential competitors from gaining access to the relevant market.

33. 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 Strømstad, and not any of the other issues that Kystlink complained about.

34. 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 Strømstad 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".

35. 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 1999, and that the infringement had lasted until "at least" 20 December 2005, when the Municipality of Strømstad decided to grant Kystlink access to the Port of Strømstad. 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.

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.

Therefore, Color Line's conduct constituted an infringement of Articles 53 and 54 EEA.

36. The decision imposes 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 EFTA Court and became final on 14 February 2012. The fine has been paid.

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

38. By a writ of 26 February 2014 to Oslo District Court (*Oslo tingrett*), Kystlink then 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 mentioned above: the exclusivity agreement with the Municipality of Strømstad, the chartering of M/S Thjelvar violating competition and unlawful predatory pricing. Kystlink also invoked circumstances that had occurred after the decision of the Municipality of Strømstad of 21 December 2005, more precisely that Color Line had attempted to impede Kystlink's operations in the Strømstad port area by, inter alia, attempting to prevent access to specific port areas and facilities. Furthermore, a right to compensatory damages was invoked on the basis of an overall assessment of these circumstances.

39. Color Line requested the court to find in its favour, arguing, inter alia, that the claim for damages had lapsed pursuant to Section 9(1) of the Norwegian Limitation Act.

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

41. 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 conciliation board complaint on 14 December 2012. 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.

42. 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 had lapsed.

43. Kystlink has appealed that judgment to the referring court. Like Oslo District Court's judgment, the appeal case before the referring court is limited to the question of whether Kystlink's claim for damages for infringement of Articles 53 and 54 EEA has lapsed.

44. 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.

45. The referring court states that it cannot assess the parties' disagreement about the facts before the oral hearing. This has influenced the wording of the referral to the Court, in particular the wording of questions 2 and 3 concerning the EEA law principle of effectiveness.

46. First, the referring court has omitted information about the factual context that it would otherwise have been reasonable to include in the referral, for example as regards what knowledge Kystlink had, prior to the cut-off date in 2009, of the factual circumstances that form the basis for the claim for damages. Instead, questions 2 and 3 have been given a general wording linked to the type of case at issue in the dispute between the parties, namely a large and complex competition case that falls under the scope of Articles 53 and 54 EEA, where ESA conducts an investigation, inter alia, by securing evidence.

47. Second, the referring court has deemed it necessary to base questions 2 and 3 on a disputed factual assumption, namely that, before the cut-off date, Kystlink did not have sufficiently broad and extensive knowledge of the circumstances that gave rise to liability in the competition case to be able to bring an action for damages. In that case, one of the questions that arise is whether Kystlink should have procured necessary knowledge in the exercise of the injured party's duty of investigation. How strictly the duty of investigation may be practised is also one of the topics on which the referring court requests guidance under questions 2 and 3.

48. In other words, questions 2 and 3 are worded based on Kystlink's pleas concerning information asymmetry, without the referring court having assessed at this stage whether these pleas will succeed.

49. The following questions were submitted 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?**

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?**

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?**

IV Written observations

50. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the appellant, represented by Erlend L. Solberg and Jon Midthjell, advocates;

- 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;

- 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.

V Summary of the arguments submitted

The appellant

51. 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.

52. 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.

53. 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.

54. The appellant 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 punishable offences in relation to a national provision such as Section 11 of the Limitation Act.

55. 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.[4]

56. 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

[4] 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.

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.[5] Where actions are determined to be similar on that basis, they must be treated similarly.

57. 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.

58. 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 following elements of EEA law should be taken into account.

59. First, the appellant refers to the objective of the EEA Agreement as it appears, inter alia, in Article 1 EEA. The appellant concludes that Articles 53 and 54 EEA are of central importance to the very objective and functioning of the EEA Agreement.

60. Second, the appellant refers to the establishment of ESA and its status with regard to the enforcement of the prohibitions of Articles 53 and 54 EEA.

61. Third, the appellant emphasises that ESA's special and independent role has led to a division of powers between ESA on the one hand and the national competition authorities and national courts on the other hand.

62. Fourth, the appellant refers to ESA's significant investigative powers.

63. Fifth, the appellant refers to ESA's significant powers to impose fines on undertakings in cases concerning infringements of Articles 53 and 54 EEA. Such fines pursue aims of both repressive and preventive character.[6] In fact, the fine imposed on the defendants was the largest fine that ESA has imposed to date.

64. Sixth, the appellant states that fines imposed by ESA cannot be made tax deductible in an EEA State.[7] This was confirmed in Norway by previous proceedings instigated by Color Line AS, where the national court emphasised that the purpose of the fine imposed

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[5] Reference is made to the Opinion of Advocate General Bobek in *Commission* v *Zagoriou*, C-217/16, EU:C:2017:385, points 40 and 41.

[6] Reference is made to Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 248, paragraph 88.

[7] Reference is made to the judgment in *X*, C-429/07, EU:C:2009:359, paragraph 39.

by ESA was, inter alia, the punitive element, and that it was therefore "very similar to fines and simplified writs".

65. Seventh, the appellant maintains that undertakings, which become subject to ESA's investigations, receive significant rights of defence and procedural protection. This means that such undertakings benefit from the presumption of innocence and have the right to full judicial review of ESA's decisions.[8]

66. Eighth, the appellant contends that it is settled case law that any individual has the right to claim damages for loss caused by conduct which is liable to restrict or distort competition. The practical effect of the prohibitions in Articles 53 and 54 EEA would be put at risk if it were not for this right.[9] Such claims are not only a matter of private interest but are also a matter of public interest since they can make a significant contribution to the maintenance of effective competition in the EEA. This thereby also benefits consumers.[10]

67. 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 fall subject to national law. The appellant adds that in most EEA states a fine in the amount of EUR 18.811 million would 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.

68. Turning to the second and third questions referred, the appellant 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.

69. 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.[11]

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[8] Reference is made to *Posten Norge* v *ESA*, cited above, paragraphs 88, 90, 91, 93 and 100.

[9] 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.

[10] Reference is made to Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1181, paragraph 132; 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; *Agria Polska and Others* v *Commission*, T-480/15, EU:T:2017:339, paragraph 83; and Case E-5/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 306, paragraph 134.

[11] Reference is made to the judgments in *Manfredi and Others*, Joined Cases C-295/04 to C-298/04, EU:C:2006:461, paragraphs 77 to 82; *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 29; *Pfleiderer*, cited above,

70. The appellant adds that the principle of effectiveness must also be read in 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.[12]

71. A national limitation rule such as the one at issue comes, according to the appellant, 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 discovery will take place.

72. 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.

73. The appellant proposes that the Court should answer the questions referred as follows:

> *The principle of equivalence must be interpreted as not precluding 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, which has as its main rationale that it may be perceived as offensive if the convicted otherwise should be able to evade liability for damages by invoking that the limitation period has expired, provided that the limitation rule applies correspondingly to an action for damages for an infringement of Articles 53 and 54 EEA that has been established by ESA in a final infringement decision imposing a fine.*
>
> *The principle of effectiveness must be interpreted as precluding 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*

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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.

[12] Reference is made to the judgments in *Danske Slagterier*, C-445/06, EU:C:2009:178, 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. 444, paragraph 99.

investigation on the part of the injured party that could lead to the period expiring before ESA has reached a final decision concerning infringement of Articles 53 and 54 EEA, based on a complaint from the injured party, and that party has not received reasonable time after the final infringement decision to file the claim, except in straightforward matters, inter alia, where it has not been necessary for ESA to conduct an unannounced inspection to search for and secure evidence, the investigation has been limited, and has not resulted in the imposition of any fines.

The defendants

74. The defendants 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).[13]

75. Taking the second question referred as its starting point, the defendants submit that this question has in fact been answered in the case law of the Court of Justice of the European Union ("ECJ"). In this regard, 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.[14] Thus, the principle of effectiveness cannot be used to compensate for a complainant's deficiencies or idleness.[15]

76. 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

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[13] Reference is made to the judgments in *Danske Slagterier*, cited above, paragraph 31, and *Francovich*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428, paragraphs 42 to 43.

[14] 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.

[15] Reference is made to the judgment in *Austurcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraph 47.

that lay down reasonable time-limits are in principle in the interest of legal certainty.[16] In fact, the ECJ has found limitation periods ranging from two to five years to be reasonable.[17] 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.

77. The defendants also 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 knowledge a claimant "knew, or ought to have known" is in line with the principle of effectiveness.[18] 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.

78. 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.[19] 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 a final decision has been adopted by an EEA institution. 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.[20]

79. Turning next to the third question referred, the defendants emphasise that this 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.

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[16] 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.

[17] Reference is made to the judgments in *Camarotto and Vignone*, Joined Cases 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 Siderurgiga*, C-231/96, EU:C:1998:401, paragraph 39.

[18] Reference is made to the judgment in *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52.

[19] Reference is made to the judgments in *Factortame*, C-213/89, EU:C:1990:257; *Brasserie du pêcheur*, Joined Cases C-46/93 and C-48/93, EU:C:1996:79, paragraphs 93 to 96; and *Dillenkofer and Others*, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 EU:C:1996:375, paragraph 28.

[20] Reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 39.

80. All of this may, according to the defendants, require the referring court to take into account the fact that the investigation was triggered by the appellant'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 the appellant 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.[21] That threshold is high.

81. With regard to the first question referred, the defendants submit 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.[22] 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.

82. There is no favouritism towards domestic claims with regard to the application of Section 11 of the Limitation Act, according to the defendants, 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, the defendants add that the adoption of that provision underlines the inapplicability of Section 11 of the Limitation Act to the facts of the present proceedings. The appellant would never have been able to rely on Section 11 of the Limitation Act for an equivalent domestic claim.

83. 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.[23]

84. 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.

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[21] Reference is made to the judgment in *Bulicke*, C-246/09, EU:C:2010:418, paragraph 35.

[22] Reference is made to the judgment in *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 31.

[23] Reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 42.

85. The defendants propose that the Court should answer the questions referred as follows:

> *1. The EEA law principle of equivalence does not require a Member State to apply a national rule that extends the general limitation period for damage claims related to criminal offences, to damages claims based on competition authorities' decisions imposing administrative fines for the violation of EEA competition rules or national competition rules, as long as damage claims based on EEA and national competition rules are subject to equivalent limitation periods.*
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> *2. The EEA law 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 Article 53 and 54 EEA, from the time when the plaintiff had, or readily had access to, sufficient information on the damage and the grounds for the defendant's liability. Nor does this principle oppose the combination of this limitation period with a duty of investigation. The fact that this limitation period could expire prior to the ESA has reached an infringement decision of Articles 53 and 54 EEA does not violate the principle of effectiveness, so long as this does not render the exercise [sic] the rights of the claimant practically impossible or unnecessarily difficult.*
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> *3. This question should be left unanswered due to the referral's factual inadequacy. If answered, it could be answered as follows:*
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> *In determining whether a national limitation period is compatible with the principle of effectiveness, the referring court should take into account the time-limit, the triggering event and whether these elements were known in advance. Where the infringement decision upon which the claim is based stems from a complaint issued by a complainant in the main proceedings, account should also be had of the information contained in that complaint, as well as what information was available to the claimant, to determine when the time-limit begins to run.*

The Norwegian Government

86. With regard to the first question referred, 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.[24]

87. 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

[24] Reference is made to *Koch and Others*, cited above, paragraph 121, and the judgment in *Manfredi and Others*, cited above, paragraph 62.

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 shall consider both the purpose and the essential characteristics of allegedly similar domestic actions.[25]

88. 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.[26]

89. With regard to the Court's case law that 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, 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.[27] Such fundamental procedural guarantees are not relevant in an action for damages in cases like the present one.

90. With regard to the reference to the new Section 34 of the Competition Act, mentioned in the order for reference, the Norwegian Government emphasises that this provision is not applicable in the present proceedings.

91. Turning to the second question referred, the Norwegian Government maintains that each case that raises the question of whether a national procedural provision renders application of community 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.[28] The ECJ has recognised that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in

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[25] 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.

[26] Reference is made to the judgment in *Bulicke*, cited above, paragraph 27.

[27] Reference is made to *Posten Norge* v *ESA*, cited above, paragraph 88.

[28] Reference is made to *Koch and Others*, cited above, paragraph 132; the judgment in *Schijndel*, Joined Cases C-430/93 and C-431/93, EU:C:1995:441, paragraph 19; and the judgment in *Radlinger*, C-377/14, EU:C:2016:283, paragraph 50.

the interests of legal certainty.[29] 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.[30]

92. 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.[31] A limitation period of three years must therefore generally be regarded as compatible with the principle of effectiveness.

93. The Norwegian Government mentions two points to further support this conclusion. First, 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. Second, 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.

94. 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.[32] 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.

95. With regard to the third question referred, 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.[33] 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.

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[29] Reference is made to the judgment in *Willy Kempter*, C-2/06, EU:C:2008:78, paragraph 58; *Barth*, cited above, paragraph 28; and *Q-Beef*, Joined Cases C-89/10 and C-96/10, EU:C:2011:555, paragraph 36.

[30] Reference is made to the judgment in *Manfredi and Others*, cited above, paragraph 81.

[31] Reference is made to the judgment in *Rewe-Zentralfinanz and Rewe-Zentral*, C-33/76, EU:C:1976:188, and *Palmisani*, cited above.

[32] Reference is made to the judgment in *Danske Slagterier*, cited above, paragraph 39.

[33] Reference is made to the judgment in *Manfredi and Others*, cited above, paragraph 81.

96. According to the Norwegian Government, the referring court should, in applying the national limitation period, 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 apply. 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.

97. The Norwegian Government proposes that the Court should answer the questions referred as follows:

> *1. It does not 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. The EEA law 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 flexible duty of investigation on the part of the injured party even if that could in principle 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.*
>
> *3. It is for the national court to assess whether the application of the national limitation period makes it excessively difficult to bringing an action for damages for infringement of Articles 53 and 54 EEA. The national court should, in competition cases of a nature and scope like the present one, inter alia assess the degree of complexity of the case, the degree of information asymmetry between the injured party and other parties, as well as other obstacles to an efficient enforcement of competition rules, when deciding upon the injured party's duty to investigate.*

ESA

98. With regard to the first question referred, 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.[34]

99. 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 should lead the national court to this conclusion.

100. First, ESA argues that 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. Second, the cause of action, that is the situation or facts from which the right to reparation is derived, is also similar in both instances, as demonstrated by the new Section 34 of the Competition Act. Third, the case law of the Court, the ECJ as well as the European Court of Human Rights and Oslo District Court indicates that an an infringement of Articles 53 and 54 EEA, is, or at least may be, sufficiently similar to a Norwegian law criminal (competition) offence.[35] Fourth, the referring court must not examine the relevant procedural rules in isolation, but rather place them in their general context, and must take 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 that national court.[36] Such an examination must involve an objective comparison, in the abstract, of the procedural rules at issue.[37]

101. With regard to the second question referred, ESA maintains that this question is, similar to the first question, 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 – a difficulty that has been addressed at 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.

102. 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,

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[34] Reference is made to *Koch and Others*, cited above, paragraphs 121 and 122; the judgment in *Courage and Crehan*, cited above, paragraph 29; and the judgment in *Manfredi and Others*, cited above, paragraphs 62 and 81.

[35] 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.

[36] Reference is made to *Koch and Others*, cited above, paragraph 124.

[37] Reference is made to the judgment in *Preston and Others*, cited above, paragraph 62.

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.[38] This will ultimately depend on how Section 9 of the Limitation Act is interpreted by the referring court.

103. Turning to the third question referred, ESA argues that Section 9 of the Limitaton 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.

104. ESA proposes that the Court should answer the questions referred as follows:

> *1. It follows from the EEA law principle of equivalence, whether alone or in combination with the principle of effectiveness, that in a case with circumstances such as the present, 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 the Authority imposing a fine;*
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> *2. 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 the Authority 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. In assessing whether such a limitation period is compatible with the EEA law principle of effectiveness in competition cases of a nature and scope such as the present one, consideration must be given to whether the duty to investigate is*

[38] 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.

applied in such a way as to require the claimant to investigate a matter beyond the information that is otherwise readily and reasonably accessible.

The Commission

105. With regard to the first question referred, 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.[39]

106. 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.[40]

107. 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.

108. 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.

109. 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. To what extent and in what areas a policy uses precisely criminal law as an instrument of social control is a fundamental decision. By criminal law, a legal community gives itself a code of conduct that is anchored in its values. With the decision on punishable conduct, the legislature takes the democratically legitimised responsibility for a form of sovereign action that counts among the most intensive encroachments on individual freedom in a modern state.

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[39] Reference is made to *Koch and Others*, cited above, paragraphs 122 and 123, and *Bulicke*, cited above, paragraphs 25 and 26.

[40] 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.

110. 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, it needs to be noted that 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.

111. Furthermore, the Commission states that Article 23(5) of chapter II of Protocol 4 SCA qualifies decisions, by which ESA imposes fines on undertakings for violations of Articles 53 and 54 EEA, as not being of criminal law nature.

112. 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.

113. 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.[41]

114. 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 European Court of Human Rights has developed a wider notion of criminal proceedings which covers certain proceedings of administrative nature. In fact, that court has found that such administrative proceedings differ from the hard core of criminal law. That finding is also supported by case law of the EFTA Court.[42]

115. Turning to the second and third questions referred, which the Commission addresses together, it 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.

116. 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

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[41] Reference is made to the judgments in *Bulicke*, cited above, paragraph 27; *Levez*, cited above, paragraph 42; and *Pontin*, cited above, paragraph 45.

[42] Reference is made, in particular, to *Posten Norge* v *ESA*, cited above, paragraphs 88 and 89.

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.

117. 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.

118. 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 light of the principle of effectiveness.

119. The Commission proposes that the Court should answer the questions referred as follows:

> *1. 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 infringements of Articles 53 and 54 EEA that has been established by a final decision by the EFTA Surveillance authority imposing a fine, provided that the time-limit applied to such action is not less favourable than that applicable to similar domestic actions for breach of the domestic competition rules following a fining decision by the national competition authority. It is for the national court to ascertain whether this condition is met.*
>
> *2. The EEA law 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, provided that the condition for the limitation period to run of the date on which the injured party should have procured knowledge of the factual conditions of liability is not interpreted in such a way as to render the exercise of the right practically impossible or excessively difficult, which is for the national court to assess.*

Páll Hreinsson
Judge-Rapporteur