Luxembourg, 22 September 2016

PRESS RELEASE 09/2016

Judgment in Case E-29/15 *Sorpa bs.* v *The Icelandic Competition Authority (Samkeppniseftirlitið)*

POTENTIAL DISCRIMINATORY REBATE POLICY OF A MUNICIPAL COOPERATIVE AGENCY PROVIDING WASTE MANAGEMENT SERVICES: ASSESSMENT UNDER ARTICLE 54(2)(c) EEA

In a judgment delivered today, the Court answered questions referred to it by the Supreme Court of Iceland (*Hæstiréttur Íslands*) on the interpretation of Article 54 EEA.

At the relevant time, the Icelandic Waste Disposal Act entrusted municipalities with the management of waste produced in their municipal area. In particular, they were to ensure that acceptance centres and landfill sites were operated in their area. The Waste Disposal Act provided that such centres and sites could not be operated without a licence, which could be issued to private as well as public entities. It further provided that the entity operating a landfill site was obliged to charge a fee in return for its services, and the entity operating an acceptance centre was allowed to charge a fee. The fee charged for the provision of either waste disposal or waste acceptance services could not exceed the costs incurred.

In 1988, the municipalities in the metropolitan area of Reykjavík entered into an agreement ("the establishment contract") whereby Sorpa bs. ("Sorpa") was established as a municipal cooperative agency (*byggðasamlag*) and was entrusted with waste management tasks. Two licences were issued to Sorpa for the operation of an acceptance centre and a landfill site. According to the establishment contract, the municipalities in the area of Reykjavík ("Sorpa's owners") are entitled to receive dividends in proportion to their share in Sorpa's capital. However, the establishment contract provides that, rather than distribute dividends, Sorpa may choose to grant its owners a discount on the fees that it sets for the acceptance and the disposal of waste. Sorpa chose to do so.

By a decision of 21 December 2012 the Icelandic Competition Authority found that Sorpa had infringed Article 11 of the Icelandic Competition Act pertaining to the abuse of a dominant position. It found that Sorpa enjoyed a dominant position on the market for waste acceptance in the metropolitan area of Reykjavík, where its market share amounted to approximately 70% and it faced competition from only one operator, Gámaþjónustan hf. ("Gámaþjónustan"). Moreover, Sorpa enjoyed a dominant position on the market for waste disposal in the same geographic area, where it was the sole operator. Since Gámaþjónustan did not run any landfill sites, it was also a customer of Sorpa. By granting its owners a larger discount than it granted its other customers, in particular Gámaþjónustan, Sorpa had abused its dominant position. The decision of the Competition Authority was upheld by the Competition Appeals Committee, and subsequently by Reykjavík District Court. Sorpa challenged the judgment of that District Court before the Supreme Court of Iceland, which decided to make a reference to the Court.

Notion of undertaking

The Court held that an entity of public law constitutes an undertaking within the meaning of Article 54 EEA when it does not act in the exercise of official authority but engages in an economic activity, which consists in offering goods or services on a market. In order to determine whether the provision of waste management services by a municipality or a municipal cooperative agency such as Sorpa is an economic

activity, account must be taken of the existence of competition with private entities and the level of the compensation received. In that regard, the Court noted that under the Waste Disposal Act, licences for the operation of waste disposal centres and landfill sites may be granted to private entities, and one licence was granted to Gámaþjónustan, a private entity. The fact that Sorpa decided to charge a fee for the provision of waste acceptance services, although it was not obliged to do so, is a further indication of the economic nature of its activity.

Derogation for undertakings entrusted with the operation of services of general economic interest

Under Article 59(2) EEA, undertakings are exempted from the application of EEA competition rules where (i) they are entrusted with the operation of services of general economic interest, and (ii) the application of such rules would obstruct the performance of their tasks. The Court held that waste management may be regarded as a service of general economic interest. It is for the referring court to determine whether, as submitted by Sorpa, the application of Article 54 EEA would make it impossible for it to provide the services it has been entrusted with, or to perform them under economically acceptable conditions.

Potential infringement of Article 54(2)(c) EEA

According to Article 54(2)(c) EEA, an abuse of a dominant position may consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

First, the Court held that companies belonging to the same group as the dominant undertaking may be regarded as trading parties of that undertaking. This is because they may contract with that undertaking and either receive goods or services from it or provide it with goods or services.

Second, the Court held that, for a trading party of the dominant firm to be placed at a competitive disadvantage, that party must be placed at a disadvantage vis-à-vis its competitors. Since it is a trading partner of the dominant undertaking, that disadvantage must occur on a market either downstream or upstream of the dominated market. The Court noted that Sorpa granted its owners a larger discount than it granted its other customers, in particular Gámaþjónustan. For the party discriminated against, Gámaþjónustan, to be placed at a competitive disadvantage with the favoured party, in this case Sorpa's owners, that firm would have to compete with Sorpa's owners. Although this was for the referring court to assess, the Court noted that Gámaþjónustan did not appear to compete against Sorpa's owners on a market upstream or downstream of the market for waste acceptance in the metropolitan area of Reykjavík. Rather, Gámaþjónustan appeared to compete with Sorpa itself on the market for waste acceptance. Therefore, Gámaþjónustan did not appear to be placed at a competitive disadvantage.

Finally, the Court held that, should the referring court find that Sorpa did not infringe Article 54(2)(c) EEA, Sorpa may nevertheless have infringed Article 54 EEA. In particular, since, pursuant to the Waste Disposal Act, the amount of the fees charged by Sorpa cannot exceed the costs incurred, Sorpa may have engaged in predatory pricing by granting rebates on such fees. This is for the referring court to assess.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.