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THE COMPETITION JURISPRUDENCE OF THE EFTA COURT

Peter Freeman CBE, QC (hon) [1]

Introduction

Ladies and Gentlemen; it is a pleasure and privilege to be invited to give this lecture at such an interesting time for the EFTA Court. I thank President Baudenbacher and the organisers for their kind invitation and for all the assistance that they have provided.

Nonetheless, it is with some diffidence and considerable hesitation that I speak now. From where I stand, this is not a particularly good time to be a Briton in Europe. Instead of seeking to give a lecture to our many European friends, and I know we still have very many, it might be better for us to observe a period of silence, combined with some anxious soul-searching, to find out how we have come to be in the situation in which we find ourselves, a situation made slightly more hopeful, even if more complicated, by the result of last week's General Election.

On the other hand, I am comforted by two things. First that this talk (lecture is rather a grand title for the random thoughts I am about to give you) is about what the EFTA Court has done, not what we have done; and second that the United Kingdom, although it appears to have forgotten it, was a founding member of EFTA, and so perhaps it is not unfitting for me to be talking about the EFTA Court.

My subject

I have been invited to address the competition jurisprudence of the EFTA Court. Taken at face value, that would be a daunting task for me, and not very interesting for you, I suspect. Instead I want to focus on some key recent decisions, which are relevant to the main debates in European competition law today; namely the argument about how an appeal court should conduct its review function, particularly in terms of the deference granted to the authorities; what should be the approach to exemptions to competition law's application; what should be done about the notion of "restriction by object" under Article 101 and, finally, Article 102 and exclusionary abuse?

[1] Chairman, UK Competition Appeal Tribunal. All views expressed are personal and do not necessarily represent the views of the Tribunal or any other body.

In all of these areas, the EFTA Court has had something interesting and important to say.

Three cases

To take us into these issues, I want to discuss three judgments of the EFTA Court, all of which will be very familiar to you. These are, in chronological order:-

- the judgment of 18 April 2012 in case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*;
- the judgment of 19 April 2016 in case E-14/15 *Holship Norge AS and Norsk Transportarbeiderforbund*; and
- the judgment of 22 December 2016 in case E-3/16 *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift SA and The Norwegian Government, represented by the Competition Authority*, judgment of 22 December 2016 .

The first case is an appeal to the EFTA Court against a decision by the EFTA Surveillance Authority (the 'ESA'). The other two cases are judgments given in response to a request from the Supreme Court of Norway under Article 34 of the Agreement between EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. They all concern Norway, but that is I think only co-incidence, and I shall mention some other cases in passing later on also.

Let me first give a brief description of each judgment and look at the issues they raise before drawing out some themes and principles.

The Norway Post case.[2]

This was a case about abuse of dominant position in the parcel delivery sector. It was an appeal against a decision by the ESA made under Article 54 of the EEA Agreement, which is the equivalent of Article 102 TFEU. Posten Norge (Norway Post) was the original state owned and sponsored postal operator, although most of its operations were by the relevant time exposed to competition. The business at issue was the Business to Consumer or "B-C" parcels service and in particular the "Post-in-Shop" network set up by Norway Post to enable customers to collect parcels from a range of retail outlets, (grocery stores, kiosks and petrol stations) supplementing its traditional post offices. Norway Post entered into exclusive contracts with several major retail groups to create Post-in-Shop network of over 1000 outlets, in addition to its 300 odd post offices.

Privpak, part of the Schenker group of companies was a new market entrant seeking to expand its B-C business but finding that what it saw as the best retail outlets were already committed to Norway Post. It complained to the ESA which investigated the case over some eight years, during which time Norway Post appeared to be willing to modify its arrangements to some extent, but not enough.

[2] Case E-15/10 *Posten Norge AS* v *EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 246.

The ESA decision of 2010 found Norway to have abused its dominant position on the B-C parcel delivery market in Norway and fined it EUR 12.89 million.

The EFTA Court upheld the decision, but reduced the fine to EUR 11.112 million on account of the time taken by the ESA to reach a decision. On the issue of how to conduct the assessment, it examined the burden of proof on the authority, the presumption of innocence and the margin of appreciation that should be granted to the ESA. On matters of substance, the EFTA Court also closely examined the ESA's assessment of the facts and its application of the law on abuse of dominant position and found in favour of the ESA.

There is much that is interesting in this case.

As regards the interpretation of Article 54 itself, the Court's approach is comprehensive, but fairly orthodox. This may have been because there was no attempt by the applicant seriously to question the ESA's interpretation of the law on abuse of dominance, and the argument centred on the application of the law (mainly the legal test of abuse) to the facts of the case. The Court stated more than once that it was not necessary to show anti-competitive effects and damage to consumer welfare in the case of an exclusivity requirement imposed by a dominant firm. It was sufficient, said the Court, for the ESA to show that the conduct in question was liable to distort competition, in this case by raising barriers to entry.

The Court also rejected the argument that leaving a sufficient part of the market free to competitors was any defence. It found that the ESA had established that the degree of foreclosure in the sector covered by the agreements was substantial, and that this in turn had a substantial effect on the market as a whole.

Having made clear its overall approach, the Court then conducted a very thorough review of the factual situation and the various arguments made by the appellants. This included consideration as to why grocery stores, kiosks and petrol stations were important lines of distribution, the parties' conduct in relation to them, whether Privpak's operations were more or less efficient than those of Norway Post and whether the conduct was objectively justified. The Court also looked at the course of Norway Post's negotiations with its principal distributors and concluded that these created further uncertainty and contributed to the abuse.

Although it had found that examination of the effects of the practice was not legally required, the Court noted that the ESA had itself considered the possible effects and so examined them also. It clearly found the arguments of Norway Post unconvincing.

So much is fairly main-stream, if refreshingly clearly expressed.

What is perhaps more remarkable is the approach taken by the Court to its role as a court of appeal. Here it stresses the importance of the right to a fair trial enshrined in the ECHR and in the EU's Charter of Rights, and the essentially criminal nature of an infringement finding subject to a penalty. From this flows the requirement that the

review, although administrative in nature, must be comprehensive enough, although varying in degree according to the severity of the penalty, to cover the substance of the case as well as procedural or other error.

On the burden of proof, the Court made it clear that this lies with the authority, and the parties benefit from a presumption of innocence. The standard of proof is stated to be what is sufficient, taking into account of all the elements relied as a whole, to establish the infringement. This formulation is rather alien to common lawyers more used to either balance of probabilities or beyond all reasonable doubt, but familiar to those from a civil law jurisdiction.

On the margin of appreciation, the logic of the requirement for a full review including substance led the Court to hold that even in cases involving complex economic assessments, the margin of appreciation allowed to the ESA must be quite limited. The Court's power to intervene is not limited to cases of manifest error.

Thus in a single judgment, that comprehensively reviews, and where necessary distinguishes, all the relevant EU and ECHR jurisprudence, we have a text book guide to how to handle an appeal in a serious infringement case. One could hardly ask for more.

The Holship case[3]

The next case I want to discuss is about the application of competition law to collective bargaining and workers' rights. It concerned the organisation of a boycott by the Norwegian Transport Workers' Association (NTF) to stop the Dutch firm Holship from loading and unloading in the port of Drammen. The boycott arose from the refusal by Holship to conclude a collective agreement that gave priority to dockworkers associated with the so called Administration Office for Dock Work in the Port of Drammen (the "AO") i.e. preventing them from using their own staff. The lower courts rejected Holship's claim that this boycott breached competition law and the law on freedom of establishment. The Supreme Court of Norway referred the matter to the EFTA Court for an advisory opinion on these points.

The EFTA Court examined the competition questions under Article 53 (prohibiting restrictive agreements) and Article 54 of the EEA Agreement, along with the possible effect of other similar arrangements involving AOs in other Norwegian ports.

The Court emphasised the co-operative nature of Article 34, and drew attention to the fundamental differences between labour markets and those for goods services and capital. Collective agreements between workers and employers were likely to restrict competition but they had over-riding social policy objectives. In saying this, the Court stayed well within the scope of established jurisprudence, both its own and that of the EU.

[3] Case E-14/15 *Holship Norge AS and Norsk Transportarbeiderforbund*, judgment of 19 April 2016, not yet reported..

But that was not the end of the matter. Not all collective agreements could be so excluded. There was a well-recognised exception for collective bargaining agreements that improved conditions of work and employment, and the framework agreement was clearly the result of collective bargaining.

However, it was necessary to look at the form and content of the agreement and the aggregate effect of all relevant provisions to see if it was designed to improve the working conditions of its members. Both the framework agreement and the boycott to enforce it were designed to benefit a group of workers (i.e. those associated with the AO) but went beyond merely improving their working conditions. The NTF was itself involved in the arrangements, again going beyond its core objective and straying into the world of business. Furthermore, whilst the arrangements might benefit one group of workers, they clearly damaged another group, i.e. those working for Holship.

The Court further concluded that both the AO and the NTF were undertakings for competition law purposes and that an appreciable effect on trade could arise from a dominant position in one EEA member state.

Having dealt with the scope of the exemption for collective bargaining agreements, the Court turned to the competition law analysis.

On Article 54, it gave a broad explanation of the law on abuse of dominant position, referring to its own *Norway Post* judgment, examined various possible abuses, and expressed some scepticism as to whether such a boycott could be objectively justified. The Court was reluctant to express a firm view on whether Article 53 applied to the AOs in this case. It did advise, however, that they did not benefit from the exception for services of general economic interest.

The Court also considered that the arrangements breached the law on freedom of establishment. That is beyond the scope of a talk on competition law, although it should be noted that it was on this ground that the Norwegian Supreme Court decided the case in the light of the EFTA Court's advice.[4]

Throughout this judgment, one is struck by the great care taken by the Court only to offer advice and not to decide the case itself. That is not to say that one cannot gain some understanding of how the Court would itself have decided this case on appeal.

The Ski Taxi case[5]

This final case I want to discuss concerned joint bidding for a taxi contract and the notion of restriction by object. This again was a request for an advisory opinion by the Supreme Court of Norway.

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[4] An English language translation of the Judgment of the Supreme Court of Norway of 16 December 2016 is available at: https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/case-2014-2089.pdf. This case has now been appealed to the ECHR.

[5] Case E-3/16 *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS* v *Staten v/Konkurransetilsynet*, judgment of 22 December 2016, not yet reported.

Two taxi co-operatives (Ski Taxi and Follo Taxisentral) submitted joint bids for framework contracts to transport patients to-and from certain hospitals in Oslo. The Norwegian Competition Authority decided they could and should have submitted separate bids and that their collaboration restricted competition "by object" contrary to the Norwegian Competition Act, which largely follows the terms of Article 101 TFEU. The questions put to the EFTA Court covered the criteria to be applied in assessing what was a restriction by object, and whether it made any difference that the collaboration in question was open and not secret.

The EFTA Court's advisory opinion provides a neat survey of the arguments currently surrounding this rather vexed issue, and in particular on the question of whether the CJEU's judgment and Advocate General Wahl's opinion in the *Cartes Bancaires* case have "changed anything". The European Commission in its observations said they had not, the appealing parties argued that they had. The Court's essential advice was that, to be a restriction by object, an agreement must "reveal a sufficient degree of harm to competition" rather than merely being capable of doing so. On this fine distinction, much legal discussion has taken place.

I suppose the question arises, has the EFTA Court's decision "changed anything"?

Formally, clearly not, as the judgment is not binding on other jurisdictions, not even on the court that requested the opinion. Nevertheless, as with the Court's other judgments, the effect of a clear restatement can assist in bringing clarity and can sometimes precipitate change.

Following the form of the questions it was asked, the Court considered the legal test for restriction by object separately from the criteria for determining whether an agreement was such a restriction. On the former, the Court recited the large number of CJEU judgments on the point, pronouncing, perhaps somewhat heroically, that they showed a consistent interpretation going right back to the seminal case of *LTM v Maschinenbau Ulm* in 1967.[6]

On the relevant criteria, the Court placed emphasis on the economic and legal context of the agreement, ie the nature of the goods or services in question, and the real conditions and structure of the market. The parties' intentions could be relevant, but were not determinative. And echoing AG Wahl in *Cartes Bancaires*,[7] the concept of restriction by object should be interpreted strictly, so that only conduct whose harmful nature was easily identifiable, in the light of experience and economics, should be regarded as a restriction by object.

The Court re-iterated the burden on the authorities to adduce the necessary evidence of infringement and the importance of the presumption of innocence.

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[6] Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* EU:C:1966:38 .
[7] Opinion of AG Wahl delivered on 27 March 2014 in Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:1958.

Finally, the agreement in question must be capable of having some market impact, but assessing this was not the same as a full examination of market effects.

The main points to note from this survey of the relevant law on restriction by object, apart from its brevity and clarity, are the emphasis on the restrictive interpretation of the concept, its roots in the jurisprudence of the 1960s, and the requirement that the harmful nature of the agreement, considered in its context, must be "easily identifiable".

Having answered the conceptual questions, the Court turned to the issue of joint bidding.

The Court discussed whether the agreement could amount to price fixing (clearly a restriction by object), whether the parties were actual or potential competitors, and whether the joint bidding was justified by objective necessity, or as an ancillary restraint, noting that the Supreme Court had found the parties could have submitted separate bids. It is fairly clear from this very courteous advice that the Court thought the conduct in question was indeed a restriction by object.

On the further question of whether the fact of the joint bidding was known to the customer, and not concealed, should make a difference to whether the restriction was "by object", the Court advised that openness might suggest there was no intention to restrict competition, but that whether a restriction was "by object" was essentially an objective assessment in which the parties' intentions were only one factor.

General Points Arising

Before seeing what conclusions we can draw from this very brief examination of three recent cases, let me make some general observations on the EFTA Court, seen from the point of view of an interested outside observer.

The first, perhaps obvious, one is that it apples law which is to all intents and purposes identical to EU competition law. Its decisions are therefore of important, potentially persuasive, effect for any jurisdiction applying that law. It is not clear that its decisions receive the attention that they deserve in this context.

Second, more technically, there is no bifurcation of General Court and Court of Justice, and no office of Advocate General. The EFTA Court is a single court that gives judgments which must be comprehensive and self-contained. This may place a bigger burden on it, but it avoids argument about which parts of which court's judgment represents the decision, and what is the authority of Advocate General's opinions where it is not clear how far the CJEU endorses the approach taken.

Third, the Court's language of procedure is English. I understand some have suggested that English is on the wane in Europe, but there is no sign of that here.

The Court is largely free from the burden of translation which aids speed and clarity. The clarity of expression is a great help in the use and citation of the cases.

Fourth, the Court is small in numbers, with three judges and fewer than 20 staff. The relatively small judicial panel of three may assist consensus, one does not know, but certainly in the UK CAT a panel of three works well, giving an appropriate level of deliberation but not too many views to reconcile. Whilst small scale is not always an advantage, in this context it would appear to be so, enabling the EFTA Court to act speedily and efficiently, and certainly much more quickly than its larger EU counterparts.

Finally, whilst the Court clearly operates alongside, if not in the shadow of, the EU courts, it has shown a refreshing willingness to combine appropriate courtesy and deference with an independent line where it thinks it right. Whether one describes this tendency as dynamic homogeneity, or merely as skilful legal diplomacy, I would suggest that it is present in all three of the cases that I have described.

Emerging themes and principles

Let us turn now to some particular areas where I think the EFTA Court has indeed "made a difference". The first is in relation to the role of an appeal court; the second is in relation to the scope of the collective bargaining exemption; the third is the notion of restriction by object under Article 53/Article 101; and the fourth is in the application of Article 54/Article 102.

The role of a court of appeal.

I said earlier that the Court's judgment in the *Norway Post* case was a textbook example of how a court should approach an appeal against a finding by an authority of a serious infringement of competition law. This comes in particular from the way the Court has freed itself from the limitations of administrative review and the approach of only intervening to correct manifest error by an adroit use of the basic principles of the ECHR, providing for a fair trial before an independent tribunal able to consider the substance of the finding appealed against.

It is perhaps worth recalling that this is a perennial complaint of companies found to have infringed EU competition law, namely that the opportunity for a substantive appeal against an authority's decision is limited.

In the UK, we do not have this problem as the CAT hears appeals against such decisions "on the merits". Whilst one still hears occasional suggestions that this standard of review is too generous to the parties, there is currently no serious proposal to change things. Instead the CAT is encouraged to be speedy, clear and thorough in the way it handles appeals, in the interests of justice for all concerned.

The EFTA Court's approach, with its clear line of reasoning from first principles shows how the same can be done under a less explicit legal framework, and is to be

much commended. One is struck in particular by the very thorough review of the ESA decision in Norway Post; not much margin of discretion there, although this was not a case of complex economic assessments.

I believe in this respect the EFTA Court has done us all a service. I will refrain from making the observation, which in the past has also had some relevance in the UK, that an appeal court cannot take decisions unless there are appeals; and there can be no appeals if there are no decisions to appeal against.

Collective bargaining agreements

Originally competition law was surrounded by exemptions for this or that sector or activity, for example, defence and national security, insurance, or agricultural co-operatives. Over time, many of these have been restricted in scope or eliminated altogether. One that appeared to have survived was the exemption for trade union activity and collective bargaining agreements between employees and employers intended to improve the working conditions of employees. This was justified by over-riding social policy objectives and acknowledged in EU law in cases such as *Jean Claude Becu*[8] (1999) and *Albany* (1999).[9]

It had also been acknowledged in the EFTA Court's own judgment in 2002 in the *LO* case[10], concerning the *Norwegian Federation of Trade Unions*, where it was also stated that provisions in collective bargaining agreements could still infringe competition law if they went beyond improving conditions of work and employment, which was itself a somewhat imprecise notion.

That observation forms the basis for the analysis in the *Holship* case. By giving a very clear exposition of how the framework agreement and accompanying boycott activity went beyond the exemption for collective bargaining agreements, the EFTA Court has not only given encouragement to more general moves to break down classical monopoly labour pool agreements in the ports sector, but also re-emphasised that exceptions to the application of competition law should be construed strictly.

Restriction by object

I have already discussed this at some length, so I will not go over all the same ground. Once again I think the EFTA Court has helpfully and succinctly laid out the law and whilst in large measure endorsing the approach current in the EU courts, there are nonetheless subtle differences of emphasis which help to move the debate on. The Court is fortunate in that it is, in this respect, its own master. Of course the principle of homogeneity is loyally observed, but it is apparent that its recital of past

[8] Case C-22/98 *Criminal proceedings against Jean Claude Becu and others* EU:C:1999:419.
[9] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430.
[10] Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. 114.

cases in the EU courts does not always denote agreement with them. By quoting AG Wahl's Opinion in *Cartes Bancaires* with approval and by its clear endorsement of a proper but restrictive use of the concept of restriction by object, the Court has, I would suggest, done the competition community a notable service.

Abuse of Dominance

Here we come to the other great battleground of current doctrine. In a nutshell, to what extent is there a read-across from the restriction by object debate under Article 101 to the abuse of dominance under Article 102?

The case currently before the CJEU is of course *Intel*, and we are currently in the uncertain position between the Advocate General's Opinion (once again Advocate General Wahl), delivered last October, and the CJEU's pending judgment.[11] The question I should like to pose is whether there are any clues in the *Norway Post* judgment as to how the EFTA Court would decide a case similar to *Intel* if were asked to do so.

In the *Norway Post* case, the Court was not required to consider the legal interpretation of Article 54 as a whole, but instead concentrated on whether the authority had correctly applied the legal test for abuse to the facts of the case. Nevertheless there are several observations that may be of interest.

In the first place, it should be recalled that this was a case about exclusivity commitments, not rebates. There was in other words no doubt about whether the practice had the effect of exclusivity; what was at issue was whether the exclusivity was liable to affect competition. Nevertheless, and despite the Court's insistence on there being no need to examine whether the conduct had actual adverse effects, much of the judgment is a discussion of what was happening in the market place.

This is perhaps for two reasons. First, the ESA had in any case examined the effects of Norway Post's conduct on the market and found that it foreclosed a substantial proportion of available outlets and made Privpak's entry more difficult.

Second, in assessing whether the conduct was liable to restrict competition, the Court had to consider whether the degree of foreclosure was substantial. Here it was careful to distinguish between foreclosure of the distribution channel and foreclosure in the market as a whole. If foreclosure of the distribution channel was not significant, so the Court said, it would be hard to establish an effect in the market as a whole.

One can argue that all the Court was doing was looking at the number of outlets subject to exclusivity, but when it comes to deciding whether the resulting effect on the market is substantial the difference between this and examining actual effects becomes rather blurred.

[11] Case C-413/14 P Opinion delivered 20 October 2016; judgment pending.

Moreover, in its review of the ESA's own examination of market effects, the Court acknowledged that persistent lack of actual negative effects may cast doubt on the finding that the conduct was liable to harm competition. It indicated, however, that it was not convinced by the appellant's claims in this respect.

That is perhaps the point. By showing a willingness to engage with the circumstances in the market place, even while denying it was necessary to do so, the Court showed its willingness to confront the real world and not to rely entirely on abstract or formalistic rules. As we saw in the Article 101 context, there is a role for practices to be condemned without more detailed examination of their effects where there is clear evidence, based on experience, that they are likely to be harmful to competition. But this approach must be limited to the clear and obvious cases. Where there is doubt, the likely effects must be examined in some detail.

Exactly the same approach would seem to apply in Article 102. There will be types of behaviour where experience shows that harm to competition is likely; but this approach should not be applied too liberally. As AG Wahl says in his *Intel* opinion:-

"(N)ot every exit from the market is necessarily a sign of abusive conduct, but rather a sign of aggressive yet healthy and permissible competition" (41).

The Advocate General rested his approach to the case on the underlying purpose of competition law to promote efficiency. In a passage that might well serve as a useful *vade mecum* for all competition lawyers, he drew the threads of this discussion together as follows:-

"A logical corollary to the objective of enhanced efficiency is that the anticompetitive effects of a particular practice assume crucial importance. Irrespective of whether we are dealing with an enforcement shortcut such as that offered by the concept of 'restriction by object' in the context of Article 101…or with single firm conduct falling within the scope of Article 102…, EU competition rules seek to capture behaviour that has anticompetitive effects. To date, the form of a particular practice has not been deemed important" (43)

Now of course, the EFTA Court has not considered a case like *Intel*. But I would suggest that if it were to find itself in that position, there is enough by way of indication of its likely approach in the judgments I have described. And I would expect the passage I have quoted above to appear somewhere in such a ruling.

Conclusion

There are many other points I could make, but time does not permit. I could refer to the EFTA Court's careful approach to state aid law in cases such as the *Mila* case, (brought by the ESA against Iceland);[12] to its use of an accelerated procedure as in

[12] Case E-1/13 *Míla ehf.* v *EFTA Surveillance Authority* [2014] EFTA Ct. Rep. 4. The case concerned the subsidised leasing of optical fibres previously operated on behalf of NATO.

the *Wow air* case,[13] also concerning Iceland; and to its permitting an in-house attorney to appear before it, despite not being a member of an independent bar, as in the *Abelia* case.[14] All these are further examples of a flexible, pragmatic approach which has enabled the EFTA Court to punch above its weight in jurisprudential terms, particularly in the field of competition law.

I hope that I have said enough to persuade you that the EFTA Court is an excellent example of leadership by quality and encouragement by the setting of high standards, both in its conduct as a court and in the substance of its judgments.

I thank you for your attention.

Peter Freeman

[13] Case E-18/14 *Wow Air ehf.* v *The Competition Authority, Isavia and Icelandair ehf*. [2014] EFTA Ct. Rep. 1304.
[14] Case E-8/13 *Abelia* v *EFTA Surveillance Authority* [2014] EFTA Ct. Rep. 638.