BORGARTING COURT OF APPEAL (BORGARTING LAGMANNSRETT)

Doc 148

EFTA Court

1 rue du Fort Thungen

L-1499 Luxembourg

Your reference	Our reference	Date
16-019680ASD-BORG/02		**23 November 2017**

Nye Kystlink AS v Color Group AS and Color Line AS

Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA'), cf. Section 51a of the Norwegian Courts of Justice Act, Borgarting Court of Appeal (*Borgarting lagmannsrett*) requests an advisory opinion for use in its appeal case no 16-019680ASD- B0RG/02.

1. OVERVIEW

Nye Kystlink AS has brought an action for damages against Color Group AS and Color Line AS for infringement of Articles 53 and 54 EEA. Color Group AS and Color Line AS have contested the claim for damages. It is submitted that the claim for damages has lapsed and that the conditions for awarding damages are in any case not satisfied.

The case before Borgarting Court of Appeal is limited to the question of whether the claim for damages has lapsed. This question has been selected for separate consideration, so that the case before the Court of Appeal does not include the question of whether the conditions for awarding damages are satisfied.

Before the Court of Appeal, Nye Kystlink AS has invoked that the EEA law principles of equivalence and effectiveness preclude a finding that the claim for damages has lapsed under national law. Against this background, the Court of Appeal has decided to submit three questions regarding the interpretation of these principles. The questions are set out in section 7 below.

The judge responsible for preparing the case is Court of Appeal Judge Eyvin Sivertsen, email: eyvin.sivertsen@domstol.no.

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2. THE PARTIES

The referral concerns an appeal case in which the appellant is Nye Kystlink AS, [redacted] The appellant is represented by Advocate Jon Midthjell of the law firm Advokatfirmaet Midthjell AS, Grev Wedels plass 5, NO-0151 Oslo, email: jon.midthjell@midthjell.as, and Advocate Erlend L Solberg of the law firm Arntzen de Besche Advokatfirma AS, P.O. Box 8853, NO-7481 Trondheim, email: els@adeb.no.

The respondents are Color Line AS, [redacted] and Color Group AS, [redacted]. The respondents are represented by Advocate Gunnar Sørlie of the law firm Advokatfirmaet BA-HR DA, P.O. Box 1524 Vika, NO-0117 Oslo, email: gso@bahr.no. Acting as co-counsel is Advocate Helge Stemshaug of the law firm Advokatfirmaet BA-HR DA, email: hst@bahr.no.

3. BACKGROUND TO THE CASE

3.1 Introduction

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. The companies are in the following referred to as 'Color Line'. The group is owned by the company O. N. Sunde AS, which is owned by Olav Nils Sunde, who is also Managing Director of Color Group AS.

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.

Kystlink AS is another Norwegian ferry company. In 2000, it started a ferry service between Langesund in Norway and Hirtshals in Denmark, intended to compete with Color Line's service between Larvik and Hirtshals. At that time, Kystlink AS's services primarily addressed the freight market, with Norsk Hydro ASA as the chief owner. For the sake of order, it is pointed out that Kystlink AS is not the same company as the plaintiff Nye Kystlink AS; see section 3.2 below.

In November 2003, Kystlink AS 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 – Strømstad – Langesund during the day, so that the vessel's capacity was utilised 24 hours a day.

Kystlink AS 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.

Kystlink AS'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.

On 21 December 2005, just before the 15-year contract period under the harbour agreement expired, the Municipality of Strømstad decided to grant Kystlink AS 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 up in November 2006.[1]

3.2 About the Kystlink companies

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, after changing its name to Nye Kystlink AS, operated the ferry service between Langesund and Strømstad from November 2006. This is not the same company as the plaintiff in the present case. The first company bearing the name Nye Kystlink AS was merged into the parent company Boa Offshore in 2010. The plaintiff, Nye Kystlink AS, was formed in 2012, and succeeded to the former Kystlink companies' possible claim for damages against Color Line.

All three Kystlink companies – Kystlink AS and the two companies named Nye Kystlink AS – are subsidiaries of Boa Offshore, a Norwegian-owned offshore shipping company that has been engaged in activities in Norway since the 1970s.

It has been clarified and is not disputed that the claim for damages has been transferred to the plaintiff, Nye Kystlink AS, and that this company is the legitimate plaintiff. For the sake of simplicity, the joint term 'Kystlink' is hereinafter used to refer to all three Kystlink companies.

3.3 About the competition case

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 Competition Authority to follow up infringements of the prohibition on abusing a dominant position.

Three sets of circumstances were invoked in the complaint:

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

2. 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 Competition Authority demand access to the investment decision relating to M/S Thjelvar.

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

[1] For details about the proceedings in the case, reference is made to ESA's decision of 14 December 2011 imposing a fine in the case against Color Line (387/11/COL), paragraphs 186–187 and 384–400. The decision is available at http://www.eftasurv.int/media/decisions/Final_non-confidential_version_of_Decision_387_11_COL_-_ENG.PDF

The complaint stated that Kystlink had meetings with the 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 Competition Authority if needed.

The parties disagree regarding the importance of the complaint and pertaining documentation in relation to the question of whether the limitation period has expired; see section 3.6 below. The Court of Appeal will have to consider this during the appeal proceedings and it must be viewed in the context of other evidence presented in the case. The Court of Appeal will therefore not go into more detail about the complaint and documentation.

Because the case had cross-border implications, the Competition Authority referred the case to ESA [the EFTA Surveillance Authority] pursuant to Article 11(3) of Protocol 4 to the Surveillance and Court Agreement (SCA) and the rules set out in the Notice on Cooperation within the EFTA Network of Competition Authorities.

From 4 to 6 April 2006, ESA conducted unannounced inspection visits to Color Line AS, Color Group ASA and O. N. Sunde AS, during which evidence was seized. During the investigation phase, several meetings were also held with Color Line and information was obtained from other companies and from public authorities in Norway and Sweden.

In January 2007, Kystlink confirmed to ESA that it wished to uphold its complaint against Color Line.

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.

ESA adopted a decision in the case on 14 December 2011 (387/11/COL).[2] In its decision, ESA only assessed the exclusivity clause in the harbour agreement with the Municipality of Strømstad, and not any of the other circumstances invoked by Kystlink.

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'.[3]

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.[4] ESA summarised its conclusion as follows:[5]

> *'The Authority concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskholmen in Strömstad had the effect of preventing, restricting or distorting competition within the meaning of Article 53(1) EEA. The Authority further concludes that Color Line has not shown that the conditions laid down in Article 53(3) EEA are satisfied*
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> *The Authority also concludes that from 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the 1991 harbour agreement to use the harbour facilities at Torskholmen in Strömstad were capable of restricting competition. The Authority further concludes that Color Line has not shown that there was any objective*

[2] See footnote 1.
[3] See 387/11/COL, paragraphs 126–128, which are based on the deliberations in paragraphs 95–125 and the presentation of the facts in paragraphs 18–94.
[4] 387/11/COL, paragraph 401.
[5] 387/11/COL, paragraphs 607–609.

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.'

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.

3.4 The damages case before the national courts

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.

By a writ of 26 February 2014 to Oslo District Court (*Oslo tingrett*), the company then brought an action against Color Line claiming damages for financial losses limited upwards to NOK 1.3 billion 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.

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. The provision establishes that a claim for damages lapses after three years from the date on which the injured party obtained or should have procured necessary knowledge about the damage and the responsible party.

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 were postponed.

By Oslo District Court's judgment of 30 November 2015, Color Line was acquitted of the claim for damages.

The point of departure for the District Court's 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.

The 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 the District Court's view, this finding applied in relation to all the acts of abuse that were invoked. The District Court therefore concluded that Kystlink's claim for damages had lapsed.

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

Kystlink has submitted several new pleas in law and evidential topics before the Court of Appeal. It argues, inter alia, that it would be in contravention of the EEA law principles of equivalence and effectiveness and the principle of legal certainty to deem the claim for damages to have lapsed. This plea was not formally invoked before the District Court and forms the background to why the Court of Appeal has decided to refer the case to the EFTA Court.

3.5 Preparation of the case prior to the referral

In autumn 2016, Kystlink requested a referral to be made to the EFTA Court. The decision to refer was taken after extensive preparation of the case before the Court of Appeal. The Court decided on the wording of the written request and the final questions of interpretation after several rounds of hearing both parties.

3.6 The parties' disagreement about factual circumstances

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.

Color Line argues that Kystlink had knowledge of all relevant circumstances prior to the cut-off date, and that there was thus no information asymmetry between the parties of the kind that is often present in competition cases. Color Line claims that this follows from, inter alia, the content of Kystlink's complaint to the competition authorities in December 2005 and the pertaining documentation. This is contested by Kystlink, which argues that it lacked information about a number of key circumstances, and neither had nor should have procured necessary knowledge about the circumstances giving rise to liability before ESA adopted the decision to impose a fine.

The Court of Appeal cannot assess the parties' disagreement about the facts before the oral hearing.

This has influenced the wording of the referral to the EFTA Court, in particular the wording of questions 2 and 3 concerning the EEA law principle of effectiveness. First, the Court of Appeal has had to omit 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, that is, large and complex competition cases that fall under the scope of Articles 53 and 54 EEA, where ESA conducts an investigation, inter alia, by securing evidence.

Second, it has been 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 one of the topics on which the Court of Appeal requests guidance under questions 2 and 3.

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

4. RELEVANT NATIONAL LAW

Limitation periods are regulated by the Act of 18 May 1979 No 18 relating to the limitation period for claims (*lov 18. mai 1979 nr. 18 om foreldelse av fordringer*) (the Limitation Act). Here below follows an overview of the provisions that are relevant to the questions of interpretation on which the EFTA Court is requested to give an opinion.

4.1 Section 9(1) of the Limitation Act

Section 9(1) of the Limitation Act contains the main rule concerning the limitation period for claims for damages. The provision reads as follows:

> *'Section 9 (Claims for damages)*
>
> *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 or the responsible party.*
>
> *[...]'*

It follows from case law that the limitation period for claiming damages under this provision starts to run from the time 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'.[6] 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'.[7] As indicated, the test is very much of a discretionary nature and requires a concrete assessment of the circumstances in each individual case.

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.[8] 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 to bringing an action for damages.

Case law does not 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.[9] It is a condition that the investigations can succeed 'without unreasonable difficulty'.[10] In other words, this test is also very much of a discretionary nature.

Before the Court of Appeal, Kystlink has submitted that it would be in contravention of the EEA law principle of effectiveness to find that the submitted claim for damages has lapsed pursuant to this provision. That is the background to questions 2 and 3 submitted to the EFTA Court.

4.2 Section 11 of the Limitation Act

As explained above, the point of departure is that a claim for damages lapses after three years from the date on which the injured party obtained or should have procured necessary knowledge about the damage and the party responsible. However, 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:

> *'Section 11. (Claims related to criminal proceedings)*
>
> *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.'*

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[6] Order of the Supreme Court (*Høyesterett*) in Rt-1996-1134.
[7] The Supreme Court's judgment in Rt-2001-1702.
[8] The Supreme Court's order in Rt-1993-911.
[9] The Supreme Court's order in Rt-1993-911.
[10] The Supreme Court's order in Rt-1994-190.

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 in damages by invoking that the limitation period has expired.[11] 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. However, Kystlink has argued before the Court of Appeal that a decision by ESA to impose a fine for infringement of Articles 53 and 54 EEA must be considered equivalent to a criminal conviction in relation to Section 11 of the Limitation Act, so that a claim for damages resulting from infringement of the competition rules does not lapse until one year, at the earliest, after ESA's decision became final. This applies even if such decisions on the imposition of fines are defined as 'civil law' decisions in Section 4 of the Norwegian EEA Competition Act. According to Kystlink, this is based on, inter alia, the EEA law principle of equivalence. Color Line disagrees that the principle of equivalence warrants such a conclusion and has argued that Section 11 of the Limitation Act is not applicable in the case. That is the background to question 1 submitted to the EFTA Court.

For the sake of order, the Court of Appeal adds that the Competition Act 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. This provision did not apply when ESA adopted its decision to impose a fine, or when Kystlink brought its claim for damages against Color Line.

5. THE EEA LAW ISSUES

5.1 Question 1 – concerning the principle of equivalence

The EEA law principle of equivalence entails that the national rules for bringing claims under EEA law must be no less favourable than those that apply to corresponding claims under national law.[12]

The Court of Appeal notes that the special rule in Section 11 of the Limitation Act concerning claims arising from criminal offences established by a criminal conviction applies regardless of whether the criminal sanction was imposed for violation of EEA law rules or national rules. The claim can in any case be filed by bringing an action within one year after the date on which the criminal conviction became final. In this respect, the provision in Section 11 does not entail any unequal treatment of claims based on EEA law and claims that are purely based on national law.

The question is whether the principle of equivalence requires equal treatment on another point, namely that ESA's final decision to impose a fine for infringement of the competition rules must be seen as equivalent to a final criminal conviction. In that regard, the Court of Appeal refers to the fact that the EFTA Court in Case E-15/10 *Posten v ESA,* paragraph 88, found that a decision by ESA imposing a fine must be deemed to constitute a criminal sanction in relation to Article 6 ECHR [the European Convention on Human Rights]:

> *'Indeed, penalties such as the one at issue pursue aims of both repressive and preventive character. They are intended to act, in the interest of society in general and the good functioning of the EEA single market in particular, as a deterrent against future breaches of the competition rules both for the perpetrator and for all other undertakings that enjoy a dominant position on the market. Accordingly, having regard to the nature of the infringements in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall, as a matter of principle, within the criminal sphere for the purposes of Article 6 ECHR [...].'*

[11] Proposition to the Odelsting No 38 (1977–1978) page 64.
[12] See, for example, the EFTA Court's Case E-24/13 *Casino Admiral AG*, paragraph 69.

The Court of Appeal does not understand this to mean that such decisions to impose fines should always be treated as equivalent to ordinary criminal sanctions. The EFTA Court's statement in *Posten v ESA* concerned the question of whether, in a particular context, a decision by ESA to impose a fine should be deemed to constitute a criminal sanction pursuant to the ECHR. The question in the case before the Court of Appeal is whether such a decision to impose a fine must be considered equivalent to a penal sanction in a national context, more precisely in relation to a national rule on limitation. The Court of Appeal assumes that whether such equal treatment is warranted by the principle of equivalence depends on a concrete assessment, based on the content of the relevant national rule, the intentions behind it and its function. The concrete assessment must be carried out by the national court, but the EFTA Court can draw up guidelines for such an assessment.

Against this background, and in light of the parties' pleas in law, the Court of Appeal has decided to submit to the EFTA Court the question of whether it follows from the EEA law principle of equivalence that a national limitation rule that lays down a separate limitation period of one year for bringing an action for damages arising from a criminal offence that has been established by a final criminal conviction, must be applied correspondingly in connection with an action for damages for infringement of Articles 53 and 54 EEA that has been established by a final decision by ESA to impose a fine.

5.2 Questions 2 and 3 – concerning the principle of effectiveness

The factual circumstances on which questions 2 and 3 are based are presented in section 3.6 above.

The principle of effectiveness entails that national procedural rules, including limitation rules, must not make it 'impossible or excessively difficult' to exercise rights derived from EEA law.[13] As mentioned above, Kystlink has invoked before the Court of Appeal that it would be in contravention of the principle of effectiveness to deem the company's claim for damages against Color Line to have lapsed pursuant to Section 9(1) of the Limitation Act.

The Court of Appeal assumes that a limitation period of three years is not in itself in contravention of the principle of effectiveness.[14] The Court of Appeal also assumes that the principle of effectiveness does not entail a general and absolute prohibition on national limitation periods starting to run – and, possibly, expiring – before the competition authorities have reached a decision in a case concerning infringement of Articles 53 and 54 EEA.[15] Hence, there is no basis for concluding – nor has this been invoked by Kystlink – that Article 10(4) of Directive 2014/104/EU concerning the suspension etc. of limitation periods entails a pure codification of applicable EEA law.

The parties seem to agree that the question of whether the EEA law principle of effectiveness has been complied with will depend on the stringency of the application, in the individual case, of the discretionary criteria for when the limitation period starts pursuant to Section 9(1) of the Limitation Act. The criteria for the limitation period, including the injured party's duty of investigation, must not be practised so stringently that, in light of the circumstances in the case, it becomes 'impossible or excessively difficult' to submit a claim for damages.

The concrete assessment of the relationship with the principle of effectiveness is not a task for the EFTA Court. As is known, it falls to the national courts to apply the legal rule to the facts, in this case Borgarting Court of Appeal.

The reason why the Court of Appeal has nonetheless decided to refer the case to the EFTA Court is the wish for more detailed guidelines for the assessment under EEA law of whether it is compatible with the principle of effectiveness to apply a provision like Section 9(1) of the Limitation Act in a competition case of a nature and scope like the present one – that is, large and complex competition cases that fall under the scope of Articles 53 and 54 EEA where ESA conducts an investigation, inter alia, by securing

[13] See, for example, the EFTA Court's Case E-24/13 *Casino Admiral AG*, paragraph 69.
[14] See, for example, the Court of Justice of the European Union's Case C-231/96 *Edis,* particularly paragraph 39.
[15] See, for example, Joined Cases C-295/04 to C-298/04 *Manfredi,* particularly paragraph 81.

evidence. It is, inter alia, of interest to receive guidelines on how strictly the injured party's duty of investigation may be practised.

The question of whether an infringement of Articles 53 and 54 EEA has occurred in a type of case like the present one depends on a series of complex assessments. It is, inter alia, necessary to ascertain the relevant market, whether the operator had a dominant position and whether its prices were below cost. Depending on the concrete circumstances in the case, an assessment of these matters might require a significant information basis.

Recitals 14 and 15 in the preamble to Directive 2014/104/EU read:

> *'Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.*
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> *Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. [...]'*

The Directive has, so far, not been incorporated into the EEA Agreement and it had not been adopted in the EU when Kystlink filed its claim against Color Line in December 2012. One question in the case is whether the considerations set out in the Directive, including the consideration of effective enforcement of competition law, must nonetheless be given weight in connection with the application of the national limitation rule in the case, for example by a more lenient application of the principle of the injured party's duty of investigation than would otherwise be the case. The Court of Appeal requests the EFTA Court's opinion on this point.

Further to the same question, it is of interest to establish whether there are limitations to the injured party's possibility to obtain information from ESA while the competition case is ongoing, that the Court of Appeal must take into account when considering the principle of effectiveness.

The assessment of whether the exception in Article 53(3) EEA is applicable could also require a considerable information basis.[16] The parties disagree as to whether the applicability of Article 53(3) is of relevance to the question of whether the limitation period has expired.[17] While not assessing this issue now, the Court of Appeal requests the EFTA Court also to take account of Article 53(3) EEA in its opinion, unless it follows from EEA law that any information asymmetry between the parties relating the question of whether this provision could be applicable is not relevant *per se* to the assessment of whether Kystlink's claim for damages has lapsed.

The Court of Appeal has decided to formulate questions 2 and 3 in such a way as to enable the EFTA Court freely to stress the elements that should be given weight in the assessment. The two questions must be considered in conjunction with each other and may possibly be answered jointly.

It is emphasised that the questions must not be understood to mean that the EFTA Court is invited to

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[16] The exception in Article 53(3) EEA is considered in 387/11/COL, paragraphs 455 ff.

[17] Color Line has argued that the provision is not relevant, inter alia, because the person who invokes the exception has the burden of proving that the conditions are fulfilled; see Article 2 of Regulation (EC) No 1/2003. Kystlink has argued that, in light of the presumption of innocence enshrined in Article 6 ECHR, it has not been finally clarified whether the burden of proof can be reversed, and that, before initiating the action for damages, Kystlink in any case needed knowledge of any circumstances that could entail that the exception was applicable.

state anything specific about what knowledge Kystlink actually had or should have procured in order to be able to bring an action for damages with a reasonable prospect of success. This is for the Court of Appeal to decide in connection with its assessment of the merits of the case; see section 3.6 above.

6. THE PARTIES' MAIN PLEAS IN LAW

6.1 Kystlink

Re Question 1:

The right to claim damages for infringement or Articles 53 and 54 EEA follows from established case law. The EEA law principle of equivalence must be interpreted in a way that does not undermine the effectiveness of this right and the deterrent effect of Articles 53 and 54 EEA.

It follows from established case law that ESA's decision to impose a fine must be deemed to constitute a criminal sanction in relation to Article 6 ECHR. In this case, this gave Color Line extensive guarantees of legal protection and entailed particularly strict requirements on ESA with regard to investigation and the decision imposing a fine.

It also follows from established case law that, in the interest of the preventive effect of ESA's decisions on fines and the effectiveness of Articles 53 and 54 EEA, ESA's decision to impose a fine cannot entitle to tax deductions. In the present case, an action brought by Color Line against the Norwegian Government in order to be granted a tax deduction for the fine of EUR 18,811 million imposed by ESA's decision was dismissed by Oslo District Court in a judgment of 5 February 2016 (TOSLO 2015-99863). Oslo District Court dismissed Color Line's plea that ESA's decision to impose a fine was purely a 'civil law sanction' and concluded instead that the fine must be seen as equivalent to a criminal sanction that could not entitle Color Line to a tax deduction. Color Line decided not to appeal the judgment, which is thus final.

There is no reason why ESA's decision to impose a fine should be deemed to constitute a criminal sanction only when this benefits the undertaking that infringes Articles 53 and 54 EEA or where it protects the Member States from having to grant tax deductions for ESA's decisions on fines, while the same decision to impose a fine in the same case should not be deemed to constitute a criminal sanction in relation to national limitation rules when the injured party seeks to enforce a liability for damages under EEA law.

For the sake of consistency between the principles underlying Articles 53 and 54 EEA and the liability for damages under EEA law for infringement of these provisions, the EEA law principle of equivalence must be interpreted to mean 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 an infringement of Articles 53 and 54 EEA that has been established by a final decision by ESA to impose a fine.

Re Questions 2 and 3:

The EEA law principle of effectiveness must be interpreted in light of the EEA law principle of legal certainty. It follows from established case law that limitation periods must be clear and accurate, and that the application of the limitation periods must be predictable. It must therefore be predictable and simple for an injured party to determine when the limitation period starts to run for claims for damages for infringement of Articles 53 and 54 EEA.

The EEA law principle of effectiveness and the principle of legal certainty are of particular importance where an objective starting date for the limitation period is not provided for in national law.

If the starting date for the limitation period is subjective and depends on what knowledge the injured party should have had about the circumstances giving rise to liability in serious competition cases

investigated by ESA following a complaint by the injured party, and where ESA finds it necessary to secure evidence, the EEA law principle of effectiveness and the principle of legal certainty must be interpreted to mean that the period of limitation cannot expire vis-à-vis the complainant until ESA has adopted a final decision.

6.2 Color Line

Re Question 1:

Under national [law], ESA's decision to impose a fine constitutes a civil law sanction and not a criminal sanction. Section 11 of the Limitation Act does not, therefore, provide for a supplementary limitation period for filing claims as a result of ESA's decision to impose a fine for infringement of Articles 53 and 54 EEA. This applies correspondingly where the Norwegian Competition Authority has imposed an administrative fine for infringement of the Competition Act.

It is of no relevance to the application of Section 11 of the Limitation Act that administrative fines for infringement of competition rules under EU/EEA law are sometimes deemed to constitute criminal sanctions in relation to Article 6 ECHR. The same applies to the imposition under national law of administrative fines and other administrative sanctions. In relation to Section 11 of the Limitation Act, the imposition of an administrative fine is not a criminal sanction imposed by a judgment in criminal proceedings and it does not trigger a supplementary limitation period for lapsed claims, regardless of whether the administrative fine is purely based on rules under national law or based on EEA rules.

The principle of equivalence entails that claims based on EEA law cannot be subject to other – and less favourable – conditions than corresponding claims based on national law. Claims that are based on infringement of EEA competition rules are subject to the same conditions as claims arising from a corresponding fine scheme under national law. If Section 11 of the Limitation Act – a special rule linked to criminal proceedings – were to be extended to grant a supplementary limitation period for claims based on infringement of EEA competition rules, this would result in a *wider* validity for such claims compared with corresponding claims based on national civil law rules. This cannot be based on the principle of equivalence.

The principle of equivalence under EU/EEA law does not provide a basis for extending the scope of application of Section 11 of the Limitation Act to grant a supplementary limitation period as a consequence of a civil law decision by ESA imposing a fine.

Re Question 2:

The content of the EEA law principle of effectiveness has been clarified through well-established case law; see, for example, Joined Cases C-295/04 to C-298/04 *Manfredi,* paragraph 62. It follows from the same case law that it is for the national court to apply national rules on limitation periods and decide whether the result is compatible with the EEA law principle of effectiveness. Reference is made to *Manfredi,* particularly paragraph 81.

This means that the EEA law principle of effectiveness does not preclude that the limitation period under national law could expire before ESA (or another competent competition authority) has reached a decision in a case concerning infringement of Articles 53 and 54 EEA, provided that this does not make it impossible or excessively difficult for the injured party to bring an action for damages before a national court.

Where the national limitation rule (i) sets a limitation period of three years, (ii) that starts to run at the time when the plaintiff had or should have had knowledge of the relevant factual circumstances, and (iii) it is possible to stay the proceedings in the damages case while the investigation by the competition authorities of a possible infringement of the EEA competition rules is ongoing, it will normally never be practically impossible or excessively difficult for the injured party to exercise its rights under EEA law.

Re Question 3:

It follows from *Manfredi* that it is for the national court in each individual case to decide whether it will be impossible or excessively difficult to bring an action before the relevant competition authority has reached a decision. The national court's deliberations must be concrete and based on the evidence presented and on an assessment of the evidence in each individual case. A key factor is what knowledge the plaintiff had or should have had at the relevant time. In this respect, cases concerning infringement of the competition rules will cover, on the one hand, a wide range of cartel cases where the parties involved have concealed their collaboration and, on the other, abuse cases where the plaintiff has been involved and continually had an overview of the relevant factual circumstances.

Question 3 invites the EFTA Court to state its opinion regarding *'what element should be given weight [...] in competition cases like the present one'*. What characterises *'competition cases like the present one'* must be considered on the basis of the facts of the case. The EFTA Court should be cautious about engaging in an assessment of the evidence, however, since it does not have as good a factual basis as the national court. Based on the wording of Question 3 and the case as presented to the EFTA Court, Color Line submits that the question should be left unanswered by the EFTA Court.

In the event that the EFTA Court wishes to reply to Question 3, Color Line submits that what characterises the present case is that the plaintiff did in fact have knowledge of all the relevant factual circumstances before the cut-off date, in this case 14 December 2009. Thus, in the present case it is not a question of what knowledge the plaintiff should have had, but of what knowledge the plaintiff had before the cut-off date.

7. QUESTIONS FOR THE EFTA COURT

The Court of Appeal requests an advisory opinion relating to the following questions:

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?*

Borgarting Court of Appeal

Eyvin Sivertsen
Court of Appeal Judge

CC: The parties' counsel