

## Chapter 4

# Competition

## Introduction

### Competition policy

The competition rules in the EEA Agreement are equivalent to the competition rules in the EU and prohibit agreements and conduct that distort or restrict competition. The competition rules also prohibit dominant firms from abusing their market power. That is the case, for example, for certain practices aimed at eliminating competitors from the market. In addition, the rules provide for a regime for the control of mergers and acquisitions which may impede effective competition in the EEA territory.

### The role of the Authority

The EEA competition rules are enforced across the EEA by the Authority and by the European Commission. The Authority enforces the prohibitions in Iceland, Liechtenstein and Norway and undertakings active in those EFTA States must comply with the EEA competition rules. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of rules laid down in the EEA Agreement.



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The Authority enjoys wide powers of investigation and may impose fines of up to 10% of global turnover on undertakings that breach the competition rules.

The Authority also has exclusive jurisdiction to take action against any EFTA State that enacts or maintains in force measures concerning public undertakings or undertakings with special or exclusive rights that are contrary to provisions in the EEA Agreement, including the prohibitions on anti-competitive conduct.

More generally, the Authority seeks to develop and maintain uniform surveillance throughout the EEA and to promote uniform implementation, application and interpretation of the EEA competition rules. The Authority cooperates with the European Commission to that effect.

## Overview of activities in 2009

In the field of competition, the Authority devoted most of its resources to a number of in-depth investigations in which it had jurisdiction to apply Articles 53 and 54 of the EEA Agreement.

In addition, the Authority was involved in various national cases in which the EFTA competition authorities envisaged applying those same provisions.

The Authority also played a role in cases under the EEA competition rules that fell under the jurisdiction of the European Commission, and was involved in a wide range of other issues relating to regulatory developments, policy issues and cooperation among European competition authorities.

Finally, resources were devoted to the Authority's cross-departmental eCOM task force (see report on the activities of the eCOM task force in Chapter 3).

### THE COMPETITION RULES OF THE EEA AGREEMENT

The substantive competition rules set out in the EEA Agreement are virtually the same as those in the Treaty on the Functioning of the European Union and can be summarised as follows:

- a prohibition on agreements or practices that distort or restrict competition (Article 53(1) EEA) with the exception of restrictions necessary for improvements which benefit consumers and which do not eliminate competition (Article 53(3) EEA);
- a prohibition on the abuse of a dominant position by market participants (Article 54 EEA);
- the requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- a prohibition on State measures in relation to public undertakings or undertakings with special or exclusive rights which are contrary to Articles 53 and/or 54 EEA (Article 59 EEA).

The Authority enjoys the same investigative and enforcement powers as the European Commission. The procedural rules relevant to the application of the EEA competition rules by the Authority are set out in the Surveillance and Court Agreement.

The Authority's website provides further information on the EEA legal framework in the field of competition (<http://www.eftasurv.int/competition/competition-rules-in-the-eea/>).

## Investigations relating to the provision of ferry services to and from Norway

**In December 2009, the Authority issued a Statement of Objections to Color Line regarding the provision of ferry services to and from Norway.**

Following a complaint, the Authority carried out an extensive market investigation into whether Color Line, a major Norwegian ferry operator, may have infringed the EEA competition rules in relation to its provision of ferry services to and from Norway.

On the basis of that investigation, the Authority decided to send a Statement of Objections to Color Line at the end of 2009 informing Color Line of its preliminary view that Color Line had infringed Articles 53 and 54 of the EEA Agreement.

The Authority's investigation focused on the market for passenger ferry services between the Norwegian coastline from Sandefjord to Langesund and the northern part of the western coastline of Sweden. The Authority's objections concern Color Line's agreements with the public harbours of Sandefjord in Norway and Strömstad in Sweden. Through these harbour agreements Color Line has, in the Authority's preliminary view, secured long-term exclusive access to harbour facilities that has enabled it to prevent potential competitors from obtaining access to the market, in breach of Articles 53 and 54 EEA.

Having received the Statement of Objections, Color Line now has the opportunity to defend itself against the

objections raised by the Authority. If the preliminary views expressed in the Statement of Objections are confirmed, the Authority may adopt a decision requiring Color Line to cease the restrictive conduct and may impose a fine.



### HIGHLIGHTS OF 2009

In 2009, the Authority sent a Statement of Objections to leading Norwegian ferry operator Color Line, closed two in-depth investigations and conducted an oral hearing. It also adopted guidelines on the application of the competition rules to maritime transport services.

## Access to the Port of Kristiansand

**The Authority closed its investigation into the alleged exclusion of Fjord Line from the Port of Kristiansand, following a decision by the Norwegian authorities requiring the Port to grant harbour access to Fjord Line.**

In autumn 2008, the Authority learned, through press reports and later through a complaint from Fjord Line, that the Port Authority of Kristiansand required all operators of ferry routes from Kristiansand harbour to offer year-round passenger and cargo transport services. Since 2006, Fjord Line and its predecessor Master Ferries had been operating a high speed catamaran ferry service between Kristiansand and Hanstholm in Northern Denmark during the summer season.

Fjord Line's catamaran ferry was not built for cargo transport and could not tackle the rough seas during the winter. Fjord Line's vessel was therefore not able to meet the Port's requirements for year-round services and cargo transport. Fjord Line's only competitor on the route, Color Line, was operating a year-round service for passengers and cargo between Kristiansand and Hirtshals in Northern Jutland, and would become the sole operator of ferry services between Kristiansand and Northern

Denmark if Fjord Line were to be excluded from the market. This led the Authority to examine whether the Port's refusal to grant Fjord Line harbour access was compatible with the competition rules of the EEA Agreement.

In parallel with the investigation by the Authority, Fjord Line also lodged a complaint with the Norwegian Coastal Administration, alleging that the Port's requirements were contrary to Norwegian harbour legislation. In May 2009, the Coastal Administration found in favour of Fjord Line, and required the Port of Kristiansand to grant Fjord Line access to the harbour in the future.

At that stage of its investigation the Authority remained concerned about the potential negative impact on competition of the Port's requirements. However, in the light of the fact that the problem had been resolved by the decision of the Coastal Administration and that it appeared that Fjord Line would be granted harbour access in the future, the Authority took the view that its resources would be better devoted to other cases.



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### CASE C-360/09 PFLEIDERER: FIGHTING ILLEGAL CARTELS: FINDING THE RIGHT BALANCE BETWEEN DIVERGING INTERESTS OF PUBLIC AND PRIVATE ENFORCEMENT

In December 2009, the Authority submitted written observations in Case C-360/09 *Pfleiderer*, pending before the Court of Justice, on whether EU competition law prevented a Member State from granting access to antitrust investigation files in cases that fell under the national leniency programme. In this case, a potential plaintiff of a civil claim in damages against participants in a secret cartel requested access to the file, including to leniency documents held by the national competition authority. The case dealt with how to balance the interests

of fighting illegal cartels by means of leniency programmes with those of assisting or encouraging private claims in damages by giving access to information which could substantiate such claims.

Many private actions for compensation fail because the plaintiff cannot establish that the cartel complained of caused direct harm to his interests.

The Authority submitted in this case that national law granting access for private enforcement reasons to leniency information given outside the specific oral procedure did not compromise the effectiveness of the European Union competition rules as they stand.

## Distribution of parcels to Norwegian consumers

**In 2009, the Authority continued its proceedings against the Norwegian national postal operator, Posten Norge AS, relating to a possible abuse of a dominant position in the market for parcel distribution to consumers.**

In December 2008, the Authority issued a Statement of Objections to Posten Norge in which it took the preliminary view that Posten Norge had abused its dominant position contrary to Article 54 of the EEA Agreement.

The alleged abuse relates to the distribution of parcels from mail-order and e-commerce companies to Norwegian consumers. The Authority has been concerned that adverse effects on competition have resulted from the granting by Posten Norge from 2000 to 2006 of preferential treatment and exclusivity in agreements with large retail groups and their outlets in relation to its Post-in-Shop distribution network. The Authority's preliminary view, set out in the Statement of Objections, was that in the absence of Posten Norge's behaviour, other suppliers could have challenged Posten Norge's leading position in the market to the benefit of mail-order and e-commerce companies and, ultimately, to end-consumers.

In spring 2009, Posten Norge submitted a detailed reply to the Authority's Statement of Objections. It also requested an oral hearing, which was held in June 2009. At the hearing, Posten Norge presented its comments on the Statement of Objections to the Authority, in the presence of representatives from the EFTA States. The complainant was also present and expressed its views on the case.

The review of Posten Norge's reply will continue into 2010 with a view to formulating the Authority's final position on the case.

## Express bus services in Norway

**After a detailed examination of the evidence obtained at an inspection, the Authority finalised its investigation into the express bus sector in Norway.**

An investigation into express bus services in Norway was initiated in June 2008, when unannounced inspections were carried out at the premises of Nor-Way Bussekspress (NBE) and two of its members, Nettbuss AS and Tide AS. During 2009, the examination of the evidence obtained was finalised.

Express bus routes are routes that cross county borders. The Authority's investigation focused on the nation-wide cooperation that takes place within NBE, the umbrella organisation for a commercial express bus network throughout Norway. The routes in this network are operated by the individual members of NBE under the brand name Nor-Way Bussekspress. Almost all express bus operators in Norway participate in the NBE cooperation and are shareholders in NBE.

The Authority had doubts as to whether there was effective competition in the express bus sector in Norway. In particular, the fact that the largest bus companies were all members of the NBE network and shareholders in NBE was regarded as a matter of concern. Such close ties between actual or potential competitors can, in certain circumstances, facilitate anti-competitive behaviour prohibited by the EEA competition rules, such as price fixing, market sharing and exchanges of commercially sensitive information.

After careful examination of the information in its possession, the Authority found that there was insufficient evidence to establish an infringement of the EEA competition rules. It therefore decided to close the case.

### WHAT IS A STATEMENT OF OBJECTIONS?

A Statement of Objections is a formal step in antitrust investigations in which the Authority informs the parties concerned in writing of the objections raised against them.

The addressee of a Statement of Objections can reply in writing to the Authority within a given time-limit. In its reply, it may set out all of the facts known to it which it considers relevant to its defence against the objections raised by the Authority.

The addressee is also entitled to request an oral hearing to present its comments on the case.

The Authority may then take a decision on whether the conduct addressed in the Statement of Objections is compatible or not with the EEA competition rules.

Sending a Statement of Objections does not prejudice the final outcome of the procedure

## Guidelines on maritime transport services

In December 2008, the Authority adopted Guidelines on the application of the EEA competition rules to maritime transport services.

Certain types of maritime transport services have been subject to a distinct enforcement regime under the EEA competition rules. The services concerned are liner shipping services, tramp services and cabotage services.

**Liner shipping** involves the transport of cargo on a regular basis to ports on a particular geographic route, generally known as a trade. **Tramp vessel services** refer to the transport of goods in bulk or in break-bulk in a vessel chartered for non-regularly scheduled or non-advertised sailings. **Cabotage** involves the provision of maritime transport services linking two or more ports in the same EEA State.

Following regulatory amendments, all types of maritime transport services are now subject to the general procedural framework under EEA competition law. This means that since October 2008 liner companies have to assess themselves whether their business practices comply with the EEA competition rules.

The Authority's new guidelines have been adopted, with a view to helping maritime operators understand the implications of this change.

The Guidelines explain how markets are defined in the fields of liner and tramp shipping services; provide detailed guidance with regard to the exchange of commercially sensitive and individualised market data between competitors; and explain under which circumstances pool agreements in tramp shipping may fall within the prohibition set out in Article 53(1) of the EEA Agreement, and the requirements that must be fulfilled in order to be exempt from that prohibition.



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### WHAT IS AN ORAL HEARING?

An oral hearing is an opportunity for the parties to whom the Authority has addressed a Statement of Objections to develop their arguments in defence.

An oral hearing can only be requested by addressees of a Statement of Objections. However, if they do so the Authority may also allow complainants and other interested parties to attend the hearing and to express their views on the case.

The competition authorities of the EFTA States are always invited to take part in an oral hearing. In cases which qualify for cooperation with the European Commission, officials from the Commission and from EU Member States are also invited.

Oral hearings are conducted by a Hearing Officer in full independence.

## Cooperation with the European Commission and the competition authorities and courts of the EFTA States

### Cooperation with the Commission

There are rules in the EEA Agreement on cooperation between the European Commission and the Authority. These rules allow the Authority and the competition authorities of the EFTA States to be involved in discussions on competition policy at EU level. Cooperation also takes place in individual cases where the two surveillance authorities apply the EEA competition rules.

The Commission applies the EEA competition rules in a significant number of cases. Sometimes those cases can have considerable impact on markets in the EFTA States. The EEA cooperation rules in the field of competition ensure that the Authority and the EFTA States can make their voices heard in cases that concern them.

### Merger cases in 2009

Mergers are examined at European level where the annual turnover of the combined merging firms or businesses exceeds specified thresholds in terms of global and European sales. The rules on jurisdiction are such that the Commission is, in practice, the competent authority to assess mergers under the EEA Agreement. The Authority is involved in merger cases by virtue of the EEA cooperation rules.

The financial crisis had a significant impact on the number of merger cases that were notified to the Commission in 2009. By December 2009, 259 cases had been notified to the Commission compared to 402 cases in 2007. In-depth investigations, which often also trigger cooperation under the EEA Agreement, were only initiated in five cases.

One case in which the Commission opened an in-depth investigation was Oracle/Sun **Microsystems**. In that case, which qualified for cooperation, the Commission investigated the planned acquisition of Sun Microsystems by Oracle Corporation, a US database and application software company. By virtue of Article 57 EEA the Commission investigation also extended to the territory of the EFTA States. The competition concerns in the case related essentially to the market for databases. At the end of 2009, those concerns had not yet been resolved.

The Commission may also examine mergers referred to it from the national competition authorities in the EEA either on their own initiative or on the request of the merging parties. When the Commission takes over such cases its review will normally also cover the EFTA States. In 2009, the Authority was involved in 21 cases in which the Commission accepted referral requests submitted by merging parties.

Under certain circumstances, the Commission may refer a case to the national competition authority of an EFTA State. However, no such referrals took place in 2009.

### Antitrust cases in 2009

The Authority is also involved in cases in which the European Commission applies Articles 53 or 54 of the EEA Agreement. In one such case, relating to **Intel**, the Commission imposed a record fine of EUR 1.06 billion on the computer chipmaker for abuse of a dominant position. The Commission found that Intel had engaged in illegal practices aimed at excluding competitors from the market for computer chips for personal computers by preventing or delaying the launch of computers based on competing products. These practices harmed consumers throughout the EEA. The Authority supported the position adopted by the Commission in this case. The case is on appeal before the General Court of the European Union.

Another case the Authority was involved in concerned **Microsoft's** tying of its web browser Internet Explorer to the Windows PC operating system. This case was settled by the Commission at the end of 2009. Microsoft has committed to offer users of Windows a choice among different web browsers through a "choice screen". It will also allow computer manufacturers and users to turn Internet Explorer off. The commitments are valid for five years in all countries of the EEA. The origin of the case was a complaint by the Norwegian web browser developer Opera. The Authority welcomed these developments.

Many cases in which the Commission applies Article 53 EEA concern EEA-wide or worldwide cartels which the Commission has been able to detect and sanction. In 2009, one such case related to **heat stabilisers**. Heat stabilisers are added to PVC products in order to improve their thermal resistance. The companies involved fixed prices, shared customers, allocated markets and exchanged sensitive commercial information, including in relation to Norway. The Commission imposed fines totalling over EUR 173 million on 24 companies for this infringement.

### Cooperation with the EFTA competition authorities and courts

Under the current enforcement regime, national competition authorities and courts apply Articles 53 and 54 EEA side-by-side with the equivalent national competition rules.

In the EFTA network of competition authorities, the activities of the Authority in the field of competition are coordinated with the activities of the national competition authorities of the EFTA States.

The EFTA competition authorities inform each other when they initiate investigations where they envisage that Articles 53 and/or 54 EEA may be applied. The purpose is to allocate cases to the authority that is best placed to act, and to ensure effective enforcement. In 2009, the Authority was informed of 15 new cases by the EFTA competition authorities. At the end of the year, 17 pending national investigations were registered with the Authority.

Before they adopt decisions applying Articles 53 and/or 54 EEA, the national EFTA competition authorities are required to submit their draft decisions to the Authority for review. However, within the network of EFTA competition authorities all members are regarded as equal partners, with the common objective of enforcing competition rules to the benefit of consumers. Therefore, there is an informal exchange of views inside the network with a view to contributing to that objective and to ensuring consistent application of competition rules throughout the EEA. In 2009, the Authority made substantive comments on two cases that were dealt with by national competition authorities.

National courts in the EFTA States may, where they find it necessary to reach a decision in a particular case, request assistance from the Authority with regard to the EEA competition rules. The Authority also has the possibility to submit written observations to the national court where it considers that the coherent application of Articles 53 and/or 54 so requires.

During 2009, no courts in the EFTA States requested assistance from the Authority regarding the application of the EEA competition rules and the Authority did not submit written observations in any case.

