

Commitments offered in the proceedings against Color Line AS and the Municipality of Sandefjord

Background

In March 2015, the EFTA Surveillance Authority initiated [formal proceedings](#) against Color Line AS, Color Line Transport AS and Color Group AS ("Color Line"), and Sandefjord Municipality, concerning possible infringements of Articles 53 and/or 54 of the Agreement on the European Economic Area ("EEA Agreement").

In 2011, the Authority [fined](#) Color Line 18.8 EUR million for infringing the EEA competition rules by maintaining long-term exclusive rights to access the harbour of Strömstad, Sweden. The commercial agreements between Color Line and the Municipality of Sandefjord that are subject to the present proceedings, were not addressed in that decision.

In August 2015, Color Line, Sandefjord Municipality and another ferry operator, Fjord Line AS ("Fjord Line"), entered into a settlement agreement. The settlement brought to an end the civil proceedings initiated by Fjord Line against Color Line and Sandefjord Municipality, for the obstruction of Fjord Line's entrance to Sandefjord inner harbour. The Authority subsequently made certain reservations to the settlement regarding the rights granted to Color Line and Sandefjord Municipality. To address these reservations, Color Line and Sandefjord Municipality entered into a revised agreement.

In October 2015, following commitments discussions with Color Line and Sandefjord Municipality, the Authority adopted Preliminary Assessments addressed to Color Line and Sandefjord Municipality. In its Preliminary Assessments, the Authority took the view that by entering into the long-term harbour agreements, as well as by upholding Color Line's rights under the harbour agreements, Color Line and Sandefjord Municipality have prevented viable entry and expansion in the relevant market for passenger ferry services on the Sandefjord – Strömstad route. Thus, Color Line and Sandefjord may have infringed Articles 53 and 54 of the EEA Agreement.

Short summary of the commitments offered

The commitments offered by Color Line and Sandefjord Municipality can be summarised as follows:

- The following sailing plan will apply for both Color Line and Fjord Line from 1 October 2015 until 31 December 2019:

Ferry	Departure Sandefjord	Arrival Strömstad	Departure Strömstad	Arrival Sandefjord
Color Line	07:00	09:30	10:00	12:30
Fjord Line	08:30	11:00	12:00	14:30
Color Line	10:00	12:30	13:40	16:10
Color Line	13:30	16:00	17:00	19:30
Fjord Line	15:20	17:50	18:30	21:00
Color Line	17:00	19:30	20:00	22:30

- As of 1 January 2020, Color Line shall waive its entitlement to the above sailing times, whilst Fjord Line shall retain the right to continue to operate the above sailing times until 31 December 2025.
- By the end of 2019, Sandefjord Municipality shall allocate the above times which up until then have been operated by Color Line, for the period 1 January 2020 until 31 December 2025. The allocation shall be announced no later than 1 March 2016, with an application deadline of 1 September 2016. The allocation shall safeguard competition, equal treatment and non-discrimination.
- As of 1 January 2026, if Sandefjord Municipality wishes to use the harbour for other purposes, neither shipping company shall be entitled to use Sandefjord harbour for ferry services. If ferry services are to continue from the harbour after 31 December 2025, the Municipality shall set criteria for the allocation of sailing times by 31 December 2024.
- In the above mentioned announcement of the criteria for the award (for the period 2020-2025) of those sailing times currently operated by Color Line, the Municipality shall state that a shipping company which is allocated sailing times for that period, and which on the basis of the allocation has placed in service a materially rebuilt and specially adapted ship, or a new ship, shall have a preferential right to retain these sailing times for that ship for as long as the port is kept open for ferry services, albeit not beyond 31 December 2030.

The competition rules of the EEA Agreement

The competition rules in Articles 53 and 54 of the EEA Agreement correspond to Articles 101 and 102 TFEU, prohibiting anticompetitive and abusive practices by undertakings.

Article 53 EEA prohibits agreements and concerted practices which restrict competition between undertakings, such as but not limited to price-fixing and market-sharing arrangements. The provision covers both agreements between actual or potential competitors (horizontal agreements) and agreements between undertakings operating at different levels (vertical agreements), for example between a manufacturer and its distributor.

Also a municipality will come under the scope of Article 53 EEA if it runs a commercial operation. The application of Article 53 EEA is not preconditioned on the commercial activities being carried out through a separate legal entity, nor that it seeks to achieve a profit.

Article 54 EEA prohibits dominant undertakings from abusing their market power. That may be the case, for example, for certain practices aimed at eliminating competitors from the market.

Just the same as Article 53 EEA, also Article 54 EEA may apply to any commercial operations of a municipality, and the municipality may be the dominant provider of certain services in a geographically defined market.

What is the EFTA Surveillance Authority's role in the field of competition?

The EEA competition rules are enforced across the EEA by the EFTA Surveillance Authority and by the European Commission. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of rules laid down in the EEA Agreement.

The Authority's main task in the field of competition is to ensure that undertakings active in the EFTA States (Norway, Iceland and Liechtenstein) comply with the EEA competition rules. For this purpose, the Authority enjoys the same investigative and enforcement powers as the European Commission, including the power to impose fines of up to 10% of global turnover on undertakings that act in contravention of the rules.

The purpose of imposing fines is to deter companies from infringing the competition rules. It is further incumbent upon the Authority to supervise the application of the EEA competition rules by the competition authorities of the EFTA States.

Commitments procedure

Undertakings subject to competition proceedings may voluntarily offer commitments intended to address the competition concerns identified by the Authority. If the Authority accepts the proposed commitments, it may adopt a decision which makes the offered commitments binding on the parties subject to the proceedings.

The main difference between a prohibition decision and a commitment decision is that the former contains a finding of an infringement while the latter makes the commitments binding without concluding whether there was or still is an infringement.

Once the Authority is convinced of the undertaking's genuine willingness to propose commitments which will effectively address the competition concerns, a Preliminary Assessment will be issued. A Preliminary Assessment summarises the main facts of the case and identifies the Authority's competition concerns.

The submission of commitments does not imply that the parties agree with the Authority's finding in the Preliminary Assessment.

Next steps

Following the commitments offered by Color Line and Sandefjord Municipality respectively, the Authority must market test the offered commitments. A market test notice will be published in the Official Journal of the European Union and the EEA supplement to the Official Journal. In the market test notice, the Authority will summarise the case, the main content of the commitments, and invite third parties to submit their observations on the offered commitments. Interested parties may submit their observations within one month following the publication. Comments can be submitted to the Authority by email to registry@eftasurv.int.

If the Authority, based on the results of the market test, is satisfied that the commitments sufficiently addresses the competition concerns identified, the Authority may adopt a decision making the commitments binding upon the parties.

However, if the Authority, based on the results of the market test, is of the view that the competition concerns have not been addressed or that changes in the text of the commitments are necessary to make them effective, this will be brought to the attention of the undertakings having offered the commitments. If they are willing to address the problems, they should submit an amended version of the commitments. If the undertakings are unwilling to submit an amended version were required, the Authority can revert to an infringement proceeding.

Read More:

- [Legal base for commitments decision: See Article 9 of Chapter II of Protocol 4 to the Surveillance and Court Agreement](#)
- [Further explanation of the commitments procedure in the Authority's best practice guidelines](#)