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Some thoughts on enforcing EEA competition law in Iceland

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Today's topics

- Fines in competition cases – finding the appropriate level
- Enforcing Articles 53 and 54 of the EEA Agreement in Iceland – ICA and ESA
- Further action that ESA can take in Iceland – against Icelandic companies, against Icelandic authorities, in Icelandic courts
- *Examples and illustrations*

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Fines in competition cases

- Three examples
- Fines must be commensurate with the gravity of the infringement, and reflect its duration
- Fines must be high enough to have a deterrent effect
- Fining Guidelines – methodology in setting fines

Example 1: Norway Post

- ESA's case against the Norwegian postal incumbent, *Posten Norge AS*, re exclusivity
- Infringement of Article 54 EEA (for 5.5 years)
- ESA Decision of 14 July 2010, imposing a fine of 12.89 million EUR (≈ 1.78 billion ISK), reduced from 13.89 million EUR (≈ 1.92 billion ISK)
- EFTA Court upheld Decision, further reducing fine to 11.112 million EUR (≈ 1.53 billion ISK)

Example 2: Color Line

- ESA's case against Norwegian ferry undertaking *Color Line*, on its Sandefjord-Strömstad route
- Infringement of Articles 53 and 54 EEA concerning exclusivity (for 7 years)
- ESA Decision of 14 December 2011, imposing a fine of 18.811 million EUR (≈ 2.60 billion ISK)
- Color Line paid the fine, and did not appeal to the EFTA Court

Example 3: NCC

- Norwegian Competition Authority (NCA) Decision against construction firm *NCC*
- Infringement of Norwegian competition law and Article 53 EEA for bid-rigging (4 years)
- NCA Decision of 4 March 2013, imposing a fine of 140 million NOK (≈ 2.01 billion ISK)
- Final judgment on appeal *increased* fine to 150 million NOK (≈ 2.15 billion ISK)

Fining Guidelines

- http://www.eftasurv.int/competition/notices-and-guidelines/
- ESA Guidelines = COM Guidelines
- ESA Guidelines available also in Icelandic
- Norwegian Regulation, FOR-2013-12-11-1465: https://lovdata.no/dokument/SF/forskrift/2013-12-11-1465 (forskrift om overtredelsesgebyr)

ESA's Fining Guidelines

- Wide margin of discretion
- Gravity of the infringement
- Duration of the infringement

- Deterrent effect:
- *«Deter» / «deterrence» / «deterrent effect» mentioned 10 times in the Guidelines*

ESA's Fining Guidelines

- Two-step methodology: first, a basic amount is determined, then adjusted up/downwards
- Basic amount set by reference to value of sales; up to 30% depending on gravity (highest for grave infringements, e.g. price-fixing); this is in turn multiplied by number of years
- Aggravating/mitigating circumstances…
- Possible specific increase for deterrence
- Legal maximum: 10% of annual global turnover

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Enforcing Articles 53 and 54 EEA

- ICA obliged to apply Article 53/54 EEA whenever there is an *effect on trade*
- The same is the case in other EU and EFTA States: national competition authorities (NCAs) are the «first line» in enforcing the rules
- NCAs must thus be independent and have the toolbox they need to be effective
- In addition, cooperation with Brussels is key

Effect on trade

- Whenever there is an effect on trade, Article 53/54 EEA *shall* be applied when ICA acts
- Low threshold, which may be met also where the relevant market is national or regional
- It is sufficient that trade *may* be effected; there is no requirement that it actually is affected; required is merely a «direct or indirect, actual or potential influence on the pattern of trade»
- Also an *increase* in trade fulfils the criteria!

Strengthening the NCAs

- As the ”first line” in the enforcement of the EU/EEA competition rules, the NCAs may need to be strengthened in their independence and in the toolbox they have at their disposal
- The Commission has launched an initiative on «Empowering the national competition authorities to be more effective enforcers»
- http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html

Cooperation with Brussels

- ICA, as all other NCAs in EU/EFTA, is obliged to cooperate with Brussels, and indeed does so
- There is considerable informal cooperation in the form of consultations ICA-ESA
- And there are formal steps of ICA's processes at which ESA must be consulted (e.g. Decision)
- ESA may induce changes to ICA's approach to cases, and sometimes does

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ESA action against Icelandic firms?

- ESA can take over ICA's enforcement of Article 53/54 EEA in any given case; investigating and ultimately fining Icelandic undertakings
- This is what ESA has done (and is doing) in Norway, in cooperation with the NCA
- Any «dawn raid» would be carried out in cooperation with ICA
- Any appeal would go to the EFTA Court

ESA and the Government

- ESA is also enforcing Iceland's obligations under the EEA Agreement vis-à-vis the Icelandic Government (ministries). Current examples:
- Letters of Formal Notice for failure to incorporate Regulations in Icelandic law (mergers, air transport, technology transfer)
- Request for Information concerning derogation clauses in the Agricultural Act No 99/1993; cream and yogurt are subject to EEA law (skyr?)

ESA in Icelandic courts

- In cases concering Article 53/54 EEA, ESA can also intervene directly before Icelandic courts
- It can be expected that ESA will do so
- Since ESA started making use of this tool (*amicus curiae* observations) in 2014, ESA has intervened in two cases before Norwegian courts: *NCC* and *Bastø Fosen v Color Line*
- http://www.eftasurv.int/competition/national/co-operation-with-national-courts/

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