Summary of EFTA Surveillance Authority Decision

of 14 December 2011

relating to a proceeding under Articles 53 and 54 of the EEA Agreement against Color Group AS and Color Line AS

(Case no 59120 Color Line)

(The English and the Norwegian texts are authentic)

(Text with EEA relevance)

1 Introduction

1. On 14 December 2011, the EFTA Surveillance Authority (the "Authority") adopted a Decision relating to proceedings pursuant to Articles 53 and 54 of the EEA Agreement. In accordance with the provisions of Article 30 of Chapter II of Protocol 4 to the Surveillance and Court Agreement the Authority hereby publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets. A non-confidential version of the full text of the decision can be found in the authentic languages of the case on the Authority's website at:

   http://www.eftasurv.int/competition/competition-cases/

2. The decision is addressed to the ferry companies Color Line AS, for its direct participation in the infringement of Articles 53 and 54 of the EEA Agreement. The decision is also addressed to Color Group AS in its capacity as the parent company of Color Line AS from 1 October 1998 to 20 December 2005. A fine has been imposed for the period from 1 January 1999 to 20 December 2005, for which Color Line AS and Color Group AS are held jointly and severally liable.

2 Background and procedure

3. A complaint was submitted to the Norwegian Competition Authority on 20 December 2005 by Color Line's competitor at the time, Kystlink AS. The case was subsequently re-allocated to the Authority pursuant to Article 11 of Chapter II of Protocol 4 to the SCA, and the rules set out in the EFTA network notice.[1]

[1] OJ C 227, 21.9.2006, p. 10 and EEA Supplement to the OJ No 47, 21.9.2006, p. 1.

4. From 4 to 6 April 2006, the Authority carried out inspections at the premises of Color Line AS, Color Group ASA and O.N. Sunde AS (the parent company of Color Group ASA) in Oslo, Norway.

5. On 16 December 2009, the Authority notified a Statement of Objections (SO) to Color Line. The Authority took the preliminary view that: (i) Color Line's exclusive agreement with the harbour of Strömstad protected Color Line against effective competition in the market for the provision of short-haul passenger ferry services with tax-free sales on routes between ports on the Norwegian coast between Sandefjord and Langesund and ports on the Swedish coast in the Municipality of Strömstad, contrary to Article 53 EEA; and (ii) that by maintaining that agreement in force after the entry into force of the EEA Agreement Color Line had abused its dominant position on that market contrary to Article 54 EEA.

3 Color Line

6. Color Group AS is active in the field of transport and tourism, including ferry services. Color Line AS, a wholly owned subsidiary of Color Group AS, was the company responsible (together with its predecessors) for the Group's ferry operations during the period under examination, including the route at issue between Sandefjord and Strömstad.

7. The route was originally operated by a company called Scandi Line AS. Color Line AS is the direct legal successor of that company. Color Group AS has wholly owned Color Line AS since 30 September 1998.

4 The harbour agreement

8. Color Line and its predecessors have operated a ferry route from Strömstad to Sandefjord in Norway since 1986. Color Line first entered into an agreement with the Municipality of Strömstad in July 1989. That agreement was replaced by the agreement that is the object of the present decision on 26 March 1991 (the "harbour agreement"). The harbour agreement was valid for a period of 15 years (from 1 January 1991 to 30 December 2005). Thereafter, Color Line was entitled to a further 10 year prolongation.

9. Pursuant to the harbour agreement, the Municipality of Strömstad leased a designated area within the harbour – the area referred to as Torskholmen – to Color Line, including the right to use the ramp and the lining-up area for cars.

10. Color Line's right to exclusive use of Torskholmen was provided for in clause 7 of the harbour agreement, which prevented the Municipality from granting access to Torskholmen to competing ferry activities.

5 The Sandefjord – Strömstad route

11. The Sandefjord – Strömstad route links the towns of Sandefjord, located in the county of Vestfold in Norway, approximately two hours by car to the south of Oslo on the western side of the Oslofjord, and Strömstad, located on the west coast of Sweden, close to the Norwegian border.

12. The ferry crossing between Sandefjord and Strömstad takes approximately 2.5 hours. In general, Color Line has operated five sailings a day on the route since 1994, and six in the peak season. A large proportion of passengers bring their car on board the ferry in Sandefjord and drive back to Norway via the border crossing at Svinesund, north of Strömstad.

13. Tax-free sales on-board Color Line's ferries are and have been very important to the success of the route. Tax-free sales aboard ferries in Norway require a licence to be granted, and Color Line has had a licence for tax-free sales on the Sandefjord – Strömstad route since 1987.

6 The relevant market

14. The Authority has defined the relevant product market as the provision of short-haul passenger ferry services with tax-free sales. The geographic scope of the relevant market was likely limited to the provision of such services between ports in the Municipalities of Sandefjord and Strömstad; however, for the purposes of the Decision, the exact definition of the geographic market can remain open since, during the period under examination, Color Line was, in any event, the sole supplier of short-haul passenger ferry services with tax-free sales between Norway and Sweden.

7 Restriction of competition within the meaning of Article 53(1) EEA

15. The harbour agreement in Strömstad granted access to the Torskholmen area within Strömstad harbour exclusively to Color Line for a period of 25 years (initially 15 years, with an entitlement to extend that period for an additional 10 years). It prevented the Municipality of Strömstad from granting access to Torskholmen to anyone other than Color Line for the whole of that period.

16. Color Line obtained a right to exclusive use of all available capacity in that strategically located harbour for a period of 25 years, irrespective of whether it would actually use or even need that capacity. The harbour agreement thereby foreclosed the relevant market for a substantial period of time.

17. Other barriers to entry included the regime for tax-free sales, Color Line's first-mover advantage (it had a monopoly on the route from its inception until 2006), and brand loyalty. Color Line had also established itself as an aggressive competitor, willing and able to defend its position and exercise its market power in order to do so.

18. At least three significant attempts were made during the relevant period by potential competitors to enter the relevant market and compete with Color Line on the Sandefjord to Strömstad route. Two of those attempts were unsuccessful; the third – by Kystlink – succeeded only after the initial period of 15 years' exclusivity granted under the harbour agreement came to an end and the Municipality refused to grant the 10-year extension to which Color Line had a right under the agreement. The Municipality of Strömstad granted access to Kystlink on 21 December 2005.

19. A review of possible alternative harbours has shown that for technical, commercial, geographic and regulatory reasons, none of those harbours offered genuine possibilities for new entry within a reasonable time frame to a potential new entrant seeking to compete with Color Line's route during the period under examination.

20. On the basis of the elements outlined above, the long-term exclusive harbour agreement restricted competition within the meaning of Article 53(1) EEA from the date of entry into force of the EEA Agreement on 1 January 1994 until at least 20 December 2005.

8 Effect on trade

21. International ferry services are by their very nature cross-border. In addition, Color Line's turnover on the route was significant and increased year-by-year during the relevant period. The number of passengers on the route also increased over the period, reaching 1.2 million passengers in 1999 and essentially remaining at or above that level until 2005.

22. In that light, the impact of the harbour agreement on the possibilities for competitors to establish a service in competition with Color Line between Sweden and Norway on the relevant market is sufficient to establish that the harbour agreement was capable of appreciably affecting intra-EEA trade within the meaning of Article 53(1) EEA.

9 No justification under Article 53(3) EEA

23. Color Line has claimed that it made substantial upfront investments that led to significant improvements on the Sandefjord – Strömstad route to the benefit of consumers. However, all efficiency gains claimed by Color Line to have been brought about by the long-term exclusive harbour agreement have either been insufficiently substantiated or were, at best, limited in nature. Color Line has failed to show that the benefits of any efficiencies that can be said to have been brought about by its agreement outweigh the harm to consumers resulting from its long-term exclusivity. Furthermore, the duration – 25 years – of the exclusivity enjoyed by Color Line went way beyond what was acceptable and was fundamentally disproportionate to the realisation of any efficiency gains.

24. It follows that Color Line has not shown that the conditions in Article 53(3) EEA are fulfilled.

10 Abuse of a dominant position within the meaning of Article 54 EEA

25. In the period from 1986 until Kystlink entered the market in 2006, Color Line was the sole, that is, the monopoly supplier on the relevant ferry services market, with a market share of 100%. The company's customers were mainly individuals with limited or no countervailing buyer power. In addition, the market was characterised by significant barriers to entry, including Color Line's market position, the brand loyalty of its customers, a lack of viable harbour alternatives and regulatory barriers. For these reasons, Color Line enjoyed a dominant position on the relevant market at least during the period under examination.

26. From 1 January 1994 to 20 December 2005 the long-term exclusive rights enjoyed by Color Line pursuant to the harbour agreement to use the harbour facilities at Torskholmen in Strömstad, which foreclosed competition on the relevant market, were, at the very least, capable of restricting competition within the meaning of Article 54 EEA.

27. Color Line has not shown that there was any objective justification for relying on that agreement and maintaining its exclusive rights in force from the entry into force of the EEA Agreement on 1 January 1994 until 20 December 2005. Color Line therefore abused its dominant position on the relevant market.

28. International ferry services are by their very nature cross-border, and the relevant market for ferry services in this case forms a substantial part of the common market. In that light, Color Line's abuse of its dominant position on the relevant market was capable of appreciably affecting intra-EEA trade within the meaning of Article 54 EEA.

11 Addressees of the decision

29. The decision establishes that Color Line AS and Color Group AS have infringed Articles 53 and 54 of the EEA Agreement through the long-term exclusive rights enjoyed by Color Line AS pursuant to the harbour agreement contracted with the Municipality of Strömstad in 1991, as follows:

    a. Color Line AS, by virtue of its direct participation in the infringements, from 1 January 1994 until 20 December 2005;

    b. Color Group AS, as a result of its decisive influence over its wholly-owned subsidiary Color Line AS, from 1 October 1998 until 20 December 2005.

12 Fines

30. Pursuant to the Authority's Guidelines on the method of setting fines,[2] the basic amount of the fine is related to a proportion - up to 30% - of the value of sales in the relevant geographic area within the EEA of the products/services to which the infringement directly or indirectly relates, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.

31. The Authority normally takes the sales made by the undertaking during the last full business year of its participation in the infringement. In this case that corresponds to Color Line's turnover on the Sandefjord – Strömstad route in 2004.

32. In assessing the gravity of the infringement, in order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of the scale, the Authority carries out a case-by-case analysis, taking into account all of the relevant circumstances of the case. The Authority has regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned and the geographic scope of the infringement.

[2] OJ C 314, 21.12.2006, p. 84 and EEA Supplement to the OJ No 63, 14.12.2006, p. 44.

33. In this case, the Authority has concluded that the proportion of the value of sales to be used to establish the basic amount of the fine should be 2.5%.

34. Although the Authority has identified an infringement of the EEA competition rules from 1 January 1994, in exercising its power to impose fines, the Authority has decided, exceptionally, under the wide margin of discretion that it enjoys in setting fines,[3] and in the light of the particularities of the present case, only to impose a fine for the period from 1 January 1999 to 20 December 2005. The period taken into account therefore amounts to seven years.

35. In the light of the above, the basic amount of the fine is fixed at EUR 18.811 million.

36. There are no aggravating or mitigating circumstances in this case.

37. The fine does not exceed 10% of the total turnover of the undertaking participating in the infringement in the business year preceding the decision.

13 Decision

38. Color Line AS and Color Group AS have infringed Article 53 and Article 54 of the EEA Agreement through the long-term exclusive rights enjoyed by Color Line AS pursuant to the harbour agreement contracted with the Municipality of Strömstad in 1991, as follows:

    a) Color Line AS, by virtue of its direct participation in the infringement, from 1 January 1994 until 20 December 2005;

    b) Color Group AS, as a result of its decisive influence over its wholly-owned subsidiary Color Line AS, from 1 October 1998 until 20 December 2005.

39. While the Authority, on the basis of the available evidence, has found that the infringement ceased on 20 December 2005, for the avoidance of doubt, the undertakings which remain active in the relevant market and to which the decision is addressed are required to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any act or conduct which might have the same or similar object or effect.

40. For the period from 1 January 1999 to 20 December 2005, a fine of EUR 18.811 million is imposed on Color Line AS and Color Group AS, for which they are jointly and severally liable.

[3] Guidelines on the method of setting fines, paragraph 37.