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Global Competition Review 2017 Law Firm of the Year – Europe

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission grants Apple unconditional clearance to acquire Shazam

On 6 September 2018, the European Commission unconditionally cleared Apple's acquisition of the music recognition app, Shazam, following an in-depth Phase II review.

Initially, the Commission was concerned that Apple would be able to harm competition for digital music streaming services by: (i) directly targeting Apple's music streaming rivals, such as Spotify, via data held by Shazam; and (ii) discontinuing referrals from the Shazam app to other non-Apple digital music services. However, the Commission's in-depth investigation found that such competition concerns were not substantiated as the merged entity would not be able to shut out competing providers of digital music streaming services. The Commission found that access to Shazam's data would not materially increase Apple's ability to target buyers of digital music and the Shazam app had limited importance as an entry point for digital music streaming services. Finally, the Commission found that combining user data for Apple and Shazam customers would not confer a unique advantage on the merged entity as other competitors would be able to access such data elsewhere.

This case is noteworthy as it highlights that the Commission will subject the acquisition of important data sets to careful analysis and scrutiny.

Commission conditionally clears Hutchison's acquisition of sole control of Italian JV

On 31 August 2018, the Commission conditionally approved Hutchison's acquisition of sole control – from joint – of Italian telecommunications operator, Wind Tre. The clearance is conditional on the continued fulfilment by Hutchison of commitments adopted in 2016.

By way of background, Wind Tre is a joint venture created when Hutchison and VimpelCom combined their activities in the Italian retail mobile market. Following an in-depth investigation, the Commission cleared the creation of the joint venture in September 2016 on the basis of significant structural remedies offered by Hutchison and VimpelCom (see VBB on Competition Law, Volume 2016, No. 9). These remedies consisted of the divestment of sufficient telecommunication assets to allow Iliad, a French telecommunications operator, to enter the Italian mobile market. In particular, the joint venture offered to divest mobile radio spectrum, to transfer several thousand mobile base station sites and to provide transitional services to Iliad.

In assessing Hutchison's proposed acquisition of sole control of Wind Tre, the Commission noted that there had been no significant changes to the competitive landscape on the Italian mobile market compared to 2016, and no further competition concerns were identified during the current review. However, as implementation of the 2016 remedy package was still ongoing, Hutchison, as the sole remaining parent of Wind Tre, committed to assume full responsibility for complying with the 2016 commitments. As a result, Hutchison will complete the transfer of mobile radio spectrum, the site divestments and implement Iliad's national roaming agreement pending the full roll out of Iliad's own mobile network in Italy.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we give a factual overview of a significant case development at EU level, and then provide a more detailed analysis of the development addressed.

Summary of Significant Case Developments

Court of Justice partly upholds Infineon appeal against General Court judgment in Smart card chip cartel case, but dismisses Philips appeal

On 26 September 2018, the Court of Justice of the European Union ("ECJ") delivered two judgments on the appeals brought by Infineon and Philips against the General Court ("GC")'s earlier judgments relating to the European Commission's decision in *Smart card chips* cartel case.

By way of background, in 2014, the Commission issued a decision imposing fines totalling €138 million in connection with a cartel on the market for smart card chips used in mobile SIM cards, bank cards, and other applications. According to the Commission, four competing suppliers of smart card chips – Infineon, Samsung, Renesas and Philips – discussed and exchanged sensitive commercial information on pricing, customers and contract negotiations and coordinated their responses to customer demands for lower prices. On 15 December 2016, the GC upheld the fines imposed by the Commission (see VBB on Competition Law, Volume 2016, No. 12). Philips and Infineon appealed against the GC's judgments.

In its judgments on appeal, the ECJ upheld the findings of the GC in relation to, *inter alia*, the existence of a restriction of competition by object, the concept of a single and continuous infringement and the rules of evidence (see section 1.2 below). With respect to the appeal brought by Infineon, however, the ECJ referred the case back to the GC because the GC had not examined whether the amount of the fine imposed was commensurate with Infineon's level of involvement in the infringement. According to the ECJ, this examination was necessary in order to determine whether the small number of contacts established between Infineon and its competitors (eleven contacts) warranted a higher reduction of the fine than the 20% granted by the Commission on account of mitigating circumstances (Case C-98/17, *Philips and Philips France*; Case C-99/17, *Infineon Technologies*).

Analysis of Important Substantive and Procedural Developments

Smart card cartel case – Calculation of the fine: effective judicial review and unlimited jurisdiction

Under EU case law, the fact that an undertaking did not take part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Those factors, however, must be taken into consideration when the gravity of the infringement is assessed when it comes to determining the fine.

On appeal, Infineon criticised the reduction rate of 20% which was granted by the Commission and upheld by the General Court ("GC") on account of mitigating circumstances due to its limited involvement in the infringement. In particular, Infineon took issue with the fact that the GC reviewed only five of the eleven bilateral contacts relied upon by the Commission to hold Infineon liable for participating in the single and continuous infringement, despite having challenged all eleven contacts. According to Infineon, the assessment of all eleven contacts was necessary to ascertain whether the amount of the fine was proportional to the infringement it had committed.

The Court of Justice ("ECJ") sided with Infineon and ruled that, when conducting a review in the exercise of its unlimited jurisdiction, the EU judicature is bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity of the infringement. Further, in order to determine the amount of a fine, the ECJ noted that it is necessary to take into account all the factors capable of affecting the assessment of its gravity, such as the number and intensity of the contacts.

Accordingly, the ECJ ruled that the GC was not entitled, without misconstruing the extent of its unlimited jurisdiction, to refrain from responding to the argument raised by Infineon, according to which the Commission had infringed the principle of proportionality by setting the amount of the fine imposed without taking into account the small number of contacts in which Infineon had participated. The ECJ added that this conclusion was all the more compelling given that, in the present case, the GC had confined itself to confirming only five of the eleven contacts established, while not responding to the question of whether the Commission had duly established the existence of the six other contacts set out in the decision.

The ECJ consequently concluded that an examination of the eleven contacts was necessary in order to assess whether the small number of contacts warranted a reduction of the amount of the fine that exceeded the 20% reduction granted on account of mitigating circumstances. On that basis, the ECJ set aside the judgment under appeal and referred the case back to the GC.

Smart card cartel case – Burden of proof and authenticity of evidence

Under EU case law, in order to contest the credibility of a piece of evidence relied on by the Commission, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of circumstances which might affect the probative value of that evidence and, second, that such circumstances call into question the probative value of that evidence.

In its appeal, Infineon argued that the General Court ("GC") had incorrectly placed the burden of proof on it to show that a piece of evidence (an email) presented by Samsung in the context of its leniency application, and which had been used by the Commission in its decision, was not authentic. In support of its position, Infineon argued that it had provided the Commission with an expert report which concluded that the authenticity of the email could not be confirmed. Infineon took issue with the fact that, without having recourse to an independent forensic expert report, the Commission dismissed Infineon's doubts on the basis of its own forensic assessment regarding the authenticity of that email. In its judgment, the GC, in light of the latitude the Commission has in deciding on additional steps to be taken, rejected the argument that the Commission should have had recourse to an independent expert report and found that Infineon had failed to establish that such a request was necessary.

On appeal, the Court of Justice ("ECJ") recalled its case law that, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of an infringement, it is for the undertaking concerned to prove to the requisite legal standard: (i) the existence of circumstances capable of affecting the probative value of that evidence; and that (ii) such circumstances actually call into question the probative value of the evidence relied on by the Commission. The ECJ further clarified that, although this case law related to the contestability of the credibility of a piece of evidence, it is also applicable in relation to the contestability of the authenticity of an item of evidence.

On this basis, the ECJ concluded that the GC had not unjustifiably reversed the burden of proof since: (i) the Commission responded in detail to the concerns raised by Infineon with respect to the authenticity of the contested piece of evidence; (ii) Infineon did not show before the GC that the Commission had made errors through an inadequate investigation; and (iii) the piece of evidence did not establish that the Commission's explanations were incorrect.

Accordingly, as the burden was on Infineon to demonstrate that the piece of evidence was not authentic, the ECJ concluded that the GC was also entitled to reject Infineon's argument that the Commission should have requested an independent forensic expert report to establish the authenticity of the relevant email.

Smart card chip cartel case – Partial liability for single continuous infringement

In its judgment in *Infineon*, the Court of Justice ("ECJ") provided further clarification regarding the distinction between: (i) the finding of the existence of a single and continuous infringement; and (ii) the question of whether or not a specific undertaking should be held liable for the entirety of that infringement.

The concept of a single and continuous infringement was developed by the Commission to impute liability to undertakings which had not been involved in every single cartel contact or had not engaged in every aspect of the infringing conduct. This concept entitles the Commission to treat a series of infringements by a number of undertakings as constituting one infringement. According to EU case law, there are several criteria that must be satisfied in order to establish an undertaking's participation in a single continuous infringement. Specifically: (i) there must be an overall plan pursuing a common objective; and (ii) the undertaking must have been aware (actually or presumably) that they were contributing to that overall plan.

In its appeal to the ECJ, Infineon argued that the General Court ("GC") had erred in its application of the concept of single and continuous infringement. Infineon contended that there was a contradiction in the reasoning of the GC, as it had attributed liability to Infineon for the overall infringement, whilst also simultaneously finding that Infineon had not participated in the single and continuous infringement as a whole. In this respect, Infineon asserted that it had not been established that it was aware of the collusive conduct of the other parties.

The ECJ rejected this ground of appeal in its entirety. According to the ECJ, the finding of the existence of a single and continuous infringement is separate from the question of whether liability for that infringement as a whole is imputable to an undertaking. More particularly, the ECJ referred to case law supporting the principle that an undertaking can be held liable for only part of a single and continuous infringement. In the present case, the ECJ concluded that the Commission had only attributed liability to Infineon for part of the single and continuous infringement and, accordingly, that there was no contradiction in the reasoning of the GC.

Furthermore, as Infineon was only held liable for part of the infringement, the ECJ stated that it was not necessary to establish that Infineon was aware of all the collusive conduct of the other parties.

– MEMBER STATE LEVEL –

GERMANY

Federal Cartel Office fines media group for market-sharing agreement

On 4 September 2018, the German Federal Cartel Office ("FCO") imposed fines totalling €16 million on the German media group DuMont, on an officer of DuMont and on DuMont's external lawyer for having engaged in territorial market allocation with competing media group Bonner Generalanzeiger in the region of Bonn between 2000 and 2016.

DuMont and Bonner Generalanzeiger were found to have agreed to allocate certain local territories for the supply of newspapers between one another, with the result that the party to which a specific local territory had not been allocated reduced the quality and depth of the news reports in its local newspaper for that territory, in order to increase the sales of the other party's local newspaper. To that end, the party to which a specific local territory was not allocated also closed its local news office in that territory and switched to newspaper distribution by post instead of courier, which is less attractive for customers. The two media groups were found to have concluded a "basic understanding" in December 2000, which was intended to protect their anticompetitive territorial allocation agreement by the acquisition of reciprocal minority shareholdings.

The cartel proceedings were initiated following a leniency application by Bonner Generalanzeiger, which received immunity from fines. The external lawyer of DuMont who was fined was found to have drafted the anti-competitive market allocation agreement. The FCO's fining decision can be appealed to the Higher Regional Court of Düsseldorf.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GREECE

Greek competition authority fines margarine and butter producer €384,000 for resale price maintenance

On 3 September 2018, the Hellenic Competition Commission ("HCC") fined Minerva, a producer of margarine and butter products, a total of €384,000 for infringing Article 101(1) TFEU and the Greek equivalent by imposing resale price maintenance in distribution agreements with retailers and wholesalers.

UNITED KINGDOM

UK Competition Appeal Tribunal finds that Ping's online sales ban was an unjustified restriction, but reduces fine imposed by the CMA from £1.45 million to £1.25 million

On 7 September 2018, the Competition Appeal Tribunal ("CAT") rejected the appeal brought by the golf club manufacturer Ping against the decision of the Competition and Markets Authority ("CMA") of 24 August 2017 imposing a fine of £1.45 million on Ping for infringing both Chapter I of the Competition Act 1998 and Article 101 TFEU by banning online sales of its customised golf clubs (see VBB on Competition Law, Volume 2017, No. 8).

Ping has a long-standing policy of face-to-face custom fitting for its golf clubs, which it has sought to promote by consistently preventing the retailers in its selective distribution system from selling its golf clubs online. In defence of this policy, Ping raised several grounds of appeal in challenging the CMA's 2017 decision, all of which were rejected by the CAT.

In essence, the CAT agreed with the CMA that the consumer benefits resulting from Ping's legitimate policy of promoting custom fitting (i.e., receiving a better quality product) could be achieved by less restrictive alternative means than a general online sales ban, in particular, by specific online interactive features. The CAT further rejected Ping's arguments that its brand image could be harmed without the ban because of the risk that consumers would buy the wrong golf clubs. The case illustrates that it will be exceptionally difficult, if not impossible, to justify a general online sales ban as necessary to protect a brand and provide specific consumer benefits.

The individual pleas raised in the appeal are considered in more detail below.

Dismissal of Ping's arguments that the CMA's decision infringed its human rights

First, Ping argued that the CMA's decision contravened its rights under Article 16 of the EU Charter on Fundamental Rights (the "EU Charter"), which concerns the freedom to conduct business, by requiring it to sell non-fitted clubs which are products that it does not wish to sell. It further argued that the decision contravened its right under Article 17 of the EU Charter (concerning the right to property) because forcing Ping to give up its unique position of selling only customised clubs would undermine the goodwill of its business. The CAT rejected this ground of appeal noting that, where a restriction is found to be a restriction by object that does not meet the conditions for exemption under Article 101(3) TFEU (see further below), the limitation of rights under Articles 16 and 17 of the EU Charter is a proportionate means to avoid the distortion of competition in the EU. It also found that: (i) Ping was not forced to sell products it did not wish to sell, since it already sold a number of golf clubs without prior custom fitting; and (ii) Ping had failed to establish that prohibiting the internet sales ban would deprive its business of goodwill.

Upholding of CMA's finding that the internet sales ban constitutes a restriction of competition "by object"

The CAT agreed with the CMA's finding that the objective of the internet ban was to prohibit online sales of Ping's golf clubs, and the fact that the restriction also had the legitimate aim of promoting custom fitting did not preclude a finding that the agreement had an anti-competitive object. The CAT then considered whether the ban revealed in itself a sufficient degree of harm to competition to be considered a restriction by object. The CAT answered this in the affirmative, pointing out that the impact on consumers and retailers was real and material since: (i) it significantly restricted consumers from accessing retailers outside their local area and from comparing prices (for example, since prices were not widely available on online price comparison tools); and (ii) it significantly reduced the ability of, and incentives for, retailers to compete for business using the internet.

Upholding of the CMA's finding that the internet sales ban was not objectively justified

The CAT noted that, in order for an internet sales ban to be objectively justified and to fall outside the scope of Article 101(1) TFEU, it must satisfy the Metro criteria, in particular it must be necessary for non-price competition to exist. In this respect, it was clear that the policy was not objectively justified since Ping could still compete with other manufacturers on non-price parameters (e.g., quality and innovation) without the internet sales ban. This was made clearer by the fact that other golf club manufacturers did not prohibit online sales but nevertheless competed vigorously with Ping on non-price parameters. The CAT further pointed out that the distinct question of whether the ban enabled Ping to compete more vigorously on non-price parameters was to be assessed separately under Article 101(3) TFEU.

Dismissal of Ping's arguments that the CMA erred in finding that the ban on internet sales was disproportionate

Ping argued that the CMA was wrong, in its analysis under Article 101(1) TFEU, to find Ping's internet policy to be disproportionate, particularly since the alternative measures proposed by the CMA would be impractical and less effective than the ban. While the CAT considered that, in this case, the extensive assessment of proportionality carried out by the CMA should have been part of its assessment under Article 101(3) TFEU, rather than under Article 101(1) TFEU, the CAT nevertheless agreed with the CMA that the internet sales ban was disproportionate.

Ping challenged the CMA's findings that: (i) the ban was not necessary since there were alternative and less restrictive measures to meet the legitimate aim; and that (ii) the restrictive nature of the ban was disproportionate to the promotion of custom fitting. With respect to the necessity of the ban, the CAT considered that the notion of necessity requires an assessment of whether a less intrusive measure could have been used without unacceptably compromising the promotion of custom fitting. Three key issues had to be resolved in order to conduct this assessment: (i) whether Ping's legitimate aim should be characterised as "promoting" or as - which would favour Ping's case - "maximising" custom fitting (the CAT found the former); (ii) whether the internet ban was effective (the CAT found that it was not); and (iii) whether there were realistic and less restrictive alternatives to the ban.

With regard to this third issue, Ping's fundamental objection to alternative measures, such as the online interactive features which the CMA had considered could be used by Ping, was that they would lead to customers making uninformed decisions by guessing their custom fit measurements. This would in Ping's view ultimately harm its brand, as well as cause free-riding among retailers. (These interactive features included live chat windows, advisory notices strongly recommending custom fitting, drop-down boxes with a range of relevant Ping custom-fit options, and mandatory tick boxes for customers to accept the risks of purchasing without custom fitting.)

The CAT, however, dismissed these objections pointing out the following:

- the price of clubs, the number of customisable options and the fact that customers keep clubs for a number of years all suggested that customers would be inherently unlikely to buy clubs without a prior custom fitting;
- the Court of Justice of the European Union has already endorsed the use of online interactive features as providing adequate protection against the risk of customers purchasing incorrect products in the case of contact lenses and non-prescription medications; and
- custom fitted clubs of other brands are available online.

For these reasons, the CAT found that the alternative measures proposed by the CMA would not lead to customers guessing their specifications and buying the wrong clubs, and would not damage Ping's brand. In this respect, the CAT also pointed out that Ping already allowed sales of its clubs without a custom fitting (e.g., via telephone). It also found no evidence that the alternative measures would reduce incentives to invest in custom fitting, triggering a free-rider concern, instead emphasising the incentives to invest that are created by the very high conversion rate of custom fittings into sales.

The CAT therefore found that the ban was not necessary to achieve its legitimate aim and was therefore disproportionate.

Dismissal of Ping's arguments that the internet sales ban constituted an ancillary restraint

The CAT noted that, in order for a restriction to fall outside Article 101(1) TFEU as an ancillary restraint, it must be objectively necessary to the implementation of a main operation which has a neutral or positive effect on competition which would otherwise be impossible. In this respect, the CAT pointed out that since (as described above) the ban was not necessary for the promotion of custom fitting, it could similarly not be impossible to promote custom fitting without it. The ban was therefore not an ancillary restraint.

Dismissal of Ping's arguments that the ban was exempted under Article 101(3) TFEU

Ping contended that the ban should be exempted under Article 101(3) TFEU since it produced real benefits for consumers which could not be achieved in a different way. In deciding that the four cumulative conditions of Article 101(3) TFEU were not all met, the CAT emphasised that the ban was not a particularly effective means of increasing custom fitting rates and was not indispensable as it had been established that alternative means existed which would be effective. In addition, consumers would not obtain a fair share of the benefits, taking into account that: (i) the benefits that would accrue were very limited and would do little to counteract free-riding; and (ii) these benefits would not outweigh the disadvantages to consumers in terms of increased inconvenience and reduced choice of retailers.

Reduction of the fine since the CMA erred in treating director involvement as an aggravating factor

The CAT finally reduced the fine from £1.45 million to £1.25 million, based on the ground that the CMA erred in treating director involvement as an aggravating factor in this specific case since the directors sought to pursue a legitimate aim with the internet policy.

STATE AID

– EUROPEAN UNION LEVEL –

EUROPEAN UNION: On 19 September 2018, the European Commission announced that, following an in-depth investigation launched in December 2015, it has found that Luxembourg's tax treatment of McDonald's Europe Franchising ("McDonald's") does not constitute state aid. Tax rulings granted by the Luxembourg tax authorities in favour of McDonald's interpret the Luxembourg – US Double Taxation Treaty in such a way that McDonald's benefits from double non-taxation. According to the Commission, however, this double non-taxation results from a mismatch between Luxembourg's and US tax laws, rather than a misapplication of the Luxembourg – US Double Taxation Treaty granting special treatment to McDonald's. Nevertheless, Luxembourg is taking legislative steps to prevent future double non-taxation.

EUROPEAN UNION: On 25 September 2018, Advocate General Wathelet issued his opinion on a reference for a preliminary ruling from an Estonian court (Case C-349/17, *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*). In the opinion, Advocate General Wathelet confirms the established case law that it is the recipient companies that are responsible for verifying whether state aid they receive is legal. A national authority which decides to grant aid mistakenly considering that the aid meets the conditions of the block exemption regulation is, in fact, awarding unlawful aid and such authority cannot create a legitimate expectation on the part of the beneficiary of the aid. The fact that the granting authority may have been aware that one of these conditions had not been fulfilled, or may even have misled the beneficiary, is irrelevant in this respect.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GERMANY

German FCO publishes annual report 2017

On 27 August 2018, the German Federal Cartel Office ("FCO") published its annual report for 2017. The report summarises the FCO's key activities during 2017, when the FCO: (i) imposed fines totalling approx. €66 million; (ii) received 37 leniency applications; (iii) conducted 11 dawn raids; and (iv) issued 1,243 merger control decisions, of which 1,239 were phase-I clearances, three were phase-II clearances without conditions and one was a prohibition decision. According to the FCO's press release (available here), the key focus in 2017, and for the near future, is the growing importance of the digital economy and consumer protection in the digital economy. An English version of the FCO's 2017 annual report is available here.

Expert working group to modernize competition law

On 10 September 2018, the Federal Ministry for Economic Affairs and Energy set up an expert working group on competition law 4.0 ("*Kommission Wettbewerbsrecht 4.0*") whose task is to devise suggestions for modernising German competition law. According to the mandate, the working group will focus on challenges in the digital sector, such as access to data, how to reconcile a competitive data economy and privacy concerns or special liability rules with regard to the use of artificial intelligence. The working group has one year in which to evaluate whether comprehensive reform is needed and prepare specific suggestions.

Just one week earlier, on 4 September 2018, the Federal Ministry for Economic Affairs and Energy published a study examining how market power rules apply with regard to digital markets. The findings of that study are expected to be taken into account both by the expert working group on the modernization of competition law and for the tenth review of the German Act against Restraints of Competition.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

EFTA Court judgment on limitation period for damages claims

On 17 September 2018, the Court of Justice of the European Free Trade Association States (the “EFTA Court”) handed down its judgment in *Nye Kystlink AS v Color Group AS and Color Line*, Case E-10/17, answering preliminary questions asked by Norway’s Borgarting Court of Appeal (*Borgarting lagmannsrett*) in a case concerning the limitation period for bringing damages claims subsequent to a competition law infringement decision imposed under Articles 53 and 54 of the European Economic Area Agreement (“EEA”), the corresponding provisions of Articles 101 and 102 TFEU.

In 2005, Kystlink AS, a Norwegian ferry company, brought to the attention of the Norwegian Competition Authority the existence of an alleged anti-competitive exclusivity agreement between one of its competitors, Color Line, and the Municipality of Strömstad. Due to cross-border implications, the Norwegian Competition Authority referred the case to the EFTA Surveillance Authority (“ESA”). On 14 December 2011, the ESA issued a decision finding that the exclusivity agreement prevented Kystlink AS from gaining access to the Strömstad port facilities and therefore infringed Articles 53 and 54 EEA.

On 14 December 2012, Kystlink AS brought an action before the Norwegian Courts against Color Line seeking damages for financial losses it incurred due to infringement of Articles 53 and 54 EEA. Pursuant to Section 9(1) of the Norwegian Limitation Act, a claim for damages is time-barred three years after the date on which an injured party obtained or should have procured necessary knowledge about the damage and the responsible party. However, under Section 11 of the same Act, a claim for damages arising from a criminal offence may in any event be filed within one year after the criminal conviction becomes final. The Oslo District Court (Oslo tingrett) found the action to be time-barred under Section 9(1) and excluded the application of Section 11. Kystlink AS appealed the judgment to the Borgarting Court of Appeal.

The Borgarting Court of Appeal referred three questions to the EFTA Court, concerning essentially two distinct matters. First, the Court asked, in essence, whether infringements of Articles 53 and 54 EEA are to be considered as criminal offences and whether damages claims based on such infringements should therefore benefit from Section 11 of the Limitation Act.

Second, the Borgarting Court of Appeal asked whether combining a limitation period with a duty of investigation on the part of the injured party, as provided for under Section 9(1) of the Limitation Act, runs counter to the principle of effectiveness, particularly in cases where the limitation period could expire even before the ESA has reached a final decision on the practice at stake.

Kystlink AS drew a parallel between the ESA infringement decision and Norwegian criminal law, arguing that the fine imposed by the ESA is significant and substantially higher than fines received for most violations of criminal law, and therefore Section 11 should apply.

The EFTA Court highlighted that in the absence of harmonising EEA legislation, it is for the internal legal order of each EEA State to lay down procedural rules for legal proceedings intended to safeguard the rights derived from EEA law. However, the conditions under these rules must not be less favourable than those relating to similar domestic rights and must respect the principles of equivalence and effectiveness in EEA law.

The EFTA Court found that the principle of equivalence dictates that national procedural law must remain neutral in relation to the origin of the rights invoked. Nevertheless, a damages claim based on a breach of EEA competition law should not automatically benefit from the limitation rule laid down in Section 11 of the Limitation Act. Rather, the national court is under a duty to assess whether a damages claim based on a ESA decision should be equated with a similar damages claim based on a national criminal conviction or rather on a national administrative sanction. In its assessment, the national court must consider the purpose, cause of action and the essential characteristics of allegedly similar domestic actions.

As regards the principle of effectiveness, Kystlink AS claimed that the duty of investigation placed on the injured party for the application of Section 9(1) of the Limitation Act is too onerous. Such injured party is expected on its own, without recourse to the investigative powers of the ESA, to bring a damages claim in a national court before the ESA's investigation has been completed. In addition, it is problematic in light of the principle of legal certainty because the limitation period may expire before an injured party has actually gained the necessary knowledge for bringing an action for damages. In its defence, Color Line submitted that a limitation period of three years does not, in itself, violate the principle of effectiveness, even when the triggering of a limitation period is contingent on what a claimant knew or ought to have known.

The EFTA Court held that EEA States are free to combine a limitation period for bringing a damages action for infringement of Articles 53 and 54 EEA with a duty of investigation on the part of the injured party where the limitation period could possibly expire before the ESA has reached a final decision, as long as such duty and limitation period do not render it impossible or excessively difficult to bring a damages action for infringement of EEA competition rules. However, the EFTA Court acknowledged the potential for information asymmetry and held that the duty of investigation should not go further than to require the procurement of information that the claimant can reasonably be expected to obtain from readily accessible sources. In assessing this duty, national courts must take into account the individual facts and circumstances of each case and must have particular regard to the special features of competition cases which tend to be protracted and complex in nature.

In this noteworthy judgment, the EFTA Court makes it clear that the national laws of EEA States may require injured parties not to be idle in bringing damages claims proceedings before national courts, but rather to be proactive, to stay informed and pay close attention to the procedural rules of EEA States which may substantially differ in the absence of harmonisation.

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