

## Private Enforcement and Collective Redress in European Competition Law

### National report for Norway

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#### 1. Introduction

A national report on private enforcement of European competition law in Norway will necessarily differ quite a bit from similar reports from EU Member States. By this, we do not mean that the possibility for private parties to enforce European competition rules is *per se* weaker in Norway than in the EU Member States – simply that the legal framework is quite different. As a party to the Agreement on the European Economic Area (EEA), Norway has implemented and applies EEA competition rules, which correspond to a great extent with EU competition rules.<sup>1</sup> Yet the institutional set-up of the EEA, and the interplay between European competition law and relevant national Norwegian law (public/administrative law, civil procedural law, tort law etc.), is even more complex than in the EU. Particularly because at the time of writing it remains uncertain if – and if so when, how and with what adaptations – Directive 2014/104/EU on antitrust damages actions (“Damages Directive”) will be made part of the EEA Agreement. The importance of the ongoing discussions between the EFTA States parties to the EEA Agreement (Iceland, Liechtenstein and Norway) on the one side and the EU on the other should not be underestimated.<sup>2</sup> The underlying issue is whether the three EFTA States – their National Competition Authorities (NCAs) and courts included – should be allowed to participate on an equal footing with the EU Member States in both the decentralised public enforcement of the common EU/EEA competition rules and in the facilitation of their private enforcement. A key question is whether the NCAs of the EFTA States and the EFTA Surveillance Authority (ESA) will be given

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<sup>1</sup> OJ No L, 3.1.1994, p. 3. For a recent analysis of the Agreement’s achievements and future challenges, see H.H. Fredriksen and C.N.K. Franklin, “Of Pragmatism and Principles – The EEA Agreement 20 Years On”, 52 *Common Market Law Review* (2015), 629-684.

<sup>2</sup> Although an EFTA State, Switzerland is not a party to the EEA Agreement.

full membership in the European Competition Network. The outcome of the discussion may be important not only to the EEA, but also to Switzerland and other non-Member States. Depending on the outcome of the upcoming “Brexit” referendum, it may even prove highly relevant to the UK as well.

In order to provide the fullest picture of private enforcement issues in Norway today, we shall therefore start out by explaining how EU competition law is included in the EEA Agreement (Section 2), with particular emphasis on its enforcement in the EFTA-pillar of the EEA (Section 3). We shall then briefly cover the current discussions concerning the EEA-relevance of the provisions on civil procedure in the Damages Directive (Section 4), before moving on to examine several selected issues relating to private enforcement of the EEA competition rules in Norway (Section 5). Finally, the report will be rounded off with a summary of our findings (Section 6).

## 2. EU Competition Law as part of the EEA Agreement

The substantive EEA rules on competition law set out in Articles 53 and 54 EEA are carbon copies of what are now Articles 101 and 102 TFEU.<sup>3</sup> Following the EEA Agreement’s fundamental goal of uniform interpretation and application of the Agreement and those provisions of EU law which are substantially reproduced in it (“principle of homogeneity”),<sup>4</sup> both the EFTA Court and the national courts of the EFTA States have always sought to interpret and apply Articles 53 and 54 EEA in line with the case-law of the European Court of Justice (ECJ) on Articles 101 and 102 TFEU.<sup>5</sup> Importantly, this approach is also followed by the ECJ and the General Court (GC) in cases in which it falls to them to enforce EEA competition law against undertakings from the EU Member States – over the last 20 years, the ECJ and the GC have simply taken for granted in numerous judgments that Articles 53 and 54 EEA are to be interpreted and applied in conformity with Articles 101 and 102 TFEU.<sup>6</sup>

The situation is more complicated, however, when it comes to the enforcement of Articles 53 and 54 EEA. As far as public enforcement is concerned, the EEA Agreement is based on the so-called two-

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<sup>3</sup> For an early analysis, see P.-C. Müller-Graff, “EEA Agreement and EC law: A Comparison in Scope and Content”, in: Müller-Graff and Selvig (eds.), *The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe*, Berliner Wissenschafts-Verlag 1997, pp. 17-41, at pp. 23 ff. For an overview after 20 years of experience, see J. Temple Lang, “Competition Law”, in: C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer 2016, pp. 523-545.

<sup>4</sup> For an early analysis of the principle of homogeneity, see Müller-Graff (*ibid.*), p. 37. For a recent presentation of the EFTA Court’s understanding of the principle, see P. Hreinsson, “General Principles”, in: C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer 2016, pp. 349-389.

<sup>5</sup> For an example from the EFTA Court, see Case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 246. For an example from the Norwegian Supreme Court, see Rt-2012-1556 (*Gran & Ekran*-case).

<sup>6</sup> For recent examples from the ECJ, see e.g. Case C-231/14 P, *InnoLux v. Commission*, ECLI:EU:C:2015:451; Case C-227/14 P, *LG Display and LG Display Taiwan v. Commission*, ECLI:EU:C:2015:258; Case C-634/13 P, *Total Marketing Services v. Commission*, ECLI:EU:C:2015:614 and Case C-382/12 P, *MasterCard and Others v. Commission*, ECLI:EU:C:2014:2201.

pillar model: Enforcement in the EFTA States is entrusted to the independent EFTA Surveillance Authority (ESA),<sup>7</sup> whereas enforcement in the EU Member States falls to the European Commission. Detailed and rather complex rules on the division of competences between ESA and the Commission are laid down in Article 56 EEA and Protocols 21-23.<sup>8</sup> In short, the Commission deals with all infringements of the EEA competition rules which have an appreciable effect on trade between EU Member States, whilst ESA is left to deal with cases where only trade between EFTA States is affected or where the effects on intra-EU trade are not appreciable.<sup>9</sup> As for enforcement against public authorities, however, ESA has exclusive jurisdiction to take action against any EFTA State that enacts or maintains in force measures that are contrary to Articles 53 and/or 54 EEA.<sup>10</sup>

The two-pillar structure of the EEA does not hinder *decentralised public enforcement* of Articles 53 and 54 EEA *per se*. Unfortunately, however, the Commission has taken the view that Articles 55 and 56 EEA vest the public enforcement of Articles 53 and 54 EEA exclusively in ESA and itself. This interpretation of Articles 55 and 56 EEA is not particularly convincing – a historical and contextual interpretation suggests that these provisions were only meant to adapt the enforcement of the EEA competition rules to the two-pillar structure of the EEA Agreement, not to foreclose an EEA adoption of a (at the time of the EEA-negotiations) possible future decentralisation of EU competition law. Moreover, Article 55 EEA explicitly gives way to the provisions giving effect to Articles 53 and 54 found in Protocol 21 and Annex XIV of the Agreement. Protocol 21 on the implementation of competition rules applicable to undertakings is one of the protocols which the EEA Joint Committee has competence to amend (Article 98 EEA). Thus, from the perspective of EEA law, it is quite clear that the EEA Joint Committee can decentralize enforcement of the competition rules through amendments to Protocol 21, without Article 55 EEA posing any problem (and without the need therefore to go through the cumbersome process of treaty amendment to amend Article 55 EEA as such).<sup>11</sup> Unlike the situation under EU law, the EEA Agreement does not establish a hierarchy of “primary” and “secondary” EEA law, under which Articles 55 and 56 EEA will limit the EEA Joint Committee’s ability to amend Protocol 21 EEA.<sup>12</sup>

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<sup>7</sup> Article 108 EEA.

<sup>8</sup> See e.g. F. Büchel and X. Lewis, “The EFTA Surveillance Authority”, in: C. Baudenbacher (ed), *The Handbook of EEA Law*, Springer 2016, 113-138, at p. 121.

<sup>9</sup> Article 55 (1) EEA and Protocol 23 provides ESA with the right and, if need be, an obligation to participate in the Commission’s investigations in “mixed” cases (i.e. cases which affect both the EFTA States and the EU Member States).

<sup>10</sup> Article 109 EEA.

<sup>11</sup> Still, internally in the EU, the Commission will need approval from the Council (Article 1 (3) of Council Regulation (EC) No 2894/94 concerning arrangements for implementing the Agreement on the European Economic Area).

<sup>12</sup> For more generally on this, see H.H. Fredriksen, “EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols”, in: C. Baudenbacher (ed), *The Handbook of EEA Law*, Springer 2016, pp. 95-110.

As a result of the Commission's view, Regulation 1/2003 was rendered largely inoperative under EEA law.<sup>13</sup> The EFTA States have objected to the Commission's interpretation of Article 56 EEA, but so far without any success.<sup>14</sup> When they therefore decided to go ahead on their own, however, the Commission seemed to tacitly accept the situation: Public enforcement of EEA competition law *in the EFTA-pillar* was consequently decentralised in practice by implementing the relevant parts of Regulation 1/2003 into Protocol 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).<sup>15</sup> As a result, the Norwegian Competition Authority and the NCAs of the other two EFTA States *do* have the power to apply Articles 53 and 54 EEA.<sup>16</sup> However, as a result of the Commission's refusal to accept decentralised enforcement as a matter of EEA law, neither the competition authorities of the EFTA States nor the EFTA Surveillance Authority are treated on an equal footing with the authorities of EU Member States in the European Competition Network.<sup>17</sup> Thus, the unilaterally established decentralized enforcement of Articles 53 and 54 EEA in the EFTA-pillar is hampered by the EFTA State NCAs' lack of power to request their colleagues in the EU to carry out inspections on their behalf, as well as their lack of access to confidential information already held by NCAs of most of the EU Member States.<sup>18</sup> (The only exception being the formal, legally-binding, Nordic agreement in competition cases, entered into in 2001, which enables the NCAs of Norway, Iceland, Sweden and Denmark to exchange confidential information regarding mergers, cartels and abuses of dominant positions.<sup>19</sup>)

However, as noted in the introduction, the current discussion concerning the incorporation of the Damages Directive into the EEA Agreement has brought the problems caused by the Commission's interpretation of Article 56 to the attention of the Contracting Parties once again. The Norwegian government clearly hopes that the Commission will change its view, thereby enabling full and sym-

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<sup>13</sup> The Regulation was incorporated into the EEA Agreement by the EEA Joint Committee's decision 130/2004 of 24 September 2004, but the key part of it – the decentralised enforcement of EU competition law through the national competition authorities – is rendered inoperative in the EU-pillar as a consequence of the Commission's interpretation of Article 56 EEA. The Commission's presentation of "The EEA Agreement and Regulation 1/2003" in its Staff Working Document SWD (2014) 230 – *Ten Years of Antitrust Enforcement under Regulation 1/2003* fails to recognise this (para. 256 following).

<sup>14</sup> For a frank admission of the disagreement concerning the interpretation of Article 56 EEA, see the Norwegian Ministry of Trade, Industry and Fisheries' recent Consultation Paper on the implementation of Directive 2014/104/EU into Norwegian law (*Forslag til endringer i konkurranseloven – gjennomføring i norsk rett av direktiv 2014/104/EU om privat håndheving av EU/EØS-konkurransereglene*), Oslo 11 December 2015, p. 7 following. The Consultation Paper relies heavily on an extensive report prepared by E. Hjelmen, I. Ørstavik and E. Østerud, *Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU*, Oslo 19 December 2014 (available in Norwegian only),

<sup>15</sup> The protocol may be found at <http://www.efta.int/legal-texts/the-surveillance-and-court-agreement>.

<sup>16</sup> See Article 5 of Protocol 4 SCA.

<sup>17</sup> See Article 1A of Protocol 23 EEA, which allows for participation in meetings of the European Competition Network for the purposes of discussion of general policy issues only.

<sup>18</sup> As recently acknowledged by the Ministry of Trade, Industry and Fisheries in its Consultation Paper (see fn. 14 above), p. 8.

<sup>19</sup> Agreement between Denmark, Iceland and Norway concerning cooperation in matters of competition, signed on 16 March 2001. Sweden acceded to the convention in an agreement on amendments, signed on 9 April 2003.

metrical decentralized enforcement of EEA competition law throughout the EEA and full participation of the NCAs of the EFTA States and ESA in an “EEA-wide” European Competition Network.<sup>20</sup> The recent Consultation Paper on the implementation of the Damages Directive into Norwegian law suggests that the government is prepared to use the directive as leverage to secure this.<sup>21</sup>

### 3. Private enforcement of EEA Competition Law

Fortunately for private parties, the abovementioned peculiarities concerning the public enforcement of EEA competition law have no direct consequences for their ability to enforce Articles 53 and 54 EEA directly before national courts. The possibility of private enforcement of EEA competition law flows from the fact that Articles 53 and 54 EEA, just like Articles 101 and 102 TFEU, confer rights on individuals. The fact that the EU law principle of direct effect is not part of EEA law is no problem in practice as far as Articles 53 and 54 EEA are concerned:<sup>22</sup> Together with the rest of the EEA Main Agreement, these provisions have been made part of both Icelandic and Norwegian law,<sup>23</sup> whereas they enjoy direct effect in Liechtenstein by virtue of Liechtenstein law.<sup>24</sup> Further, Articles 53 and 54 EEA are clearly both unconditional and sufficiently precise to fulfil the EU law conditions for the direct effect of international obligations in the EU legal order.<sup>25</sup> They may therefore be enforced by individuals before the national courts in all of the EEA countries.

In the *Schenker I*-case from 2012, which concerned third party access to documents in an ESA competition case file for the purpose of pursuing a follow-on damages claim before Norwegian courts, the EFTA Court came out as a strong defender of private enforcement:

“... specific policy considerations arise in requests for access to documents as part of follow-on damages cases brought before national courts concerning Articles 53 and 54 EEA. The private enforcement of these provisions ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA (see, with regard to the parallel rules in EU law, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 paragraphs 26 to 28). ESA’s and the Commission’s view that follow-on damages claims in competition law cases only serve the purpose of defending the plain-

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<sup>20</sup> See the Consultation Paper (fn. 14 above), at p. 17.

<sup>21</sup> *Ibid.* p. 14, where the Ministry deems full “cross-pillar” effect as an essential precondition for both the (legal) EEA-relevance and the (political) acceptability of the Damages Directive.

<sup>22</sup> For an early analysis, see Müller-Graff (fn. 3, p. 32). For a recent confirmation by the EFTA Court (although strictly speaking limited to decisions from the EEA Joint Committee), see e.g. Case E-11/15, *EFTA Surveillance Authority v. Iceland*, judgment of 27 October 2015 (not yet reported), para 20 (with further references).

<sup>23</sup> Through the Icelandic EEA Act (No 2/1993) and the Norwegian EEA Act (No 109/1992).

<sup>24</sup> Under the Liechtenstein constitutional system, a treaty ratified by the Principality is as such part of the national legal order – see e.g. the submissions of the Liechtenstein government before the EFTA Court in Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, para. 35.

<sup>25</sup> See more generally P. Eeckhout, *EU External Relations Law*, 2<sup>nd</sup> ed. OUP 2011, Chapter 9.

tiff's private interests cannot be maintained. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers."<sup>26</sup>

Importantly, and in contrast rather interestingly to the ECJ's subsequent judgment in *EnBW*, the EFTA Court held that private enforcement was an overriding public interest which may justify disclosure of documents from an antitrust case file.<sup>27</sup> As ESA had failed to consider this, the decision denying access to the documents in question was annulled. The EFTA Court also took "a more private plaintiff-friendly" approach than the ECJ by finding that the presumption against disclosure in cartel cases cannot apply after final closure of the proceedings in the absence of leniency documents in the file, and that third parties in any event have to get an index of the documents in the file in order to rebut the presumption.<sup>28</sup> According to its President, the EFTA Court is thus the only European court which truly sees private plaintiffs as "actors of the *bonum commune*".<sup>29</sup>

Another expression of the EFTA Court's pro-private enforcement stance may be found in the *Wow air*-case, which concerned slot allocation at Keflavik International Airport in Iceland for the summer of 2014. In its request for an advisory opinion on the interpretation of the relevant provisions of EEA law (Regulation 95/93/EC), the Reykjavik District Court asked the EFTA Court to apply the accelerated procedure provided for in the Rules of Procedure.<sup>30</sup> Even though the summer of 2014 was over, the president of the EFTA Court granted this on the basis of "the economic sensitivity" of the case, holding that "the potential effects on slot allocations in the near future are such as to constitute a matter of exceptional urgency." For the purpose of this report, the following part of the President's reasoning merits particular attention:

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<sup>26</sup> Case E-14/11, *DB Schenker v. EFTA Surveillance Authority (Schenker I)* [2012] EFTA Ct. Rep. 1178, para 132. Subsequent referrals to this statement are found in Case E-7/12, *DB Schenker v. EFTA Surveillance Authority (Schenker II)* [2013] EFTA Ct. Rep. 356, para. 139, where reference is made to "the importance of private enforcement of competition law" in the EEA; in Case E-5/13, *DB Schenker v. EFTA Surveillance Authority (Schenker V)* [2014] EFTA Ct. Rep. 304, para. 134; in Advocate General Kokott's Opinions in Case C-681/11, *Schenker and Co AG*, ECLI:EU:C:2013:126, para. 114, and Case C-557/12, *Kone and Others v. Commission*, ECLI:EU:C:2014:45, para. 60; and in the GC's judgments in Case T-341/12, *Evonik Degussa v. Commission*, ECLI:EU:T:2015:51, para. 114, and Case T-345/12, *Akzo Nobel and Others v. Commission*, ECLI:EU:T:2015:50, para. 84.

<sup>27</sup> *Ibid.* para. 241. Cf. Case C-365/12, *Commission v. EnBW*, ECLI:EU:C:2014:112, para. 104-105. For a comparison of the two judgments, see R. Polley, "Third Party Access to File in Competition Cases", in: EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration*, Hart 2014, 435-458, at p. 445.

<sup>28</sup> See Polley (*ibid.*), at p. 448. See also F. O'Regan, "Fine-tuning transparency", in: EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration*, Hart 2014, 337-376, at p. 357 following.

<sup>29</sup> C. Baudenbacher, "[M]ust be interpreted in the light of economic considerations": some reflections on the case law of the EFTA Court", in: D. Edward et.al. (ed), *Ian S. Forrester: A Scot without Borders – Lieber Amicorum – Volume II*, Concurrences Review 2015, 77-98, at p. 95.

<sup>30</sup> Article 97a of the EFTA Court's Rules of Procedure, which essentially mirrors Article 105 of the ECJ's Rules of Procedure.

“To guarantee fair and effective competition is one of the most important goals of the EEA Agreement. Effective competition benefits both consumers and competitors and contributes to the common good.”<sup>31</sup>

As acknowledged by the President himself in a later publication, the decision to accelerate a competition case such as this one – and on the basis of such a justification, one might add – “was far from self-evident”.<sup>32</sup> In its Advisory Opinion to the Icelandic court, which took less than three months to reach, the EFTA Court found *inter alia* that the Icelandic Competition Authority has the right to give instructions to undertakings when it comes to a transfer of slots after the initial time slot allocation, thereby exposing the system of “grandfather rights” to at least some degree of competition.<sup>33</sup>

Despite of the EFTA Court’s (laudable) efforts, however, a number of differences between EU and EEA law remain which can cause problems for the private enforcement of European competition law in the EFTA-pillar of the EEA. Firstly, the EU rules concerning judicial cooperation in civil matters fall outside the scope of the EEA Agreement. As a result of this, *the Brussels I and the Rome II regulations are not part of EEA law*.<sup>34</sup> For Norway (and Iceland, but not Liechtenstein), the lack of Brussels I is largely compensated for by the 2008 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.<sup>35</sup> Still, the simple fact that the legal basis is a different one and the risk inherent in the fact that Norwegian courts have to interpret the convention on their own, without the possibility to ask either the EFTA Court or the ECJ for an advisory opinion or preliminary ruling, may be enough to place the Norwegian legal order at a disadvantage in the European “competition” for individual or collective private enforcement cases with a cross-border element.<sup>36</sup> Unfortunately, this risk is strengthened by the fact that the applicability of the rules of the Rome II-regulation in Norway is somewhat uncertain (and hard to assess for foreigners). The Norwegian Supreme Court has indicated that it will strive to construe unwritten Norwegian rules

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<sup>31</sup> Case E-18/14, *Wow air ehf v. The Icelandic Competition Authority*, order of the president of 30 September 2014, published electronically, para. 7.

<sup>32</sup> C. Baudenbacher (fn. 29), at p. 95. It is indeed hard to imagine the President of the ECJ granting such a request in a case like this.

<sup>33</sup> Case E-18/14, *Wow air ehf v. The Icelandic Competition Authority*, Advisory Opinion of 10 December 2014, published electronically, para. 72.

<sup>34</sup> Regulation No 1215/2012 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) and Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II).

<sup>35</sup> Note that although the 2012 recast of Brussels I has created a number of divergences between the Brussels and Lugano-regimes, the Standing Committee of the Lugano Convention has so far taken the view that there is no pressing need to amend the Convention.

<sup>36</sup> Even though the Norwegian Supreme Court generally has a good record in homogeneous interpretation of the Lugano Convention in line with ECJ case-law, the highly unfortunate exception found in Rt. 2012 p. 1951 *Trico Subsea* has caused prominent foreign commentators to question this. See in particular the very harsh criticism voiced by C. Kohler, “Homogeneity or Renationalisation in the European Economic Area? Comments on a Recent Judgment of the Norwegian Supreme Court”, in: EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration*, Hart 2014, 237-249.

on the law applicable to non-contractual obligations in line with the Rome II-regulation.<sup>37</sup> Yet in the absence of a legal obligation to do so (and to follow the ECJ's interpretation of the Regulation), one may wonder if this would suffice to meet any foreseeability and predictability concerns of foreign market operators. Other EU rules concerning judicial cooperation in civil matters such as those on the service of judicial and extrajudicial documents (Regulation No 1393/2007) and the taking of evidence in civil and commercial matters (Regulation No 1206/2001) may perhaps also impact negatively on Norway's attractiveness as a forum for individual or collective private enforcement cases with a cross-border element.<sup>38</sup>

Secondly, the difficulties caused by "side-lining" ESA and the NCAs of the EFTA States (as discussed in Section 2 above) will to some degree "spill-over", and may hinder access to evidence necessary for the pursuit of a claim for damages – particularly in private enforcement cases with a cross-border element which also involve the Commission and/or NCAs from EU Member States. It remains uncertain in this regard whether the so-called *Zwartveld* procedure applies cross-pillar, so that for example a Norwegian court faced with a follow-on damages case can request documents *from the Commission* on the basis of the principle of sincere co-operation.<sup>39</sup> The fact that the loyalty clause set out in Article 3 EEA reproduces Article 4(3) TEU almost verbatim suggests an affirmative answer.<sup>40</sup> As far as ESA is concerned, the EFTA Court has already held in a State aid case that *Zwartveld* applies to it *vis-à-vis* the EFTA States<sup>41</sup> and this is reflected in ESA's Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement.<sup>42</sup> Given its refusal to (formally) accept decentralised enforcement of Articles 53 and 54 EEA, however, it remains doubtful whether the Commission would be prepared to accept that Article 3 EEA entails that national courts from the EFTA-pillar can request documents from it on the basis of the principle of sincere co-operation.

Thirdly, until a solution is found concerning the incorporation of the Damages Directive into the EEA Agreement, difficult questions will continue to arise as to what extent the by now well-established EU-law principles of effectiveness and equivalence, which are also recognised as general principles of

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<sup>37</sup> See in particular Rt-2009-1537 ("*The bookseller in Kandahar*"-case).

<sup>38</sup> There are ongoing negotiations between Norway, Denmark, Iceland and Switzerland on the one hand and the EU on other concerning parallel agreements to extend the applicability of both these regulations, but it remains to be seen if the EU is willing to accept this.

<sup>39</sup> Case 2/88, *Zwartveld*, EU:C:1990:315, para. 17.

<sup>40</sup> See R. Polley and M.-J. Clifton, "The Principles of Transparency and Openness, and Access to Documents", in C. Baudenbacher (ed), *The Handbook of EEA Law*, Springer 2016, 625-656, at p. 652.

<sup>41</sup> See Joined Cases E-5/04, E-6/04, and E-7/04 *Fesil and Others v. ESA* [2005] EFTA Ct. Rep. 117, para. 128.

<sup>42</sup> OJ 2006 C 305, p. 19, and EEA Supplement to the Official Journal 2006 No 62, p. 21, in particular points 15, and 21-26.

EEA law,<sup>43</sup> require an interpretation of national public/administrative law, civil procedural law and tort law which *in effect* comes close to the solutions prescribed by the Directive.<sup>44</sup> This may come as a surprise to the national authorities of the EFTA States, but from a legal perspective it is quite clear that the lack of a decision in the EEA Joint Committee on the incorporation of the Directive cannot have such an impact on the interpretation of existing principles of EEA law.<sup>45</sup> To what extent particularly the EFTA Court and the highest national courts of the EFTA States will be able to “remedy” a delayed incorporation of the Damages Directive is, however, far from clear. Whereas some of the Directive’s provisions arguably “merely” define and give concrete expression to the principle of effectiveness, others prescribe specific solutions which can hardly be regarded as the only way to fulfil the obligations flowing from the duty not to render the exercise of rights conferred by EEA competition law “practically impossible or excessively difficult”. For the purpose of this introductory part of the report, suffice to say that the legal uncertainty protracted by the current situation hardly meets the market operators’ need for predictability.

#### 4. The EEA-relevance of the provisions on civil procedure in the Damages Directive

One aspect of the current discussions in the EEA Joint Committee concerning the Damages Directive which ought to be mentioned specifically concerns the Directive’s (many) provisions on civil procedure. In their comments to the Commission’s proposal for the directive in 2013, the EFTA States felt the need to “strongly underline that provisions on civil procedure are, in general, not EEA relevant and fall outside the scope of the EEA Agreement”.<sup>46</sup> As we have argued elsewhere, this position is not only legally unconvincing, but also a real threat to the functioning of the EEA.<sup>47</sup> It is true that EU rules concerning judicial cooperation in civil matters are outside the EEA Agreement (as mentioned in section 3 above), but the procedural provisions of the Damages Directive do not fall in this category. Rather, as already suggested above, they have to be seen as concrete expressions of the general

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<sup>43</sup> See e.g. Case E-2/10 *Kolbeinsson v. The Icelandic State* [2009-2010] EFTA Ct. Rep. 234, para. 46-49; Case E-7/13, *Creditinfo Lánstraust v. Registers Iceland and the Icelandic State* [2013] EFTA Ct. Rep. 970, para. 45; further the Norwegian Supreme Court’s decisions in Rt-2005-597 (*Allseas*-case), para. 38, and Rt-2010-1500 (*Edquist*-case), para. 65.

<sup>44</sup> Practice so far would seem to indicate that this is certainly already the case regarding e.g. the limitation periods set out in the Directive – see section 5.3 below.

<sup>45</sup> For more generally on this, see Fredriksen (fn 12), , at p. 110.

<sup>46</sup> EEA EFTA Comment on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 13 November 2013.

<sup>47</sup> See Fredriksen and Franklin (fn. 1), p. 653 following.

principle of effectiveness, which both the EFTA Court and the national courts of the EFTA States have long recognised as part of EEA law.<sup>48</sup>

Fortunately, in its recent Consultation Paper on the implementation of the Directive into Norwegian law, the Norwegian Ministry of Trade, Industry and Fisheries has softened its stance and now appears ready to accept the EEA-relevance of the Directive in its entirety.<sup>49</sup> Presumably out of tactical considerations, however, the Norwegian government's assessment of the EEA-relevance of the Directive is explicitly preconditioned on EU acceptance of full and symmetrical "cross-pillar" application of the Directive throughout the EEA.

## 5. Selected Issues Relating to Private Enforcement in Norway

### 5.1 Introduction

From the outset in this section, it is important to stress that we have not found it possible or prudent to answer all of the questions posed in the questionnaire – some are simply not relevant under the Norwegian system, whilst others have not been the subject of great (or any) attention yet by the courts in practice. We have therefore chosen to focus on a few select issues that will hopefully prove beneficial to the comparative aims of the FIDE-project.

Quite a number of nullity of contract cases have come before Norwegian courts, some of which have been referred to the EFTA Court.<sup>50</sup> There are also a few high-profile cases concerning private enforcement of EEA competition law against trade unions.<sup>51</sup> We have nevertheless chosen in the following to focus our attention on certain issues particularly (but not exclusively) related to follow-on damages actions. Such cases by their very nature raise several different issues connected primarily to Norwegian tort and civil procedural law, such as the (non-)binding nature of NCA decisions before Norwegian courts (Section 5.2), the application of limitation periods time-barring potential claims (Section 5.3) and third party access to documents forming part of the Norwegian Competition Authority's case file (Section 5.4). Certain other related aspects of Norwegian tort and procedural law that may be affected in the event of the Damages Directive becoming part of EEA law – particularly

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<sup>48</sup> See the cases mentioned in fn. 43.

<sup>49</sup> See the Consultation Paper referred to in fn. 14, pp. 10-14.

<sup>50</sup> For an overview of the Norwegian cases up to 2011, see H.H. Fredriksen, *EU/EØS-rett i norske domstoler [EU/EEA law in Norwegian Courts]*, Report commissioned by the Norwegian EEA Review Committee, Oslo 2011, pp. 57-59. Case E-3/97, *Jan and Christian Jæger v. Opel Norway* [1998] EFTA Ct. Rep. 1; Case E-7/01, *Hegelstad v. HydroTexaco* [2002] EFTA Ct. Rep. 310; Case E-8/01, *Gunner Amundsen AS and Others v. Vectura AS* [2002] EFTA Ct. Rep. 236.

<sup>51</sup> Case E-8/00, *Norwegian Federation of Trade Unions and Others v Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA Ct. Rep. 114; and the EFTA Court's much anticipated pending decision in Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*.

issues connected to quantification of damages, joint and several liability and the “passing-on” defence – will also be briefly touched upon here (Section 5.5).

## 5.2 Norwegian Courts and Decisions of NCAs, the EU Commission and ESA

The starting point under Norwegian law is that national courts are not bound by the decisions of national public/administrative authorities.<sup>52</sup> The Norwegian Competition Authority is an administrative body, answerable to the Norwegian Ministry of Trade, Industry and Fisheries, to which appeals of many of its decisions may currently be directed at first instance. Decisions imposing fines for competition infringements may not be appealed to the Ministry, however, and must be raised directly before the Norwegian courts. The Norwegian judiciary is hierarchically structured, with all courts exercising general jurisdiction in most types of cases, meaning that claims pertaining to almost any matter related to competition law issues will be heard at first instance by one of the 66 local District Courts and not by a specialized competition law court or tribunal. In August 2015, however, the Norwegian government announced its plans to establish a new Competition Complaints Board in 2016 which may deal with appeals of any and all decisions of the Norwegian Competition Authority.<sup>53</sup> While this will hopefully ensure a greater degree of political independence in the latter’s work, perhaps also stimulating eventual participation by Norwegian judges attached to the Complaints Board in the Association of European Competition Law Judges, the decisions of both the Competition Authority and the Complaints Board will still not automatically bind the courts in follow-on cases.<sup>54</sup> In the event that the Damages Directive were to be implemented in EEA law, however, then this will presumably have to change. In its recent Consultation Paper, the Ministry of Trade, Industry and Fisheries has indicated that the requirement to consider final decisions of the Norwegian Competition Authority (and any administrative or judicial appeal findings directly related thereto) as binding in follow-on damages actions under Article 9(1) of the Directive is acceptable (albeit alien to the Norwegian legal order), and will be implemented through a new provision in the Norwegian Competition Act.<sup>55</sup>

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<sup>52</sup> Section 11-3 of the Act of 17 June 2005 no. 90 Relating to Mediation and Procedure in Civil Disputes (the Norwegian Code of Civil Procedure). An (unofficial) English translation may be found at <http://app.uio.no/ub/ujur/oversatte-lover/english.shtml>.

<sup>53</sup> The decision was made following a public consultation, and based largely on the findings of an expert evaluation published in the Norwegian Official Reports (NOU 2014:11 *Konkurransklagenemnda— Etablering av et uavhengig klageorgan for konkurransesaker*, 11 November 2014 – available in Norwegian only).

<sup>54</sup> Such a rule might be difficult to square away with the general rules granting Norwegian courts the right (and duty) to freely evaluate the evidence in a case (Section 21-2 of the Dispute Act (*Tvisteloven*)). Since the Norwegian Competition Authority is also answerable directly to the Ministry, and subject therefore to a certain degree of political steering, such a rule might also indirectly raise issues concerning the independence of the courts which could be potentially problematic from a Norwegian constitutional perspective as well.

<sup>55</sup> See the Consultation Paper (fn. 14), p. 46.

Regarding *ESA decisions*, the situation is similar to that of Commission decisions under Article 16 (1) of Regulation 1/2003. Following the *de facto* decentralization of public enforcement of EEA competition law in the EFTA-pillar of the EEA (as described in Section 2 above), decisions of the NCAs as well as the national courts of the EFTA States cannot run counter to a decision adopted by ESA.<sup>56</sup> In Norway, this limitation of the competences of the Norwegian Competition Authority and Norwegian courts is set out in Section 8 of the EEA Competition Act.<sup>57</sup> Whether it also applies similarly to *Commission decisions*, meaning that a Norwegian court has to recognize them as binding in follow-on damages cases, is less certain. The purpose behind Article 110 of the Main Part of the EEA Agreement certainly suggests an affirmative answer, but the text of the provision is limited to cross-pillar enforceability of decisions by the Commission and the EFTA Surveillance Authority which impose pecuniary obligations.<sup>58</sup> From the perspective of the EFTA States, the key question is whether the courts of the EU Member States (and, ultimately, the ECJ) are prepared to recognize similar decisions from ESA as binding in follow-on damages cases raised before them (principle of reciprocity). The fact that the wording of Section 8 of the EEA Competition Act is limited to ESA decisions certainly suggests that the Norwegian legislator is of the view that decisions from the Commission are *not* binding on Norwegian courts. To our knowledge, the question of “cross-pillar” binding effect of decisions from the Commission and ESA, respectively, has never been tried in the EU or in any of the EFTA States. Hopefully it may be clarified as part of the ongoing EEA negotiations concerning the Damages Directive.

*Decisions of NCAs of one of the two other EFTA States party to the EEA Agreement and NCAs of the EU Member States* are not legally binding on Norwegian courts faced with follow-on damages claims. Another novel provision to potentially be added to the Norwegian Competition Act will nevertheless acknowledge such decisions as *prima facie* evidence of a competition law infringement, in accordance with Article 9 (2) of the Damages Directive.<sup>59</sup> Yet the Commission’s original proposal for final decisions of NCAs from other EEA States to be recognized as binding is only considered constitutionally acceptable in Norway insofar as final decisions from the Norwegian Competition Authority are

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<sup>56</sup> Article 16 (1) of Protocol 4 to the SCA.

<sup>57</sup> “When the courts rule on agreements, decisions or practices under Article 53 or Article 54 of the EEA Agreement which are already the subject of a decision by the EFTA Surveillance Authority, they cannot take decisions running counter to the decision adopted by the EFTA Surveillance Authority.”

<sup>58</sup> To complicate matters further, Norway stated in a unilateral declaration to the Final Act of the EEA Agreement, that the Norwegian Constitution does not allow for direct enforceability of decisions by EU institutions (such as the Commission and the ECJ). In response, the EU declared that the Commission would keep the situation ‘under constant review’ and ‘initiate consultations’ should problems arise. However, as any undertaking with a wish to operate in the internal market has no choice but to comply with final decisions from the Commission, no such problems have arisen.

<sup>59</sup> See the Consultation Paper (fn. 14), p. 47.

given similar status in the EU Member States (principle of reciprocity).<sup>60</sup> As this is not required by the final version of the Directive (and thus not part of the negotiations concerning the incorporation of the Directive into the EEA Agreement), it is clear that the Norwegian legislator cannot (and will not) go beyond the minimum requirement to acknowledge decisions from NCAs of the EU Member States as *prima facie* evidence.<sup>61</sup> Given the fact that the EFTA-pillar only consists of Norway, Iceland and Liechtenstein, the practical effect of a more ambitious approach within the EFTA-pillar alone will be marginal. It is not even contemplated by the Ministry in its recent Consultation Paper.<sup>62</sup>

It may be further added here that the division of jurisdiction between the ECJ and the EFTA Court under the two-pillar-structure of the EEA will most likely require an adaptation of Article 9 (3) of the Directive, to the effect that a Norwegian court which doubts whether a final decision from the NCA of an EU Member State is based on a correct understanding of the common EU/EEA competition rules may only refer the question to the EFTA Court under Article 34 SCA, and not to the ECJ.<sup>63</sup> Conversely, a national court of an EU Member State which questions the interpretation of Article 53 or Article 54 EEA laid down in a final decision from the Norwegian Competition Authority will probably have to refer the matter to the ECJ, and not to the EFTA Court.<sup>64</sup>

### 5.3 Follow-on Damages Cases so far – *DB Schenker/Posten Norge, Bastø Fosen and Nye Kystlink*

Following (presumably) the trend in most EEA countries – and in spite of ESAs genuine desire to share the burdens of enforcement of the EEA competition regime with national authorities in the EFTA states parties to the Agreement – relatively few follow-on actions for damages based on breaches of Articles 53 and 54 EEA have been raised before Norwegian courts to date.

This is perhaps unsurprising, however, as whilst both the Commission, ESA and the Norwegian Competition Authority entertain a great many complaints into alleged breaches of the EEA competition

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<sup>60</sup> *Ibid*, p. 9.

<sup>61</sup> Note that if the Damages Directive is incorporated into the EEA Agreement without accompanying full and symmetrical decentralization of public enforcement in both the EU-pillar and the EFTA-pillar of the EEA, the EU Member State NCAs will not be competent to make any decision establishing an infringement of Articles 53 or 54 EEA. Still, it is not difficult to imagine a follow-on damages case in Norway based on a final decision from the NCA of an EU Member State which establishes an infringement of *Articles 101 or 102 TFEU*. Although it is hardly a given that Article 9(2) of the Damages Directive will apply to Norwegian courts in such a scenario (this ought to be clarified before the Directive is incorporated into the EEA Agreement), this will presumably not matter so much to Norwegian courts who will nevertheless take such a decision into consideration and, presumably, acknowledge it as *prima facie* evidence of an infringement also of Articles 53 or 54 EEA (as long as the case has an EEA-dimension).

<sup>62</sup> See fn. 14.

<sup>63</sup> Political reasons strongly suggest that none of the EFTA States will make use of Article 107 EEA and enable their courts to ask the ECJ for preliminary rulings on the interpretation of EEA law.

<sup>64</sup> If the EFTA Court has been involved in the case by way of an Advisory Opinion under Article 34 SCA, the net result may be a *de facto* ECJ-review of the EFTA Court's interpretation of Articles 53 or 54 EEA.

rules, these will naturally not always lead to a finding of infringement in the end. There are also relatively few final decisions establishing infringements to base such damages claims on – not to mention the fact that not all of ESA’s (or the Commission’s) decisions in such matters might be relevant in a Norwegian context, either. From what we were able to draw from its Annual Reports, for the past ten years, ESA has had approximately 10 pending cases each year (notifications, complaints and ex officio investigations).<sup>65</sup> Since 1994, ESA has issued 10 statements of objection, 2 prohibition decisions without fines, 2 prohibition decisions with fines and 1 commitments decision. Beyond this, cases have been closed after withdrawal of the complaint or because no infringement (or no evidence of such) has been found. In several cases such closures have come after amendments to the potentially anti-competitive practices in question.

Although perhaps not directly relevant to the aims of the report, the number of infringement decisions reached by the Norwegian Competition Authority nevertheless further illustrates the rather scant basis for follow-on claims in Norway more generally. From 2007-2014, the Norwegian Competition Authority found 12 infringements of Sections 10 (collusion) and/or 11 (abuse of dominant position) of the Norwegian Competition Act.<sup>66</sup> Very few of the Competition Authority’s decisions or investigations have triggered follow-on damages actions – and where they have, all of the cases seem to have ended up being settled out of court.<sup>67</sup>

To our knowledge, only three follow-on cases appear to have been raised before Norwegian courts based on ESA decisions and/or investigations into infringements of Articles 53 and/or 54 EEA.

A *fourth* potential follow-on case was the *Fjord Line*-case, which concerned alleged breaches of (amongst other things) Article 53 and/or 54 EEA, following the exclusion of the ferry company Fjord Line from using the Norwegian port of Kristiansand. As a prerequisite for use, the Port Authority required all ferry operators to provide year-round transport for passengers and cargo. Since Fjord Line used high speed catamarans which do not carry cargo and are also unsuitable for sailing in winter conditions, access to use the port was denied. ESA commenced investigations in-

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<sup>65</sup> ESAs Annual Reports are available at: <http://www.eftasurv.int/press--publications/annual-reports/archives/>. This is naturally not counting the number of cartel cases with pronounced cross-border effects and abuse of dominance cases affecting both the EFTA side and at least one EU Member State which are passed on to the Commission by ESA according to the division of competition competences set out in Protocol 23 of the EEA Agreement (as mentioned in Section 2 above).

<sup>66</sup> The Annual Reports of the Norwegian Competition Authority may be viewed here (Norwegian only): <http://www.konkurransetilsynet.no/nb-NO/publikasjoner/arsmeldingar/>

<sup>67</sup> E.g. the *ABB/Siemens*-case from the late 1990’s, concerning price collusion on power-plant transformers; and the *Asphalt*-case from 2007, which led to a follow-on damages action raised by the Norwegian Public Roads Administration against several private contractors involved in the construction of several bridges. On referral from the Norwegian Competition Authority, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) reached a decision imposing fines on the contractors for market sharing, price and tendering collusion. All four of the companies eventually agreed to an out of court settlement, paying NOK 6 million in damages each.

to alleged competition infringements caused by this denial following a complaint from Fjord Line in November 2008, yet decided to close the case only a year later following a decision by the Norwegian Coastal Administration obliging the port to grant Fjord Line access in the future. Fjord Line subsequently brought a case before the Kristiansand District Court, seeking to establish grounds of liability for a damages claim. In its decision from August 2010, although the District Court strongly hinted that it considered the Port Authority's behaviour to be anti-competitive, the material breach which paved the way for the subsequent follow-on damages action was in fact unlawful denial of sailing rights and access to the port under the Norwegian Harbour Act.<sup>68</sup> The same conclusion was reached on appeal by the Agder Court of Appeal, although here the anti-competitive behaviour and potential infringements of Articles 53 and 54 EEA were played down even further.<sup>69</sup> The damages claim was eventually settled out of court in 2013, for an amount believed to be in the region of NOK 45 million.

The *DB Schenker/Posten Norge*-case followed in the wake of an ESA decision from July 2010 concerning an infringement of Article 54 EEA by Posten Norge (the Norwegian national post service) for abusing its dominant position in the business-to-consumer parcel market in Norway between 2000 and 2006, for which it was fined EUR 12.89 million.<sup>70</sup> ESA's decision was subsequently upheld on appeal by the EFTA Court in April 2012, although the fine was reduced by 20%.<sup>71</sup> DB Schenker subsequently brought a follow-on action for NOK 600 million in damages against Posten Norge in Norway, but the case was settled for an undisclosed amount in July 2015, before it ever came to court.

The two other Norwegian follow-on cases both arose from the same ESA decision in the *Color Line*-case.<sup>72</sup> In 1991, Color Line – a Norwegian ferry company operating routes from Norway to Denmark, Germany and Sweden – entered into an agreement with Strömstad harbour in Sweden, thereby securing long-term exclusive access to its harbour facilities. Given the lack of alternative ferry harbours in the area, Color Line became the only provider of short haul passenger ferry services with tax-free sales between Norway and Sweden. The case was brought to ESA's attention at the beginning of 2006, following an initial complaint by one of Color Line's competitors (Kystlink) to the Norwegian Competition Authority. ESA carried out a dawn-raid of Color Line's offices in April of the same year, and a statement of objections was issued in December 2009. In its final decision of 14 December 2011, the exclusivity clause in the agreement was deemed to restrict competition and constitute an

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<sup>68</sup> TKISA-2009-137542, 3 August 2010.

<sup>69</sup> LA-2010-82438, 18 July 2011.

<sup>70</sup> EFTA Surveillance Authority Decision of 14 July 2010, Case No. 34250 Norway Post/Privpak (available at <http://www.eftasurv.int/competition/competition-cases/competition-cases-archive/>). The abuse identified in the decision concerned exclusivity agreements with major retail and petrol station chains in Norway, as well as the pursuit of a renegotiation strategy likely to limit the willingness of chains to negotiate and conclude agreements with Norway Post's competitors. ESA started its investigations in 2002 following a complaint made by DB Schenker.

<sup>71</sup> Case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 246.

<sup>72</sup> EFTA Surveillance Authority decision of 14 December 2011, Case No. 59120 Color Line.

abuse of Color Line's dominant market position in breach of both Articles 53 and 54 EEA. The infringement was considered to have lasted from the entry into force of the EEA Agreement in 1994 until December 2005, when Kystlink was finally granted access to use the harbour. Color Line was fined (and subsequently paid) an ESA-record EUR 18.8 million. The decision was not challenged before the EFTA Court.

Two of Color Line's Norwegian competitors – Bastø Fosen and Kystlink – had unsuccessfully sought to establish ferry links between Norway and Strömstad harbour at different points in time between 1997 and 2005.<sup>73</sup> Less than a year following ESA's final decision in the case, both companies therefore filed separate and considerable damages claims of NOK 991 million and 1.3 billion respectively before the Oslo District Court, for (alleged) losses connected to the competition infringements, building directly on ESAs findings.

The *Bastø Fosen*-case came to court first, and both the District Court and the Borgarting Court of Appeal dismissed the claim as out of time.<sup>74</sup> According to Section 9 of the Norwegian Limitation Periods Act, claims for damages are subject to a general limitation period of three years from the date on which the injured party *obtained or should have himself acquired necessary knowledge of the damage*.<sup>75</sup> This has been consistently interpreted by the Norwegian Supreme court as meaning that time will start running when the claimant either had or should have acquired such knowledge as to encourage him to initiate proceedings with a view to a positive outcome.<sup>76</sup> Although the mere possibility of a positive result is not enough,<sup>77</sup> it is sufficient that the claimant had such information that – in spite of any uncertainty as to how his claim actually might fare – he had reasonable grounds for bringing his claim before the courts.<sup>78</sup> Crucially in the present context, the duty to investigate so as to acquire necessary knowledge is triggered as soon as the court believes that the claimant had adequate grounds for suspecting that a legitimate claim might exist.

Bastø Fosen initiated proceedings on 13 December 2012. The question for the courts was therefore whether the claimant knew or should have sought to acquire the necessary knowledge connected to the exclusivity clause and its anti-competitive effects before or after 13 December 2009. Bastø Fosen argued that the prerequisite knowledge was not – and could not have been – acquired before ESA

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<sup>73</sup> Bastø Fosen started planning a route between Sandefjord and Strömstad in 1997, but had its application for access turned down by the Strömstad Port Authority in 1998 (allegedly) for “traffic and environmental reasons”. Kystlink had started looking into the possibility of using Strömstad in 2003. Although its initial advances were rebuffed, as mentioned above, the company was finally granted access in 2005.

<sup>74</sup> TOSLO-2012-203595 (decision of 21 June 2013); LB-2013-178315 (decision of 22 September 2014).

<sup>75</sup> Official (and unofficial) translated English versions of many Norwegian statutes – including the Limitation Periods Act – may be found at: [https://lovdata.no/info/information\\_in\\_english](https://lovdata.no/info/information_in_english).

<sup>76</sup> See e.g. Rt-1967-1182; Rt-1975-82; Rt-1992-64; and Rt-1996-1134.

<sup>77</sup> Rt-1998-587.

<sup>78</sup> Rt-2001-1702.

reached its final decision in the case on 14 December 2011, alternatively (and at the earliest) when the statement of objections was issued on 16 December 2009.

Bastø Fosen's arguments were further bolstered by written observations presented to the Court of Appeal by ESA, in one of only two welcome uses of the *amicus curiae* procedure set out in Article 15(3) of Chapter II, Protocol 4 SCA, so far.<sup>79</sup> In its written observations, ESA focused on: the importance of private enforcement in the EEA, and the significant contribution this can make to the maintenance of effective competition; the (arguably excessive) difficulties facing private parties in obtaining evidence necessary to support an action for damages if they are unable to base their claim on a final infringement decision of a competition authority – the latter naturally being much better placed to uncover and prove infringements given their wide-ranging investigative powers; that the starting point for national limitation periods for follow-on actions for damages, or their length, should therefore be such that potential victims can bring actions for damages after an infringement decision by an NCA or ESA becomes final (thereby also reflecting the position taken in the Damages Directive);<sup>80</sup> and, given that Section 11 of the Norwegian Limitation Period Act provides for damages claims to be brought within one year of a final decision in *criminal proceedings* in competition cases, the potential lack of equivalence with the limitation period at issue in the case.

Borgarting Court of Appeal – upholding the essence of the District Court's decision – disagreed with both Bastø Fosen and ESA's contentions. The Court found that enough indications were present by 2008 to trigger Bastø Fosen's duty to investigate a potential, legitimate claim, thereby effectively time-barring the follow-on action.<sup>81</sup> Referring exclusively to the ECJ's decision in *Danske Slagterier*, the Court rejected any contention that such an interpretation and application of Section 9 of the Limitation Act might be at odds with the EEA principles of equivalence and/or effectiveness.<sup>82</sup> Further still, the Court stated that in reaching its decision, account needed to be (and had been) taken of recent legislative initiatives in both the EU (i.e. the Damages Directive) and at national level. Whilst the case had been making its way through the court system, Section 34 of the Norwegian Competi-

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<sup>79</sup> This provision – which is incorporated into Norwegian law by Section 9(2) of the Norwegian EEA Competition Act – allows ESA to submit written observations on its own initiative to Norwegian courts where the coherent application of Articles 53 and/or 54 EEA so require. ESA has issued a Notice on Co-operation with the courts of the EFTA States in the application of Articles 53 and 54 EEA, which further sets out its policy regarding the application of *amicus curiae* observations. The only other case in which this procedure has been used was in the “*Asphalt-case*” (see fn. 67), where ESA submitted observations to the Borgarting Court of Appeal concerning the interpretation of the effect on trade criterion under Articles 53 and 54 EEA.

<sup>80</sup> ESA also seemed to hint strongly to the fact that the statement of objections – although merely a preliminary step in the investigation, which may also contain matters not pursued in the final decision (as was also the case here) – might be considered a reasonable point in time for the limitation period to start running, in light of the information which a private party could glean from it.

<sup>81</sup> The Court of Appeal nevertheless impliedly accepted ESA's arguments in its *amicus curiae* observations to the effect that time could not start running as soon as various preliminary steps of ESA's investigations are taken (such as a “warning letter” sent from ESA to Bastø Fosen in January 2007, and the dawn-raid in 2006).

<sup>82</sup> Case C-445/06, *Danske Slagterier*, EU:C:2009:178.

tion Act had been amended so as to introduce a new limitation period applicable to follow-on damages claims. The amendment – which entered into force on 1 January 2014, and was therefore not directly applicable in the case – made it possible to apply for special leave to proceed with such a claim up to one year following a final infringement decision reached by the Norwegian Competition Authority (thereby bypassing the general 3 year limitation period in Section 9 of the Limitation Period Act). Although the *travaux préparatoires* indicated that the amendment had been introduced so as to make it easier for private parties to pursue such claims, especially in light of the difficult evidentiary situation presented by such cases, this fact did not appear to hold much sway on the Court’s findings in the end.<sup>83</sup> The Norwegian Supreme Court rejected an application for leave to appeal in the case.<sup>84</sup>

In light of the final outcome in *Bastø Fosen*, the result in the first round of *Nye Kystlink* – the second damages claim following on from ESA’s decision in *Color Line* – certainly seemed predictable.<sup>85</sup> As mentioned previously, Kystlink had applied to use Strømstad harbour in 2003, and eventually gained access for its ferries in 2005. It nevertheless experienced significant difficulties along the way: In addition to practices related to the exclusivity clause which had kept competitors out of Strømstad harbour for so long, a ferry which Kystlink had been due to charter for use in Strømstad was “snapped up” by Color Line at the last minute, at a price which seemed to heavily outweigh any potential profit from use. Other allegations included subsequent use of the chartered ferry as a “fighting ship” by Color Line, indicative of a predatory pricing scheme. In 2006, a mere 6 months after making its complaint concerning these potential breaches of Articles 53 and/or 54 EEA to the Norwegian Competition Authority (and ultimately ESA), Kystlink went bankrupt. A new company – Nye Kystlink – was eventually set up to pursue the damages claim, and filed for conciliation proceedings at Oslo District Court on 14 December 2012.

Relying heavily on the Court of Appeal’s findings in *Bastø Fosen* concerning the interpretation and application of Section 9 of the Limitation Period Act, the Oslo District Court ruled the damages action as out of time on all counts. In doing so, it placed a strong emphasis on the level of knowledge it believed that Kystlink had already accrued at the point of time when the initial complaint was made to the Norwegian Competition Authority in December 2005, well before the start of the general 3-year limitation period. The decision has been appealed to the Court of Appeal.

Taken at face value, the decisions in *Bastø Fosen* and *Nye Kystlink* might easily be read as somewhat unremarkable (albeit strong) assertions of national procedural autonomy, in a situation where there

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<sup>83</sup> Official Norwegian Report (NOU) 2012:7 *Mer effektiv konkurranselov*, of 14 February 2012, p. 180; Draft legislative bill Prop.75 L (2012-2013) *Endringer i konkurranseloven*, of 15 March 2012.

<sup>84</sup> HR-2015-102-U (decision of 19 January 2015).

<sup>85</sup> Oslo District Court, 14-039745TVI-OTIR/03, decision of 30 November 2015.

are (as of yet) no specific EEA rules governing the limitation periods in question. The (EU/EEA-)age-old balance to be struck between legal certainty and equivalence/effectiveness is naturally often a difficult one, and the issues it gives rise to are by no means particular to Norwegian courts alone. Yet whilst this might go some way in explaining the lack of any real or convincing explanation as to how the EEA principles of effectiveness and equivalence and recent EU and national legislative moves were in fact taken into account by the courts in reaching their decisions, it certainly cannot excuse it. In our view, this is where the main problems from the cases arise.

Firstly, it cannot have been lost on the courts that incorporation of the Damages Directive would necessarily entail several fundamental changes to the Norwegian limitation period in question. Whilst extending the general limit from three to five years would probably only have been of relevance in the *Bastø Fosen*-case,<sup>86</sup> the rule by which the limitation period shall be suspended or interrupted until at least one year after a decision by a competition authority is final or proceedings are otherwise terminated would certainly have been relevant to both claims.<sup>87</sup> Indeed, as we have seen, the latter point has subsequently been incorporated into Norwegian law by virtue of Section 34 of the Competition Act, thus illustrating the Norwegian legislature's growing appreciation of the difficulties faced by private parties when attempting to pursue damages claims based on competition infringements. The subjective/discretionary element in Section 9 of the Limitation Act – whereby time will start running as soon as the claimant ought to have carried out investigations so as to acquire knowledge of an infringement – would also presumably have to be amended, so as to reflect the factual and constructive knowledge requirements set out in Article 10(2) (i.e. that the “claimant knows, or can reasonably be expected to know, of the infringement”). It is rather difficult therefore to see how these matters were taken into account, if at all, in the courts decisions.

Secondly, the reference to the ECJ's decision in *Danske Slagterier* as the sole grounds for contending that the EEA principles of effectiveness and equivalence were upheld in these cases appears somewhat misplaced. Although it is certainly true that the ECJ held here that a general 3-year time limit for raising a follow-on action under national law was reasonable, and not liable in itself to make it impossible or excessively difficult in practice to exercise rights conferred by EU/EEA law, the analogies between the cases would seem to end here. *Danske Slagterier* concerned limitation periods in damages claims following on from a Commission infringement decision related to a Member State's failure to correctly implement and apply EU directives under what is now Article 258 TFEU. On average, such proceedings will usually take around 2 ½ years to complete. By comparison, Commission investigations into competition infringements take more than 4 years on average to complete – and

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<sup>86</sup> Article 10(3) of the Damages Directive.

<sup>87</sup> Article 10(4) of the Damages Directive.

ESA in *Color Line* took more than 5 ½ years to reach its final decision. Which also goes some way towards explaining why – unlike in competition infringement proceedings – there is (as of yet) no requirement under EU law for national limitation periods to be either interrupted or suspended whilst Article 258 TFEU proceedings are being conducted.<sup>88</sup> The direct (or even implied) relevance of the ECJ's findings in this case may therefore be questioned.

Thirdly, and in any event, a number of other questions concerning the equivalence and/or effectiveness of the limitation period at issue in *Bastø Fosen* and *Nye Kystlink* which were not addressed by the ECJ in *Danske Slagterier* also remain unanswered. Possible equivalence concerns might for example be attached to the differing limitation periods which will apply depending on which form of sanction the competition authorities choose to pursue in a given case (i.e. administrative or penal). As a result of its application, the conditions for reparation under Section 9 of the Limitation Periods Act are clearly less favourable than those which would have been applicable to a damages action following on from penal proceedings under Section 11. Although unstated in the *travaux préparatoires*, it seems reasonable to presume that the amendment to Section 34 of the Competition Act in 2014 was also brought about (in part, at least) with a view to ensuring equivalence in this regard.

Certain other issues relating to effectiveness may also have been overlooked in the decisions, particularly regarding the legal certainty of the claimants in the cases. One point concerns application of the discretionary/subjective powers vested in Norwegian courts to determine at which point in time the duty to investigate so as to acquire knowledge of an infringement kicks in, thereby making it difficult to foresee in advance when the limitation period would start running. More importantly, however, is awareness of the alternative course of action effectively proposed by the Norwegian courts by their decisions: Imagine if the damages claims had been raised at an earlier point in time – say in 2008 – and hence within the limitation period. In order to avoid potentially reaching a decision which would conflict with a decision contemplated by ESA (and assuming that it wishes to uphold Norway's EEA obligations), the national court would clearly be obliged to interrupt the case until a decision was reached.<sup>89</sup> Yet raising a damages action at this stage would pose significant risks for the claimants: In the event that ESA were to close its case before reaching a final decision – or if it arrived at a conclusion that no infringement had taken place – claimants would face the very real prospect of having their claims dismissed altogether for lack of merit, and being lumbered with the costs.

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<sup>88</sup> As we recall, Article 16 of Regulation 1/2003 prohibits national courts from taking decisions running counter to Commission competition infringement decisions. Where the Commission is investigating, national courts will usually therefore be obliged to stay proceedings pending the outcome. The same rule applies to national courts in Norway as far as competition infringement decisions of ESA are concerned, by virtue of Article 16(1), Chapter 2, Protocol 4 SCA.

<sup>89</sup> Article 16(1), Chapter 2, Protocol 4 SCA; and Section 16-18 of the Civil Disputes Act (*Tvisteloven*).

Finally, as recalled by ESA in its *amicus curiae* observations, if there are any doubts about the interpretation and/or application of EEA law – particularly concerning the remit of the principles of equivalence and practical possibility – Norwegian courts may always ask the EFTA Court for an advisory opinion.<sup>90</sup> In light of the at times rather strained relationship between the Norwegian courts and the EFTA Court more generally – coupled with the fact that Norwegian courts to date have yet to refer any questions concerning the remit of EEA general principles whatsoever to the EFTA Court – it is perhaps not very surprising (but no less regrettable) that no referral was made in any of the cases.<sup>91</sup>

Several difficult issues therefore remain unanswered by the decisions in Norwegian follow-on damages cases so far, which one can only hope will be more fully addressed by the Court of Appeal in its pending decision in *Nye Kystlink*. This might prove particularly important as long as the passage of the Damages Directive remains stuck in the EEA Committee. More cases are also surely to follow in the future in light of the various competition investigations and formal proceedings currently pending before ESA,<sup>92</sup> although many of these will hopefully benefit from the legislative amendments introduced in 2014 which now open for the possibility of raising such claims out of time.

#### 5.4 Access to documents

The starting point when examining third party access to documents in the possession of the Norwegian Competition Authority is Section 3 of the Norwegian Freedom of Information Act, which states that:

“Case documents, journals and similar registers of an administrative agency are public except as otherwise provided by statute or by regulations pursuant thereto”.

As a main rule, documents of the NCA are public. Unsurprisingly, however, there are exceptions outlined in the Norwegian Competition Act. Firstly, the Freedom of Information Act does not apply to

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<sup>90</sup> The advisory opinion procedure under Article 34 SCA is based to a large extent on the preliminary ruling procedure under art. 267 TFEU, but with a number of significant differences: Firstly, as their name suggests, advisory opinions are not legally binding. Secondly, national courts (of last instance or otherwise) have no duty to refer questions concerning the interpretation and application of EEA law to the EFTA Court – although an interesting theoretical discussion has emerged in the last few years where it has been claimed that such a duty might be seen to flow implicitly from *inter alia* the EEA principle of loyal cooperation. Compare the views of EFTA Court President C. Baudenbacher, “EFTA-domstolen og dens samhandling med de norske domstolene”, (2013) 8 *Lov og Rett*, 515-534; and Norwegian Supreme Court Justice A. Bårdsen, “Noen refleksjoner om Norges Høyesterett og EFTA-domstolen”, (2013) 8 *Lov og Rett*, 535-546.

<sup>91</sup> For more generally on the relationship between Norwegian courts and the EFTA Court, see Fredriksen and Franklin (fn. 1), pp. 671-676.

<sup>92</sup> ESA started investigations into alleged infringements of Article 54 EEA by Telenor in 2012, with formal proceedings opened in 2014; formal proceedings were opened against Sandefjord Municipality and Color Line for breaches of Article 53 and 54 EEA in 2015 (although commitments may well be reached in this case); and in 2014, ESA carried out a dawn-raid at the premises of the Norwegian airline company Widerøes Flyveselskap AS – the investigation into possible anti-competitive conduct in this case is still ongoing.

*pending competition cases* – be it cases concerning collusion, abuse of a dominant position or merger control.<sup>93</sup>

Secondly, even after closure of a case, the Competition Act prohibits disclosure of *information received in relation to a leniency application*. Section 27 establishes absolute confidentiality of leniency statements, meaning that the leniency applicant's own participation in the infringement is confidential and not subject to disclosure at any time. The prohibition was introduced following a revision of the Competition Act in 2014. Prior to this, access to this type of information had been similar to the approach established in *Pfleiderer* by the ECJ, based on a discretionary case-by-case assessment carried out by the Norwegian Competition Authority. The Committee revising the law nevertheless considered this pragmatic approach as unpredictable, arguing that it created uncertainty amongst cartel members and thus disincentivizing them to step out of the cartel.<sup>94</sup> The Ministry opined that disclosure of the identity of the leniency applicant could discourage cartel members from cooperating, *inter alia* because it could make applicants a target for damages claims.<sup>95</sup> To promote public enforcement of cartel activity through mechanisms such as leniency programmes, it was therefore decided to deny access to this information.

Not only leniency statements are exempted from the Freedom of Information Act. According to section 26(1) of the Norwegian Competition Act, all information received by the Norwegian Competition Authority as part of a leniency application shall *initially* be exempted from disclosure at all times. The outcome of the leniency application is of no relevance.<sup>96</sup> The exemption applies to all documents which are "received" by the Competition Authority as part of an application for leniency, i.e. the leniency application itself and its appendixes, but not *other documents of the case* (such as documents obtained by the Competition Authority itself as part of its investigations).<sup>97</sup> However, with the exception of the abovementioned privileged information concerning the applicant's own participation in the infringement, information received by the Competition Authority as part of an application for leniency may be disclosed to third parties "unless such access will appear unreasonable to those to whom the information pertains".<sup>98</sup> This typically concerns information about the other cartel members' partaking in the cartel, but also other sensitive information about the leniency applicant which is not part of its leniency statement may be covered.<sup>99</sup> The disclosure has to be assessed on a case-

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<sup>93</sup> Section 26 of the Norwegian Competition Act. The EEA Competition Act does not include any rules on access to documents. Unofficial English translations of both acts may be found at the homepage of the Norwegian Competition Authority (<http://konkurransetilsynet.no/en/>).

<sup>94</sup> Draft legislative bill No. L 75 (2012-2013), p. 131.

<sup>95</sup> *Ibid.* pp. 125-130.

<sup>96</sup> Draft legislative bill No. L 75 (2012-2013), p. 152.

<sup>97</sup> *Ibid.*

<sup>98</sup> Section 27(a)(2)(1) of the Competition Act.

<sup>99</sup> Draft legislative bill No. L 75 (2012-2013), p. 127.

by-case basis. According to the Competition Act's *travaux préparatoires*, a genuine need for access to documents in order to pursue a claim for damages against a leniency applicant *can* justify disclosure, but the Ministry took care to emphasise that the effectiveness of the leniency programme suggests that the Competition Authorities ought to be careful in making use of this possibility.<sup>100</sup> Thus, the threshold for disclosure is higher than disclosure according to the Norwegian Freedom of Information Act.

In the event that the leniency applicant *consents* to disclosure, then the assessment becomes a different one. Yet even in such cases the Competition Authority may refuse to disclose information to third parties. This is likely to be quite difficult to justify, however, at least after the case has been closed.<sup>101</sup>

Thirdly, even in circumstances where the Freedom of Information Act applies (i.e. in closed cases without any documents received in relation to a leniency application), disclosure may still be denied under the general exemptions found in the Freedom of Information Act itself. Of particular relevance in competition cases is the general ban against disclosure of technical devices, production methods, business analyses and calculations and any other industrial and trade secrets, if these are of such a nature that others might exploit them in their own business activities.<sup>102</sup>

Similar to what is outlined in Article 7(1) of the Damages Directive and Article 16(a) of Regulation 773/2004, special rules apply to *the other participants to the alleged cartel*, as they are considered as parties to the case in which the application for leniency has been made. According to section 26(2) of the Competition Act, undertakings or persons subject to investigation by the Competition Authority shall upon request be given access to the documents of the case, insofar as this does not cause harm or risk to the investigation, or any third party. This includes information received by the Competition Authority as part of an application for leniency. However, Section 27a(1) makes clear that a party or a party's representative that obtains knowledge of information that stems from leniency applications and which is regarded as confidential under Section 27 (i.e. information from the leniency applicant concerning the applicants own participation in the infringement) has an obligation to maintain confidentiality of this information, and is only allowed to use it when this is necessary to protect the party's rights of defence. Such information cannot therefore be used for any other purposes, such as for example a damages claim against the applicant. In the event that the Damages Directive is to be implemented into Norwegian law, the same condition will apply to information contained in settlement submissions.

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<sup>100</sup> Draft legislative bill No L 75 (2012-2013), p. 152.

<sup>101</sup> *Ibid*, p. 153.

<sup>102</sup> Found in Section 19 of the Norwegian Public Administration Act, which applies pursuant to section 13 of the Freedom of Information Act.

On the basis of what we have seen so far, the Norwegian rules on access to and disclosure of information contained in the Competition Authority's file would therefore appear to conform to a great extent with those found in Regulations 1049/2001 and 773/2004, and the Damages Directive. In our view, however, one might raise the question more generally as to whether the importance of protecting leniency information in Norway is somehow exaggerated. First of all, in relation to the extent this information allegedly assists a claimant, one must remember that it is collected for the purpose of investigating an alleged cartel according to Article 10 of the Norwegian Competition Act, and concerns the role of the immunity applicant in addition to the other cartel members in the cartel. Even if it proves that the applicant has infringed Article 10, this information will not necessarily assist the claimants in proving that they have suffered a loss arising from and attaching them to that same cartel activity. In addition, considering that many of the violations of the cartel prohibition are object restrictions, the assumption that leniency documents will greatly assist claimants, and that failure to protect them might discourage undertakings from coming forward, may be questionable. If it is sufficient for the immunity receiver to confess to an object restriction – providing no more information than the fact that they were in a cartel, but that this had no effect on the market – then these protected leniency documents are unlikely to contain evidence that will help parties seeking to establish that the cartel was harmful. A similar line of reasoning may apply to settlement submissions. In addition to the nature of the illegal behaviour, the investigative procedure conducted by the NCA may also affect the value of the evidence provided by a cartel participant. The possibility to settle a cartel case is intended to become part of the Norwegian Competition Act in 2016.<sup>103</sup> The proposed procedure is identical to the one in the EU, and will allow for a cartel participant to enter a settlement with the NCA provided it confesses to its role in the cartel. The cartel participant will then be eligible for a fine reduction of 10 per cent. A settlement at an early stage of the investigation is unlikely to contain any detailed evidence of significant importance for third parties who will have to prove in a follow-on damages case that the cartel was harmful.

### 5.5 Other issues relating to liability for damages: Quantification, Joint and Several Liability and the “Passing-On” Defence

The following section will touch upon other various issues raised (more theoretically, perhaps) by the prospect of follow-on damages claims before Norwegian courts.

In light of their outcomes, it is perhaps unsurprising to find that the issue of quantum of damages was not touched upon in any of the three cases mentioned in Section 5.3 above. Norwegian law adheres to the principle of full compensation.<sup>104</sup> As a result, a victim of an infringement of the EEA

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<sup>103</sup> <https://www.regjeringen.no/contentassets/666125dcda744e6392885fbea3078f28/forslag-til-lovendringer.pdf>

<sup>104</sup> See Section 4-1 of the Norwegian Act of 13 June 1969 no. 26 on Compensation.

competition rules shall be compensated in full for the loss suffered, the purpose of the compensation being to restore the situation as if the infringement had never happened. Thus, a claim for compensation may include not only damages for actual loss (*damnum emergens*), but also loss of profit (*lucrum cessans*), plus interest. Exemplary or punitive damages are alien to the Norwegian legal order. Norwegian law on compensation for infringements of EEA competition law therefore appears fully in line with the requirements of the principles of effectiveness and equivalence as set out by the ECJ in *Manfredi*,<sup>105</sup> and Articles 3(2) and 3(3) of the Damages Directive will presumably have little (if any) impact in Norway.<sup>106</sup>

Joint and several liability is already established as the main rule in Norwegian law.<sup>107</sup> Article 11 of the Damages Directive nevertheless provides that immunity recipients will only be jointly and severally liable for the losses the undertaking has caused to its own direct and indirect purchasers and/or providers. If the cartel has caused harm towards others in addition to the cartel's providers or customers, the immunity recipient is only responsible for a relative part proportionate to the losses directly linked to the undertaking. It is only when the claimants cannot obtain full compensation from the other participants, that the immunity recipient will be held responsible for the whole loss. These specific exceptions to joint liability relating to entities granted leniency – as well as those pertaining to small and medium sized companies – are foreign to Norwegian law, and would therefore presumably require specific implementing national measures. That said, however, it is rather difficult to imagine any major obstacles to their potential implementation, especially since there are no pre-existing codified exceptions in this field of Norwegian law.

Yet even if the implementation of the solution chosen in the Directive does not meet any regulatory hurdles, to our mind it still may provoke some critique concerning its content. The Directive emphasizes the safeguarding of an efficient interplay between public leniency regimes and private enforcement through damages claims.<sup>108</sup> However, even if the Directive limits the liability of an immunity recipient to maintain incentives to “blow the whistle”, this liability read together with the rules on quantification of harm and limitation periods implies that the immunity recipient still risks facing damages claims of an unknown number and size.

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<sup>105</sup> Case C-295/04, *Manfredi* ECLI:EU:C:2006:461. They also appear fully in line with the EU Commission's Staff Working Document (Practical Guide) and Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, OJ C (2013) 167.  
the Treaty on the Functioning of the European Union

<sup>106</sup> In the event that the Damages Directive is to be incorporated into Norwegian law, then – more for the sake of clarity than mere possibility – the Ministry does intend to codify the claimant's right to payment of interest (Consultation Paper, fn 14 above, p. 20).

<sup>107</sup> See Section 5-3 (1) of the Compensation Act.

<sup>108</sup> See *inter alia* recital 26 of the Damages Directive.

As we recall, the limitation period under the Directive shall be at least five years, starting to run from the moment the infringement has ceased and the claimant knows, or can reasonably be expected to know of the infringement. Further, the Directive provides for no absolute limitation period, but merely states in recital 36 of the preamble that “Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation” – thus emphasizing the protection of the suffering victim, not the immunity recipient, by seemingly encouraging a long limitation period.

The absolute limitation period under Norwegian law is 20 years, which is probably consistent with the Directive.<sup>109</sup> However, this means in turn that the immunity recipient (in theory, at least) risks potential damages claims for cartel activity dating a long way back in time. Predicting the number of potential claims that might be raised becomes more difficult – the same applies to the size of the claims, even if limited for the immunity recipient. Predictability is further lessened and complicated by virtue of the Directive’s quantification system relating to overcharges (as defined in Article 2(20)) and the passing-on defence, which also holds a potentially high risk of arbitrary application in different Member States. Instead of promoting an efficient leniency regime, the uncertainty this may create for cartel participants might very well end up acting as a disincentive for them to step out. Viewed together with the Directive’s rules on non-disclosure of leniency information (as described in section 5.4 above), this leads to questions as to how attractive the “compromise” outlined in the Directive actually is – not only for the immunity recipient, but also for the victims of cartel activity. The immunity recipient on the one hand still risks an unknown number and size of claims before the courts, whilst the victims of cartel activity are denied access to evidence important to prove a claim. As mentioned previously, this importance can probably be questioned. Yet it is hard to escape the feeling that complete immunity from damages claims for the immunity recipients coupled with full access to the leniency files of the NCA for the suffering victims could not have served to remove this double loss.

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<sup>109</sup> Section 9 of the Limitation Periods Act.

## 6. Summary

As we have seen, private (and public) enforcement of European competition law in Norway must be viewed through an EEA law lens in order to be fully comprehended, which adds an extra layer of complexity to the picture. In spite of the Commission's misgivings, decentralised public enforcement of the EEA competition regime has been achieved in the EFTA-pillar. Hopefully a number of other problematic issues – such as the question of full and symmetrical decentralised enforcement in the EEA, and full participation for ESA and NCAs of the EFTA States in the European Competition Network – might also be considered concurrently with the ongoing discussions in the EEA Committee concerning incorporation of the Damages Directive into the EEA Agreement. Fortunately, these matters do not appear to have had a marked impact as yet on the private enforcement of Articles 53 and 54 EEA in Norway, which is fully possible (in theory, if not elaborately pursued in practice) in spite of the lack of direct effect under EEA law. There also certainly seems to be political will to bring the relevant parts of Norwegian administrative, tort and civil procedural law in line with the Damages Directive if and when it becomes a part of EEA law – the groundwork having already been laid by the Government, all Parliament needs to do is to hit the switch. In the meantime, other matters – such as the non-incorporation of Brussels I and Rome II Regulations into the EEA Agreement, the potential difficulties facing claimants in obtaining documents and evidence related to damages claims, and the application of limitation periods for bringing follow-on claims – have and will continue to present both real and theoretical challenges to increased private enforcement in Norway.