



The Competition Rules of the EEA Agreement and Icelandic Law

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Outline

- I. Competition rules of the EEA Agreement and Icelandic law
- II. Public authorities and competition law



EU law and EEA law

- Competition rules of the EEA Agreement mirror the competition rules of EU law

EU law	EEA law
Article 101 TFEU	Article 53 EEA
Article 102 TFEU	Article 54 EEA



The EFTA Court and competition law

- **Judicial Review** in direct actions
 - Actions for annulment of decisions of the EFTA Surveillance Authority (ESA) in the field of competition
- **Judicial Cooperation** with national courts
 - Advisory Opinions from national courts relating to the interpretation of the competition rules



Direct actions

- E-15/10 – *Posten Norge AS v ESA*
 - Abuse of a dominant position
 - A fine of EUR 12.89 million
 - Decision upheld but fine reduced to EUR 11.112 million due to delays in the administrative procedure

- E-12/20 – *Telenor v ESA*
 - Abuse of a dominant position
 - A fine of EUR 111.951 million
 - Decision fully upheld by the Court



Advisory Opinions

- 10 requests for advisory opinions relating to the competition rules of the EEA Agreement
 - E-3/97 *Opel Norge AS* Article 53 EEA
 - E-8/00 *LO* Articles 53 and 54 EEA
 - E-7/01 *Hydro Texaco AS* Article 53 EEA
 - E-4/05 *HOB-vín v ÁTVR* Article 54 EEA
 - E-14/15 *Holship Norge AS* Articles 53 and 54 EEA
 - E-29/15 *Sorpa* Article 54 EEA
 - E-3/16 *Ski Taxi SA* Article 53 EEA
 - E-6/17 *Fjarskipti* Article 54 EEA
 - E-10/17 *Color Line AS* Articles 53 and 54 EEA
 - E-11/23 *Låsenteret AS* Article 54 EEA
- Importance of Judicial Dialogue



Development of Icelandic Competition law

- **Act No 56/1978** on Pricing, Restraints on Competition and Unfair Business Practices
- **Act No 8/1993** on Competition
 - Mostly inspired by EEA law with some modalities
- **Act No 107/2000** amending Act No 8/1993
 - Amended the Icelandic competition rules and essentially reproduced the competition rules of the EEA Agreement
- **Act No 44/2005** on Competition
 - Current act in force, which reproduced the rules of the 2000 Act and established the ICA



EEA law and Icelandic law

- The Icelandic competition rules mirror the competition rules of the EEA Agreement

EEA Law	Icelandic Competition Act
Article 53 EEA	Article 10
Article 54 EEA	Article 11



EEA law and Icelandic law

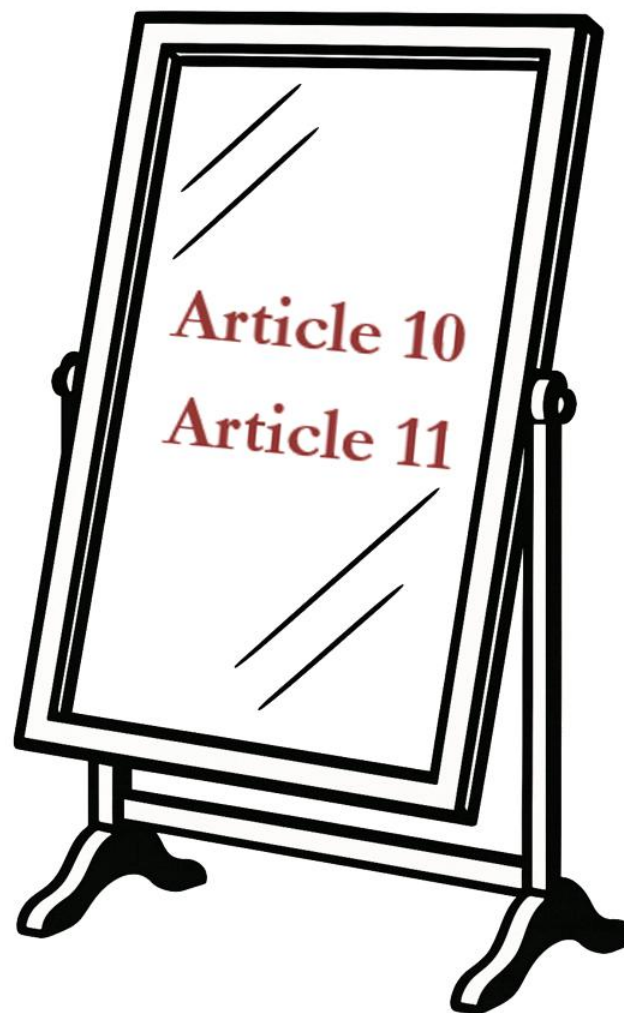
- Border between the competition rules of EEA law and of Icelandic law
- “Effect on trade” criterion
- How clear is that dividing line?
- Importance of consistency between the competition rules of the EEA Agreement and the competition rules of Icelandic law



Consistency between the competition rules

Article 53 EEA

Article 54 EEA





Consistency between the competition rules

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Consistency between the competition rules

- If a **lack** of consistency between the EEA competition rules and the Icelandic competition rules begins to emerge...



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Consistency between the competition rules

- If a **lack** of consistency between the EEA competition rules and the Icelandic competition rules begins to emerge...
- ... foreseeability and legal certainty for economic operators are **impaired**
- Different conduct forbidden or permitted under national law/EEA law?



Consistency between the competition rules

- Role of the EFTA Court in ensuring the homogenous interpretation of the competition rules of the EEA Agreement...



Consistency between the competition rules

- Role of the EFTA Court in ensuring the homogenous interpretation of the competition rules of the EEA Agreement...
- ... also when it comes to the interpretation of domestic legislation adopting the same or similar rules as those under EEA law in order to forestall future differences of interpretation.



Case E-29/15 *Sorpa*

35 ... **Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply.** However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see Case E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 45).

36 **Article 11 of the Competition Act is almost identical to Article 54 EEA.** Therefore, it must be held that the Court has jurisdiction to rule on the questions referred to it by the Supreme Court of Iceland.



Consistency between the competition rules

- Importance of judicial cooperation also for situations outside of the scope of EEA law
- Avoiding legal uncertainty
- Making use of the full body of EEA competition law



Looking forward

- Challenges to homogeneity in the field of competition
- Secondary legislation regarding competition law not incorporated into the EEA Agreement
 - EU Damages Directive 2014/104/EU
 - ECN+ Directive (EU) 2019/1
- E-11/23 *Låssenteret AS*



Public authorities and competition law

- We tend to think of competition law as regulating the conduct of “private” undertakings
- An addition to the rules of the four freedoms which are (primarily) applicable to State measures



Public authorities and competition law

- Case E-15/10 *Posten Norge AS v ESA*
 - Norwegian State was the sole owner of Posten Norge AS
- Case E-12/20 *Telenor v ESA*
 - Telenor a publicly traded company but Norwegian State a majority owner
- Status as a public entity in and of itself immaterial



Case E-15/10

Posten Norge AS v ESA

- Posten Norge subject to certain universal postal services obligations, but the majority of its services exposed to competition
- Posten Norge pursued a strategy of exclusivity in the market for B-to-C parcel services with over-the-counter parcel delivery in Norway
- Concluded and maintained agreements with important retail chains in Norway



Case E-15/10

Posten Norge AS v ESA

209 For the sake of clarity, the Court emphasises that Article 54 EEA applies to **all economic activity engaged in by undertakings at their own initiative.**

...



Case E-15/10

Posten Norge AS v ESA

... The fact that the **Norwegian State as owner urged Norway Post to reduce its costs does not differentiate it from any other undertaking** which is under pressure from its shareholders to become more efficient. ...



Case E-29/15 *Sorpa*

- Sorpa established in 1988 as a cooperative agency by an agreement between municipalities in Iceland
- Sorpa active in the waste management sector, including waste recycling
- Sorpa claimed that a municipality cannot be considered as an undertaking within the meaning of Article 54 EEA when it carried out waste management



Case E-29/15 *Sorpa*

51 Under the EEA competition rules, the concept of an undertaking encompasses **every entity engaged in an economic activity**, regardless of the legal status of the entity and the way in which it is financed ...



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52 **Any activity consisting of offering goods or services** in a given market constitutes an economic activity ...

53 The basic test is thus whether the entity in question is engaged in an activity which consists in offering goods or services on a market and **which could, in principle, be carried out by a private actor in order to make profits** (see, for comparison, the Opinion of Advocate General Jacobs in *Cisal*, C-218/00, EU:C:2001:448, point 38).



Case E-29/15 *Sorpa*

54 Activities which fall within the **exercise of public powers** are not of an economic nature justifying the application of the EEA competition rules (compare, to that effect, *MOTOE*, cited above, paragraph 24).



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55 As regards the possible application of the EEA competition rules to an entity of public law, **a distinction must be made** between the situation **where the entity acts in the exercise of official authority**, and that **where it offers goods or services in the market**. Articles 53 and 54 EEA may only apply to the latter situation (see *LO*, cited above, paragraph 63).



Case E-29/15 *Sorpa*

56 **Sorpa's owners**, the municipalities in the metropolitan area of Reykjavík, **are public law entities**. ... However, the activity under consideration is the provision of waste acceptance and waste disposal services by municipalities. **That activity cannot be characterised as, and bears no relation to, the municipalities' activities of political decision-making or public administration. ...**



Case E-29/15 *Sorpa*

57. ... In order to determine whether such an activity is economic, it is necessary to take account of other elements, **in particular the existence and the level of the compensation received and the competition with private companies on a market** (compare the Opinion of Advocate General Cosmas in *Diego Calì*, C-343/95, EU:C:1996:482, point 42). ...



Case E-29/15 *Sorpa*

58 Second, the fact that an activity may be exercised by a private undertaking **is an indication that the activity in question may be regarded as economic** (compare, to that effect, the judgment in *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617, paragraph 82).



Public authorities and competition law

- Notion of “undertaking” as a connecting factor
- Legal status as a public authority irrelevant as long as it engages in economic activity
- Public authorities must be mindful of the competition rules



Thank you
for your attention