

# **The oil cartel in Iceland.**

## **Summary**

### **Introduction**

On the 18th of December 2001 the Icelandic Competition Authority (CA) carried out a dawn raid at the premises of the three companies engaged in importing, selling and distributing fuel oil and related products in Iceland. The Competition Authority brought away computer records and hard copies of various in-house documents, which upon investigation revealed the existence of a cartel involving all oil and petrol products offered by the companies as well as extensive market sharing arrangements and collusive tendering practices. The extent of the cartel activity was such that the most suspicious minds would have had difficulty envisaging its magnitude before the CA opened the lid. The Icelandic oil and petrol markets, as in most other countries, have typical oligopolistic characteristics, characteristics which had dissuaded the Icelandic Competition Authority from undertaking an investigation of the market despite identical and parallel price movements of all the companies for some time prior to the dawn raid. However, when the Competition Authority made its findings public in October 2004 in a nearly 1000 page Decision it became clear that the oil companies had for nearly 9 years at least engaged in cartel activity of a magnitude which defied the imagination of even the most experienced trust busters. In February 2005 the Competition Appellate Committee (CAC) in Iceland confirmed the findings of the CA in all material aspects, but reduced the imposed fine from 2.5 billion Icelandic krónur to 1.5 billion. The oil companies have announced that they will file suit before the regular courts and seek annulment of CAC's ruling.

The CA's Decision identifies and describes over 500 incidents of e-mails, memoranda, minutes of meetings and reports indicating illegal contacts on prices, market sharing, bid rigging and other restrictive business practices which severally and collectively constitute an infringement of Article 10 of the Icelandic Competition Act no 8/1993.<sup>1</sup>

It is difficult to convey in a short summary the enormity of the Icelandic oil cartel case. However, in an attempt to do so this summary will follow the structure of the CA's Decision and recount selected incidents of collusion between the companies by type of infringement, i.e. bid rigging, price fixing and market sharing. In order to underline the fact that the cartel did not only affect Icelandic interests many examples are included where the oil companies' collusion was directed at foreign companies, are included in this summary. Given the magnitude of cartel it was inevitable that the fines imposed should be on scale never seen before, at least not in Iceland, and this summary will give a short description of the parameters applied by the CA in determining the fines and the CAC revision of that part of the Decision.

### **Double jeopardy**

Pursuant to Article 57 of the Competition Act violations of its provisions or orders issued in accordance with them are subject to fines or imprisonment for up to two years and in more serious cases for up to four years. Investigations under this provision are carried out by the national Commissioner of Police and prosecuted by the Director of Public Prosecutions. Having been informed of the seriousness of the oil cartel case by the CA, the Commissioner of Police opened an investigation of the case. That investigation is still pending and is understood to be directed at the part played by the CEOs and other directors at the oil companies in organising the cartel.

Both before Competition Authority and the Competition Appellate Committee the oil companies pleaded that parallel investigations, one carried out by the CA and the other

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<sup>1</sup> This act has now been replaced by a new Competition Act. However its provision on the ban against restrictive business practices remains the same as in the preceding act.

by the Commissioner of Police, with the possibility of sanctions being imposed by both authorities, violated Article 6 of the Convention on Human Rights.

While agreeing, that the relevant provision of the Convention on Human Rights as concerns the right not to be prosecuted and/or punished more than once for the same offence the CAC's finding was that the provision in question does not prevent a party from being subject to two different investigations as long as a one of them has not been concluded. The CAC went then on to agree with the CA that Convention on Human Rights only prohibits a new prosecution after a party has been found guilty or not guilty as the case may be and that a defendant can not be punished more than once for the same offence. The CAC added that Article 4 of Protocol 11 to Article 7 of the CHR is only applicable if the same party is involved in both instances. Thus, it is self evident that it is not applicable in cases like the one at hand where individuals, following actions taken by competition authorities against undertakings, become subjected to public prosecution and sanctions pursuant to the general penal code.

It was not only pleadings pertaining to the Convention on Human Rights that the oil companies put forth. They defended their actions vigorously in numerous aspects of the law, from the CA's application of the competition rules and to criminal law and the law on due process. The CA dealt thoroughly with all these arguments in its Decision. It is outside the scope of this short summary to recount all the arguments and pleadings submitted by the oil companies and CA's counter-arguments. In all principal respects the CAC confirmed the CA's conclusions but to the extent the CAC did not do so will be dealt with briefly at the end of the summary where the CAC's reasoning for lowering the imposed fines are summed up.

**The relevant market. The position of the companies in the market. The relevance of the industry and the impact of the cartel.**

The relevant product market was deemed to comprise the sale and distribution of oil and gas products in general. The CA pointed out that the oil companies are vertically integrated undertakings that import and distribute all the major types of oil and gas products. The activities investigated concerned the complete product portfolio offered by

the companies. Each of the three companies runs between 60 and 100 hundred service stations and depots spread all across Iceland. The relevant geographical market comprised the entire territory of Iceland.

During the period covered by the investigation the aggregate market share of the three companies was 99% in all products. The market share of the individual companies varied somewhat between products. With the exception of jet fuel none of the three companies had a market share below 20% or above 50% in any of the major product categories. In gasoline Olíufélagið (Esso)<sup>2</sup> had 38%, Skeljungur (Shell)<sup>3</sup> 34% and Olís 28%. These proportions as in other product categories remained relatively stable during the period under investigation.

In the year 2001 imported fuel and lubricants accounted for 8.9% of the country's total imports. Gasoline and oil are important factors in the consumer price index, weighing between 4% and 5%. In the fishery sector, fuel costs account for 11.5% of the fishing fleet's total operating costs and in the case of airline services, 15.9% of Iceland air's operating expenses in 2001 stemmed from the cost of fuel.

Iceland is a member of the European Economic Area through the EEA Agreement. The competition rules of the EEA Agreement mirror those of the EC Treaty. A condition for the jurisdiction of the EEA competition rules is that the agreements or conduct in question must affect trade between the Contracting Parties. It was the view of the CA that there could be little doubt that this condition was fulfilled in this case. As mentioned above the investigated and illegal activities of the oil companies extended to all of Iceland and, as such, were likely to affect trade in the products concerned between EEA countries and contribute to the partitioning of markets. However, at the time of the investigation Icelandic competition authorities had not been empowered to apply the competition rules of the EEA Agreement. Their impact, however, was through their interpretational value in the application of the Icelandic competition law.

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<sup>2</sup> Olíufélagið has a collaboration agreement with EXXONMobil for the use of the Esso brand, see [www.esso.is](http://www.esso.is).

<sup>3</sup> Skeljungur has a service agreement with Shell International consortium, see [www.shell.is](http://www.shell.is).

## **Bid rigging**

The investigation revealed that the oil companies had from that the time the Competition Act entered into force, cooperated extensively when making bids in connection with closed tender procedures. This applied especially where public authorities were involved and large, fuel-intensive enterprises, where the oil companies divided among themselves the supply of oil and gas products to customers. The aim was to protect their profit margins, as the oil companies put it, or in other words to maintain the price levels *vis á vis* the customer in question. For this purpose they demonstrated complete willingness to engage in various forms of cooperation and to exchange information in connection with closed tender procedures. The CEO of Olúfélagið mentioned, when giving his report before the CA, that when the prices of oil products were regulated there was no point in competing in tenders or competing for the trade with the bigger buyers rather than sharing the business with them. When prices were deregulated the oil companies tried to retain the old arrangement. The director of marketing at Olúfélagið between 1993 and 1998 confirmed that he had had considerable communications with his colleagues at the two other companies. He said that always when representatives of the three companies met they discussed what was happening in the market, what contractors and construction companies and which fishing vessel owners were calling for tenders. The companies felt threatened by tenders, particularly those launched by public entities and authorities. Invariably such business required a high level of service and the companies were afraid that their profit margins would go through the floor.

In 1996 the companies discussed the need to formulate an overall policy to deal with closed tender procedures and agreed to speak together in all tenders:

*“Following an approach made by Skeljungur regarding a common policy in tender cases, I asked them for a proposal which the CEOs could discuss. Friðrik Stefánsson at Skeljungur is not ready with such a proposal; he talked to Kristinn Björnsson who thinks the CEOs should meet first to discuss whether foundation exists. Can you meet the CEOs next Tuesday, 2nd of July? I understand that both Einar and Kristinn are free then. (Email from the marketing director at Olúfélagið to his CEO, dated 26 June 1996).*

In September 1996, the CEOs of the three companies met and a document from the CEO

of Skeljungur which was presented at the meeting includes the following text: *Agr. to speak together in all tenders.*

### **Price fixing of fuel, lubricants and other oil products**

The investigation revealed that the oil companies had engaged in regular and extensive collusion regarding pricing matters. This collusion consisted in particular of:

- cooperating on price adjustments and
- cooperating to raise mark-ups and improve profit margins
- cooperating on limiting rebates
- cooperating on levying service charges on customers
- cooperating on limiting output or reduce services

### **Price fixing between 1993 and 1996**

Even if the examples of contacts between the companies during this period were fewer and further between than was the case in the latter period, (1997 – 2001), they clearly indicate sustained price fixing of all the most important products. Some of the most incriminating evidence consisted of the following:

*“Sales price” BSJ will discuss prices with representatives of the other oil companies”*

(From the minutes of a meeting of the executive board at Skeljungur 22, march 1993).

*“Increase in gasoline prices ..... up to 3 kr”* (From notes taken by the director of marketing at Olíufélagið; the notes bore the heading: Meeting Skelj/Olís/ Olíufélagið, dated 8, April 1994)

*“Check. Adjust 92 okt “up” approx. 1 ISK. 15, January”* (From a hand written memorandum made by the director of marketing at Olíufélagið following his meeting with directors at Skeljungur and Olís, dated 3, January 1995).

*“Price discussions. Their proposal was that we should accept Esso as price leaders and*

*we the others would follow. I told them that their very old fashioned way of thinking was a handicap, but they are worried because of the bad publicity we have received recently.”* (E-mail from a director at Skeljungur to the CEO, reporting discussions with colleague at Olís during a trip they went on together).

*“Another example: It would be different if we were giving discounts from a catalogue price. GKG tells me, for instance, that we are quoting each and every heavy oil customer a pump price! Then we pump out rebates to these bastards! I think it is just as good that we talk to the other companies in order to be able to charge acceptable prices for heavy oil.....”* (E-mail sent between directors at Skeljungur. Dated 31, May 1996)

### **Price fixing between 1997 and 2001**

During the period between 1993 and 1996 a small difference in prices of gasoline and diesel oil was not uncommon between the companies. These differences were, however, minimal, at most 0.10 or 0.20 krónur and therefore not high enough to make consumers choose between companies for that reason alone.

In the latter period these occasional small differences in price vanished altogether. This development was in line with the companies more efficient organisation of their cooperation, (accepting Olúfélagið as price leader for instance), and coincided with the companies’ efforts to boost their income by improving profit margins.

A good example of how the oil companies went about realising their aim of increasing profit margins is demonstrated by communications that took place between the companies in May and June 1997. Having discussed how an increase in fuel prices due to a higher world market price could be sustained (once the prices dropped again) the director of investments and risk management at Olís sent an e-mail to his CEO saying: *“According to price calculations an increase is not necessary, based on average median of inventory, as we bought an additional quantity at a low price. If we look at the price as it is today irrespective of our inventory, then the price increase required is 0.84 krónur*

*for petrol and 0.19 kr. for diesel oil products. GK (GK = director at Skeljungur) supports an increase in petrol of about 0.50 – 1.0 kr. and a 0.30 – 0.40 kr. in diesel oil. BB (a director at Olíufélagið) is looking at the matter and will be in contact on Thursday.”*

Later in June the CEO of Olíufélagið notes: *Raise the prices for use on land = reduce the difference from 5 kr. to 4 kr. Later petrol prices will drift upwards without discounts being increased.*

Another example:

An e-mail, 3 March 1997, from the director of finance at Olís to his CEO where he informs him that Olíufélagið is considering a price reduction in diesel fuel of about ISK 1. The CEO answers:

*I want to remind you of the discussion to obtain an improvement in profit margins of approximately 0.70 pr litre in all products which “everyone” has agreed to. We must not lose this excellent opportunity for improvements, it is doubtful we will have another opportunity like it soon. Let me know if you get a negative reaction then I can take the matter up at another venue before a final decision is reached*

And yet another one:

*Esso/Olís have been pressuring a reduction in the prices of diesel oil and fleet oil, but I have tried to suppress such ideas in light of the unsatisfactory outcome in the first months of the year. That goes for the other companies as well, of course. Indeed, I am getting fed up with the reluctance showed by the other companies to raise petrol and it seems to me that we have lost a good opportunity because now petrol prices are sinking fast. (E-mail from the vice-CEO of Skeljungur to the CEO, dated 6, June 1997)*

Contrary to what the companies’ had maintained in their reports they gave before the CA, the cooperation between them had not abated after 1997. The following is just one example of regular and frequent contacts:

*“At this meeting candid discussion took place on rebate and pricing issues. It emerged*

*that both companies are going to cancel their agreement with the 4X4 club but luckily we had the sense not to take part in that nonsense. It was our joint understanding not to grant rebates to societies and associations ( individuals) with the exception when it is done through the use of customer loyalty cards.... We agreed to be on guard against companies that shop around, with no intention of transferring their business to another company, but using other companies simply as a whip to squeeze out an increase in rebates. We decided to try to use the same rebate structure for car fleets. Olís has introduced a service charge for deliveries from warehouse below 5000 kr. They maintain they have not received any complaints over this and I think we should consider taking this up.* (From the minutes of a meeting held by a sales manager at Olúfélagið with the director of retail sales at Olís and the director of marketing at Skeljungur on 29 October 1998).

Finally the CA's decision describes how simultaneous and identical price adjustments which all the oil companies announced on 1 December 2001 came about. On 27 November the director of purchase at Skeljungur sent an e-mail to the company's vice-CEO where he explains what price adjustments in fuel are necessary and asks for comments. This e-mail was opened at 12:16. The same day at 13:13 a secretary at Olúfélagið sent an e-mail to the director of finance telling him that the vice-CEO at Skeljungur had called and asked him to call back. On 30 November at 15:15 the director of purchases at Skeljungur sent a new price list to Skeljungur's staff. Two minutes later the director of finances at Olúfélagið sent a new price list to the director of purchases in the company. At 15:31 the same day, the director of investments and risk management at Olís sent an email to various members of staff advising them of the price changes that would take place December 1st. In all the instances described the information that was circulated within the respective companies was 100% identical as to the price changes they announced and which were to take effect the same date at all the three companies. None of the companies had published or announced anything officially on whether and what price changes would take place on 1 December 2001.

## **Market sharing**

The CA's investigation revealed that the oil companies had engaged extensive market sharing projects all over Iceland. They divided geographical areas among themselves; they determined the allocation of customers, and they allocated sales by quantity.

In December 1988 the three companies had entered into an agreement on the operation of service stations in 10 locations in all corners of Iceland, in both small and large towns (by Icelandic standards). Pursuant to Article 8 of this agreement the companies were not to: *“set up or assist in setting up additional service stations in these places, unless they had a prior consent from the other companies, always provided that established allocation procedures applied. This applied also to the installation of pumps for use by private parties”*.

This allocation was practiced throughout the entire investigation period as shown *inter alia*, by the following e-mail where the CEO of Olúfélagið reacted to a report from his director of retail sales telling him that he had heard from Isafjordur that a high-ranking executive from Olís had been seen driving a dark coloured Volvo looking for a suitable location for a self-service station, preferably in Isafjordur or Bolungarvík: *I think Heimir (director at Olúfélagið responsible for retail sales) should talk to Thomas Möller (director of retail sales at Olís). The condition for a jointly run station at Isafjordur is that the third company does not open against us. If anyone challenges a jointly operated station by opening his own he will be expelled from the cooperation.”*

Two days later the CEO of Olúfélagið received a report from his director saying that his colleague at Olís pleaded innocence and that he did not know who could be driving a dark coloured Volvo.

*It is my proposal that we only discuss at the meeting unsettled and outstanding payments (from allocation projects) and postpone other matters. Unsettled are Grundartangi (The Ferro Silicon plant) SVR (Reykjavik Bus Transport Services) and Kísiliðjan (The Diatomite plant at lake Mývatn). If I am forgetting something, you can add it to the list.*

*Items for another meeting are: A new agreement on Örfirisey (an oil tank depot) between ODR and Skeljungur. The Association of Oil Companies?? Please delete this message when you have read it. The CEO of Skeljungur forwarded the message to his vice-CEO asking whether any other allocation projects were unsettled. He answered: I do not know about the Ministry of Justice, but then they will point to the Coast Guard. I am not aware of any dispute regarding Raufarhöfn, where we divide sales to SR (the State Fish Meal Plant) 40/40/20 and other sharing is 33/33/33. .... I think it goes without saying that we should delete this but I think it is foolhardy to send this through net servers all around the city.”*

### **Allocation of sales to the Icelandic Aluminium Company.**

From the start of operations in 1967 the oil companies had divided among themselves the proceeds from diesel oil and gas sales to Ísal (the Icelandic Aluminium Company). Skeljungur had from the start managed the arrangement. When in 1996 Ísal requested a renewal of the old contract in 1996 Skeljungur sent this e-mail to Olís and Olíufélagið: *Referring to our telephone conversation this morning. Tomorrow Friday discussions will start with Isal on a new contract for the year 1996. In the current agreement the rebate on heavy fuel oil is 60 kr/ton. This has been unchanged for some time now. We have to review this discount and probably add something so they will feel that they are getting something for the quantity. (They are of course unaware of our sharing arrangements). We are expecting to have to agree to a 200 kr rebate pr ton or even higher, (the maximum will be 300 however, the way we see it). Please send us your comments if you do not agree with this arrangement. The meeting with Isal will be 10 o'clock tomorrow morning.* (E-mail from Skeljungur employee to a colleague at Olíufélagið and the CEO at Olís, dated 22 June 1996) On 3 July Skeljungur duly concluded the contract with the aluminium company.

In 1997 Isal decided to launch a closed tender procedure for its gas and oil requirements. In connection with the tender a memorandum was drawn up 3 September 1997 at Skeljungur headquarters with the following conclusion:

*If Ísal decides to have a closed tender this year we have the option of colluding with the other companies on the tender prices and then entering into an agreement in order to share the business in a brotherly fashion with the other companies. Such collaboration is frowned upon by the legislature, however, as evidenced by the competition law.*

When asked about the involvement of Olúfélagið in the Ísal auctions Mr. Magnússon, the CEO of Olúfélagið, told the CA: “ ... *when he started at Olúfélagið he was told the contract with Ísal had been made in cooperation with the company. However, Skeljungur had always managed the agreement and for that reason he was not familiar with details in that regard. ....*

*GM confirmed that the oil companies had colluded on the bids in 1997 and had arranged that Skeljungur’s bid should be the lowest. Consequently Ísal decided to continue with Skeljungur as its supplier. GM said that sales to Ísal had for decades been split among the companies, both after and before the tender in question. This meant that Skeljungur made payments to the other companies in connection with this trade.*

### **Sales to foreign vessels**

The investigation revealed that in 1993 the three companies had entered into an agreement regarding sales to foreign vessels. The main feature of this agreement was that sales to foreign vessels should be divided monthly between the companies. Skeljungur should receive 30.5% Olís the same percentage but Olúfélagið should get 39% of the sales. Representatives from the companies were to meet monthly to exchange figures and costs. According to this agreement the prices were to be list prices (catalogue prices). The agreement determined also terms of payment to be applied by the companies and discounts had to be agreed to by all. The agreement refers to other agreements in force between the companies. One such concerned sales to the Danish navy.

Collusion regarding sales to foreign vessels continued throughout the investigation period. Thus, during the first months of 1995 the CEOs of the three companies were in frequent contact concerning sales to foreign vessels. The CEO of Olís writes in Memorandum the 22 March s after a meeting with his colleagues:

*Our current agreement will expire this spring. GM (The CEO of Olúfélagið) suggested that we should continue the cooperation and that Gardar, Ingolf and Þorseinn should be given the task of drawing up a new agreement with the desired changes. It was discussed that a better definition of the term “foreign vessel” was needed. EB (the CEO of Olís) raised the point that service charges to foreign ships needed to be raised.*

The CA’s investigation showed that the terms laid down by the companies concerning sales to foreign vessels were observed to for the most part. However, their rigid pricing policy was starting to take its toll which is, *inter alia*, reflected in the following correspondence:

*Once again we are in the position where we with our list prices for oil are far from being competitive with oil prices available from a bunker out at sea, not to speak of the prices in countries around us. The foreign vessels that come here do not buy a drop of oil if they can avoid it. Due to this the companies have lost out on selling million liters in February alone. If we are to get a share of this trade we must tie our prices to platts plus a premium, e.g. 80 USD pr ton. (In-house e-mail at Olúfélagið from 21 February 2001).*

In late February or early March 2001 the companies had agreed on a new pricing policy concerning deliveries to foreign vessels, as the following e-mail indicates:

*Either of you has now left me in the lurch. You quote a price to Merike which lies in Hafnarfjörður harbour according to a s.k. agreement, but I gave them our list price – discount considerably higher than the other price. When we spoke of an agreement it was never intended that it should apply to Icelanders who do not have their ships in Icelandic harbours except over Christmas and New Year’s Eve before leaving for distant waters. It is bad enough to have to live with foreign ship-owners telling colleagues here what prices they are paying, but to publicise it to Icelanders is intolerable. Now I am stuck with the reputation of an exploiter and I do not know how to wriggle out of this one. (E-mail from an Olúfélagið employee to his colleagues at Skeljungur and Olís.)*

The colleagues answered and swore they had not made any offers to the vessel in question and reiterated how important it was that the companies stick to the agreement.

### **Keflavik and Reykjavik airports.**

Prior to 1993 the three oil companies operated two fuel service stations at Keflavik Airport. Skeljungur and Olífúfélagið operated one and Olís its own. When a new CEO took over at Olís the companies started to discuss the possibilities of cooperation at Iceland's two largest airports, Keflavik Airport and Reykjavik Airport. One of the documents seized in the dawn raid was a paper found in the office of the CEO of Skeljungur with the heading: Discussion between the oil companies. Under item 6 had been written:

*“Current situation as regards both sales both to foreign vessels and airlines is totally unacceptable and can be likened to export subsidies.. The question is whether we can discuss again the allocation of the ships and whether we can in some way tackle the foreign planes, e.g. by allowing the companies to have some airlines as regular customers in order to be able to obtain better prices when contracts are renewed. Is it not also worth while to discuss the fusion of the service stations?”*

In the first quarter of 1994 the oil companies entered into an agreement on the operation of fuel service station at Keflavik Airport and established a partnership for that purpose. The oil companies were to take turns operating the service station. Each company appointed a board member and during the investigation period the representative appointed was invariably the person in charge of sales to airlines at each company.

At least by January 1995 the oil companies had established a system for splitting the proceeds from sales to airlines in cases where none of the oil companies had a supply contract. The investigation revealed a report drawn up by Olís relating to sales made in 1995 which, *inter alia*, deals with allocation of sales at Keflavik Airport in that period. According to this report the allocation of sales was carried out in the same way as at Reykjavik Airport which meant that sale to “uncontracted” foreign customers who paid in cash or with credit cards were allocated equally among the three companies.

During the investigation period Hydro Texaco was a large shareholder in Olís. When Texaco bid for international supply contracts which included fuel sales at Keflavik Airport was included Olís, as Texaco's agent was named as supplier in Keflavik. However, when Olís learned that Texaco had named two airlines as its (through Olís) customers in Keflavik which, according to established practice at Keflavik, were meant to be Skejungur's customers, Olís quickly wrote to Texaco expressing outrage: *"As you know I have been trying to get the margins up for the last couple of years and by this you are putting me into a very difficult situation. It has taken me a lot of effort to get the margins as where they are now even we do not hold so much of the business. I am loosing face here Clive and I will not accept that!! Sterling European has been a Shell contract for many years and I said NO when the Shell guy asked me if I was offering + 15.5!! I do not have a choice but to ask you to redraw your offer, Sterling European and Arrow Air. In future you have to consult with me before you place bids in Iceland.* (E-mail from a director at Olís to Clive Dennis at Texaco, dated 4, May 1998)

### **Protecting the market position in Iceland by interfering in other markets**

The Association of Icelandic Fishing Vessel Owners (LÍÚ) had often expressed their displeasure with the prices offered by the Icelandic oil companies, pointing at cheaper fuel in the neighbouring countries. In 2000 the Association renewed its effort to obtain better prices from the oil companies by requesting deliveries from oil supply tankers at sea. The three Icelandic oil companies owned a joint venture company with O.W. Bunkers ltd. operating the vessel "Icebunker" for selling oil to vessels at sea. However, in the case of Icelandic vessels sales were only made outside the 200-mile economic zone.

Failing to make any headway with the Icelandic oil companies and Icebunker, LÍÚ agreed with a Danish company that it should send its tanker to Iceland and supply Icelandic fishing boats with fuel. The tanker arrived in the Westman Islands at the end of December 2000. LÍÚ told the fishing vessel owners on the island that the price would be 5 kr. below the prices of Olíufélagið. The three oil companies reacted by calling a meeting of their

directors responsible for sales to the fishing fleet. The Olúfélagið representative summed up the outcome of the meeting with these words: *“We must keep a cool head and not let this matter disturb us. We will not take the initiative to explain this to our customers any further than already has been done. We will not be duped into a price war but stick to our course and determine the prices at the end of December based on the same premises as before. Otherwise we would be playing into the hands of those who say we are opportunists when it comes to pricing decisions. We will of course monitor who buys oil from the ship. It is likely that news reporters will have a field day. Olúfélagið representatives will have to be prepared to explain the price difference between us and the price offered by the bunker. What matters here is of course to use the arguments of inventory prices, service level, secure supplies and access to oil all around the country.”* (In-house e-mail at Olúfélagið from 15 December 2000)

When criticising the Icelandic oil companies for their prices LÍÚ had frequently pointed to the Faeroe Islands where Icelandic vessels sometimes bunkered. On 2 November 1998 an interview appeared with the director of LÍÚ where he stated that oil prices to ships in Iceland was double that of the prices in the Faeroe Islands. This caused the Icelandic oil companies to take steps to try to influence the pricing strategy applied, *inter alia*, by Statoil in the Faeroe Islands. Thus, Olís sent a telefax with a translation of the interview to Statoil with the following request: *“We would appreciate if you would on this occasion be prepared, at our meeting next week, to discuss and explain the stated difference in price of gas oil here in Iceland versus f.ex. the Faeroe Islands, where Statoil has its own operation.”*

This matter was again on the agenda in 1999:

*“I talked to Sverri Steintún (an employee of Statoil in the Faeroe Islands). He told me that the list price there is 1.75 DKK: Rebates to fishing vessels had spiralled out of control. The situation was worst in Fuglafjörður, (where the Icelandic ships land) There they are selling the oil without any mark-up just to retain market share. This situation began approximately 5-7 years ago with 0.10 DKK rebate, but now it is 0.50. He told me that Statoil and Shell would be meeting soon to discuss the matter. There is no doubt that this issue will be addressed. An idea has been put forward that that Shell should service*

*Skeljung's vessels and Statoil should service Olúfélagið ships. Since there are only the two of them I suggested that they divide the Olis ships between them, either one for me the next for you, or the set up a pool which they would settle at certain intervals.”* (E-mail from an Olúfélagið employee to the CEO, dated 16 November 1999)

The Faeroe Islands continued to be a bone of contention between the Icelandic oil companies and Statoil through 2000 and 2001. Various communications and meetings took place between the parties during this time. The Icelandic oil companies used their business with Statoil as leverage to get Statoil to raise its prices in the Faeroe Islands:

*“Any news from your side on the issue we discussed concerning the Faeroe Islands and the Icelandic fishing vessels? It is necessary to have that issue finalized before we continue on the supply issue for 2002: I know that Esso is also waiting for a response from you.”* (E-mail from Skeljungur to Poul Möller at Statoil, dated 25, October 2001).

*“The reason for the e-mail to you is that I got a call from Poul Möller at Statoil in Stavanger. He told me that he spoke to Nils Julnestad your colleague in Statoil .. and he told Poul Möller that he price from Chr. í Grótinum for 1.76 was a bad mistake and would not happen again. Have you heard anything new on this matter or are the prices in the Faeroes normal at the moment? Poul told me also from Nils that Statoil's goal was to set the prices 10-15 öra higher than in Denmark: Statoil is very interested to sell us some mogas next year but we are not ready to buy from them unless Statoil in the Faeroes starts to sell at normal (market) prices. Let me know the current status and what you think or can or give a call if you are free tomorrow.”* (E-mail from Skeljungur to Hákon Djurhus at Shell in the Faeroe Islands, dated 25, October 2001).

### **Thwarting new market entry**

In 1995 a Canadian oil company, Irving oil, showed an interest in setting up business in Iceland. The oil companies tried to thwart these plans and discussed among themselves ways of stopping Irving oil. Foreign companies were enlisted for this purpose as the following message shows: *“our warmest thanks for your assistance in the battle we*

*fought to keep Irving out of Iceland”* (A telefax from Olúfélagið to Imperial oil dated 10 April 1996).

### **Choosing the methodology for estimating the gains obtained by the companies**

The powers of the CA to impose administrative fines are set out in Article 52 of the Competition Act as it was amended by law no 107/2000 when they were brought into line with the powers of the European Commission as they were under Regulation 17 (and now Regulation 1/2003). Under Article 52 of the Competition Act as it was before it was amended in 2000, it was a condition for administering a fine in the excess of ISK 40 million (and up to 10% of turnover) that the gains obtained by the perpetrators exceeded ISK 40. million.<sup>4</sup> Thus, two different provisions on administrative fines had been in force for different periods of the time the infringements of the oil companies had lasted. The CA argued that the “new” Article 52 should be applied when it came to determine the appropriate fines. At the same time the CA acknowledged that the new provision was the more onerous of the two. However, as pointed out by the CA, gains made by violators in competition cases constitute a relevant factor to be taken into consideration when appropriating fines, as established by the CAC in a case from 2002 where the Committee had applied the “new” Article 52. On this basis the CA went on to estimate the gains the companies had made from the cartel in the meaning of the term as applied by the “old” provision.

The method chosen by the CA for estimating the gains was the “before and after” comparison. However, in this case there was no “before” in the normal context of that approach since no period suitable for comparison existed where prices of oil products had been determined by free market forces. Prices of oil products had been regulated by the then Price and Competition Authority existing at that time for decades and regulation had first been lifted in April 1992 and as soon as prices were deregulated the oil companies

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<sup>4</sup> Article 52(2) of the Competition Act No 8/1993 read. Administrative fines imposed in accordance with Paragraph 1 shall be determined with a view to the damage caused by the competition restriction in question, and the gain they may have brought. The amount of a fine may be from krónur 50.000 to 40.000.000, or up to 10% of the turnover of the previous calendar year in the respective operation conducted by the undertaking or group of undertakings involved in the restriction of competition, if their gain from violating the competition provisions of this Law can be demonstrated to have exceeded krónur 40.000.000. (Underlined here).

had apparently started their own covert price regulation of their products. However, three years into the period covered by the investigation, in the latter part of 1996 and in the beginning of 1997 the cooperation of the oil companies entered a new phase with more frequent contacts between their various directors and with renewed vigour. A deliberate aim to increase profits by improving profit margins was formed. Price increases were determined, rebates were cut and service charges were raised and introduced where none had existed before. Various documents and files found during the CA's investigation confirmed this. Thus within one uninterrupted cartel period lasting at least close to 9 years, two different phases could be identified which presented a "before and after" for the purposes of estimating illegal gain as required by the competition law when determining the level of fine to be imposed.

The emphasis that the oil companies themselves put on monitoring and controlling how their profit margins developed was a further argument for applying their own targets in estimating the gains they had made in determining the appropriate sanctions.

The investigation revealed a number of e-mails and other documents bearing witness to the profit margin agenda. Some of these have been described above. In addition, the CA's investigation established that the CEOs of the oil companies had met at least three times a year between 1997 and 1999. At all these meetings pricing matters had been discussed extensively. Furthermore, the investigation revealed that the companies had kept regular and detailed records of how profit margins evolved and the companies set themselves goals in that respect and which they intended to achieve. Thus, a document was found at Skeljungur offices setting out profit margins per liter of various fuel types. The document was named:

*Figures for profit margins 1998.*

*The oil companies' consultative committee has decided the following profit margins for 1998.*

The "before and after" method applied by the CA in estimating gains consisted of taking

the difference between prices (taking into account rebates) and all variable costs in connection with obtaining the product and comparing this difference with what it would have been, had the same profit margin conditions that existed in the period between 1993 and 1995 continued to exist unchanged in the period between 1996 and 2001.

The oil companies termed this difference between sales prices and variable costs as a “profit margin per unit” and monitored it regularly as mentioned above. The terminology applied by the oil companies was strictly speaking not correct since what they were measuring was in reality the margins at which the companies managed to sell their products with/under. However, this had no impact on the suitability of the method for the purposes of the CA.

### **Determining the fine**

When determining the amount of the fine to impose on the oil companies the CA looked, *inter alia*, to the guidance provided by the CAC in the fruit and vegetable cartel case from 2001 where the CAC stated that: *when determining the sanction consideration must first and foremost be given to the seriousness of the infringement. Part of that assessment shall be the assessment of the loss caused by the restrictions of competition. The size of the undertakings concerned shall also be taken into account as well as the time that the infringement has lasted and the subjective disposition of the executives and other matters. Finally the gain resulting from the restriction of competition must also be considered.*

When the Supreme Court adjudicated in the fruit and vegetable cartel case the Court said *that infringements of Article 10 of the Competition Law are liable to cause consumers and industry harm as indeed is noted in the commentary to the Competition Act, where it is stated that more harmful restriction to competition than collusion on prices, mark-up and rebates, are difficult to imagine.*

The CA furthermore cited the CAC where it stated in the fruit and vegetable cartel ruling: *...when undertakings collude in a certain market the collusion is the more serious the bigger the market is where the collusion takes place. Similarly, such collusion is in*

*principle the more serious the stronger the position of the undertakings concerned in the market.*

The CA also referred to a notice it published in the Law Gazette in 1993, when the Competition Act of 1993 had entered into force. In that notice the CA declared that it would grant companies a 6-month grace period to discontinue any restrictive competition practices they might be engaged in.

In its Decision the CA emphasised that the oil companies were fully aware of that their actions could have serious consequences for the competitive conditions. The CA stressed that the oil companies are large companies by Icelandic standards with managers and directors possessing considerable knowledge of the legal and economic framework applying to the operation of the companies. The CA emphasised that the companies were aware of the illegality of their actions and that they had consciously tried to hide and destroy incriminating electronic documents and other evidence. This showed clear determination to resort to measures with the aim of preventing the collusion being discovered and thereby enabling the companies to preserve it.

Among the examples of attempts of concealment the CA picked out were the following three:

*Please make a print out, and then destroy this mail.* (From an e-mail within Skeljungur concerning price increase of gas in September 1997 in collusion with Olúfélagið)

In September 1997 the CEO of Olís said that it was *intolerable carelessness* to send a certain material by telefax. *Something like this should only be handed over a table or sent by courier.* This was in September 1997 and the telefax in question concerned a tender offer to the Icelandic Aluminium Company.

*This matter is of course a very grave matter, but we must handle this carefully and be and use messages sparingly.* (In-house e-mail at Skeljungur in September 2001 when the Icelandic oil companies used their leverage with Statoil to influence the prices of oil

bought by Icelandic vessels in the Faeroe Islands).

Another factor influencing the level imposed fine was that the illegal agreements the companies entered into were to a great extent carried out and thus had effect on the market. The CA referred to over 170 instances where this was the case.

### **Turnover**

Turnover figures for the three companies for the business year 2003, the year preceding the CA's Decision are not publicly available. However, in 2001 the shares in the companies were registered on the stock exchange and their annual accounts for that year were therefore a part of the public domain.

In the year 2001, the year preceding the year the CA started its investigation the turnover of the three companies was as follows:

Skeljungur: 15.444 billion ISK

Olúfélagið: 15.119 billion ISK

Olís: 12.519 billion ISK.

Approximately 80% of the companies' turnover stemmed from trade in liquid fuel and other oil products.

### **The fines imposed.**

According to The CA's estimate the all the companies had gained vast amounts from their participation in the cartel. Thus the gain of Olúfélagið was calculated as being 2.750 million ISK, Olís proceeds amounted to at least 2.083 million ISK and Skeljungur's gain was estimated as 1.654 million. The CA estimated also the shares received by each company from sales they divided among themselves and according to that method their gains were 1.697 million, 2.008 million and 2.032 million respectively.

The participation by the companies in the various infringement established by the CA varied between companies. Thus, the investigation showed 274 incidents where all three companies had been in contact with each other. The investigation turned up 101 instances where the illegal contact had been between Olís and Skeljungur. 99 times had

communications been between Olís and Olúfélagið and Skeljungur and Olúfélagið had 18 illegal dealings without Olís being directly involved.

In light of the nature of the illegal practices, the extent of the cartel activity, the time it had lasted and that participation by none of the companies could be perceived to be less than that of any other company, despite some disparity in bilateral contacts between the companies, the CA deemed that all the companies bore equal responsibility for the long and continuous infringement and each should therefore be allotted the same amount in fine, 1.1 billion Icelandic krónur.<sup>5</sup>

#### **The oil companies' assistance in the investigation.**

On 1 March 2002 Olúfélagið wrote to the CA and offered its assistance in investigating the company's part in the infringements it might have committed. In the ensuing investigation the company gave information on a number of instances of collusion which the CA deemed to constitute a valuable addition to the evidence it already possessed. However, in some instances the employees of Olúfélagið did not give satisfactory explanations of documents. For this reason the reduction in fines imposed on Olúfélagið was 45% instead of the 50% it could have been.

A few days after Olúfélagið offered its assistance Olís did the same. In light of the value of the assistance and the CAs rules on reduction fines when undertakings under investigation contribute to an investigation, Olís received a 20% reduction in the imposed fine.

Skeljungur declared its willingness to help with the inspection. However, the company did not of its own initiative come forward with or volunteer any information which helped the CA in its investigations. Accordingly, Skeljungur did not get any reduction of its fine.

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<sup>5</sup> In light of the turnover figures of the companies for 2001 and assuming a 10% percentage increase in turnover between 2001 and 2003, the allotted fines seem to be in the vicinity of 7,5% of turnover in oil products for Skeljungur and Olúfélagið and around 7% for Olís.

Thus, the fine imposed on Olúfélagið was 605 million ISK, Olís received a fine of 880 million ISK and the fine imposed on Skeljungur was 1.1 billion ISK.

### **Re-examination by the Competition Appellate Committee.**

As mentioned above the oil companies appealed the CA's decision to the Competition and Appellate Committee and raised all possible legal arguments in their defence and hired expert economics consultants to counter and invalidate the CA's Decision. This included the CA's approach and reasoning in estimating the companies' gains from the cartel. Apart from the arguments that are reflected in the reasoning of the CAC for lowering the imposed fines by the CA, the CAC either rejected or disregarded the companies' innumerable arguments.

The CAC lowered the fines imposed by the CA on the oil companies from 2.5 billion ISK to 1.505 billion ISK in total. Olís received a of fine of 560 million ISK, Olúfélagið got ISK 495 million in fine and Skeljungur was fined ISK 450 million.

The decisive criterion for the determination of the fines, should be, according to the CAC, the gains each of the oil companies obtained from the collusion.<sup>6</sup> The CAC took furthermore the following considerations into account:

- a) During the latter period, i.e. from 1996 to 2001 the growth in GNP was both higher and more constant than over the former period, 1993 to 1995. Such conditions are conducive to increased gains, especially in oligopoly markets, when consumers become less price conscious.
- b) Losses due to fluctuations in currency rates suffered by the oil companies and other import companies, especially over the years 2000 and 2001. That cost is so

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<sup>6</sup> It should be noted and reiterated here that the CAC was applying Article 52 of the Competition Act as it stood until December 2000 when the provision was amended. Before the amendment fines, according to Article 52, should inter *alia* be determined with view to the gains obtained by the undertakings concerned. While the CA estimated the gains made by the companies in order to establish it as one of the factors to be taken into account in determining the amount of the fine (and at the same time ascertain that their gains were above the 40. million, the limit for imposing a fine without having made an estimation of how much an undertaking has gained from an infringement, as was a condition under the" old Article 52), the CAC applied the "old" Article 52 in such a way that the companies' gains from their conspiracy became the "decisive criterion" for fixing the fines.

closely connected with the oil purchases themselves that it is reasonable to assume that it affected the gains made by the oil companies and, accordingly, this should be taken into account in determining the fines.

c) During the comparison period increase in the wage index was considerably greater than that of the consumer price index. In light of the fact that salaries constitute a considerable part of the oil companies' operational costs the CAC deemed right to take this into account when determining the appropriate fines.

In appropriating the fines among the respective companies the CAC furthermore took into consideration that it had acquitted the companies in some of the instances where the CA had found them guilty and that their involvement in the illegal activity had not been equal in all instances.

The CAC confirmed the CA's decision as regards the reduction of the fines of two of the companies based on their contribution the investigation.

Thus, Olís received a fine of ISK 560 million, Olíufélagið was apportioned ISK 495 million in fine and Skeljungur was fined 450 million ISK.