EFTA Surveillance Authority Annual Report 2006

EFTA SURVEILLANCE AUTHORITY

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Foreword

This Annual Report provides an overview of the work of the Authority and, in particular, the developments in individual cases during 2006. The Authority has maintained its focus on the timely and correct implementation of EEA legislation in the three EEA EFTA States. However, special efforts were made to reduce the number of pending cases, which, at the end of the previous year, stood at almost 700 cases. At the end of 2006, the number of pending cases stood at 644. This ongoing process of reducing case load should allow the Authority to free resources to cope with its surveillance functions more effectively.

The institutional two-pillar structure of the EEA Agreement can lead to situations where the Authority may be required to initiate infringement proceedings and submit a matter to the EFTA Court before the Commission has acted or before legal proceedings on a similar matter have been initiated or have reached the final stage within the EU. Two cases brought before the Court last year illustrate that the Authority is prepared to take on difficult cases of this kind. In the Gaming Machines case, a record number of observations were submitted to the Court by the EU Member States. In another case brought before the Court, concerning concessions for the use of waterfalls in Norway, observations were equally submitted both by EU and EFTA stakeholders. While the Authority is bound by the objective of achieving a homogeneous application of EEA law in close co-operation with the European Commission, the Authority cannot be prevented from pursuing a case against an EEA EFTA State on the basis of an alleged breach of EEA law, just because a similar case has not been brought before the European Court of Justice. The Authority's direct actions before the EFTA Court ensure that important questions of EEA law that arise in EEA EFTA States are ruled upon at the European level.

As in previous years, the Authority's tasks have expanded with the entry into force of new or additional EEA legislation, for example relating to aviation security. In other, more established areas of EEA law, the Authority has continued to adopt important decisions, for example new guidelines on national regional aid in 2006, and regional aid maps for Norway and Iceland for the period 2007 to 2013. It also approved a Norwegian scheme for differentiated social security contributions by employers.

As for the performance of the EEA States in implementing EEA legislation, it can no longer be held that the EEA EFTA States outperform EU Member States, as has often been the case in the past. While the EEA EFTA States have improved their average transposition deficit in 2006, they have moved down the ranks in comparison with the EU Member States.

Bjørn T. Grydeland,
President

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Chapter 1

Introduction

The European Economic Area and the EEA Agreement

The Agreement on the European Economic Area (EEA Agreement)[1] entered into force on 1 January 1994. It presently applies between Iceland, Liechtenstein and Norway[2], on the one side, and the 25 Member States of the European Union, on the other, forming together the 28 EEA States. The European Community is also a contracting party to the Agreement.

The aim of the EEA Agreement is to guarantee the free movement of goods, persons, services and capital, as well as equal conditions of competition for undertakings and non-discrimination against individuals in all 28 EEA States.

The successful operation of the EEA Agreement depends upon uniform implementation and application of the common rules in all the 28 EEA States. To facilitate the achievement of this goal, a two-pillar system of supervision has been devised: Iceland, Liechtenstein and Norway are supervised by the EFTA Surveillance Authority and the EC Member States by the European Commission.

Central to the EEA Agrerement is the principle of homogeneity. This is to be achieved by the timely incorporation of EC legislation *(acquis communautaire)* into the EEA Agreement. This means that when an EC legal act, which falls within the material scope of the EEA Agreement, has been formally adopted by the Council of Ministers and/or the European Parliament, or by the European Commission, the EEA Joint Committee shall take a decision concerning the appropriate amendment of the EEA Agreement *"with a view to permitting a simultaneous application"* of legislation in the EU and the EEA EFTA States (Art 102 (1) EEA).

Judicial protection

In areas covered by the EEA Agreement, the EFTA Court has jurisdiction similar to that of the Court of Justice of the European Communities and the Court of First Instance.

Both the European Court of Justice and the EFTA Court have underlined that one of the main objectives of the EEA Agreement is to create a homogeneous European Economic Area.[3] More specifically, the two Courts have emphasised the need to ensure uniform interpretation of those rules of the EEA Agreement and the EC Treaty that are identical in substance. In Ospelt, the European Court of Justice highlighted one of the principal aims of the EEA Agreement; to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the Internal Market established within the European Union is extended to the EEA EFTA States. In addition, the EFTA Court confirmed in *Ásgeirsson* (E-2/03) that the EEA Agreement is to be interpreted in light of fundamental rights. The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.

1. The Agreement on the European Economic Area may be found at http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement
2. Hereinafter referred to as EEA EFTA States. These three States are members of the European Free Trade Association (EFTA) together with Switzerland. They are contracting partners to the EEA Agreement, while Switzerland is not.
3. See *e.g.* EFTA Court ruling in the Icelandic passenger tax case (E-1/03), and the judgment of the European Court of Justice in Ospelt (C-452/01).

What is the EFTA Surveillance Authority?

The legal basis of the Authority is found in Article 108 of the EEA Agreement. The detailed legislative provisions governing its role and obligations are contained in the Agreement between the EEA EFTA States commonly known as the Surveillance and Court Agreement.[1]

Located in Brussels, the EFTA Surveillance Authority ensures that Iceland, Liechtenstein and Norway respect their obligations under the EEA Agreement. It also ensures that undertakings in these countries abide by the rules relating to effective competition. The Authority can investigate possible infringements of EEA provisions, either on its own initiative, or on the basis of complaints.

With regard to its surveillance function, the EFTA Surveillance Authority has been accorded powers corresponding to those of the Commission.

General surveillance

If the Authority considers that an EEA EFTA State has failed to fulfil an obligation under the EEA Agreement, it may, according to Article 31 of the Surveillance and Court Agreement, initiate formal infringement proceedings. However, before such proceedings are commenced, the Authority will use other means to try to ensure compliance by the EEA EFTA State with the Agreement. In practice, the majority of problems identified by the Authority are solved as a result of informal exchanges of information and discussions between the Authority's staff and representatives of the EEA EFTA States.

Infringement proceedings

If formal infringement proceedings are initiated, the Authority will first send the Government of the EEA EFTA State concerned a letter of formal notice. This letter identifies the provision of EEA law that, in the Authority's view, has been infringed. The Government is invited to submit its observations on the matter. If the Authority is not satisfied with the Government's answer to the letter, or if no answer is received, the Authority may deliver a reasoned opinion. This document defines the final position of the Authority on the matter, states the reasons on which that position has been based, and requires that the State take the measures necessary to bring the infringement to an end within the deadline specified. Should the State fail to comply with the reasoned opinion, the Authority may bring the matter before the EFTA Court, whose judgment is binding on the State concerned.

Competition

In addition to the four freedoms on which it is based, the Internal Market's objectives are also furthered by the application of the EEA competition rules. The work of the Authority in the field of competition mainly concerns the direct application of the EEA Agreement to individual economic operators in the EEA EFTA States. The substantive competition rules in the EEA Agreement are virtually the same as those in the EC Treaty. The competition provisions prohibit, among other things, restrictive practices between businesses and abuses of dominant positions in any given market.

The Authority can initiate proceedings against market players. This may result in a decision imposing fines for anticompetitive behaviour. In practice, most cases are resolved informally, with competition concerns identified by the Authority being remedied without the need for formal proceedings.

The EC merger control rules apply to the entire European Economic Area as a result of their incorporation into the EEA Agreement. The Authority provides comments and information on mergers handled by the European Commission in cases where markets in one or more of the EEA EFTA States are particularly affected.

In cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EEA EFTA States, the Authority may take action not only against the undertaking in question but also, if the behaviour is a result of measures adopted by the State, against the EEA EFTA State itself.

State aid

With regard to state aid, the EEA Agreement and the Surveillance and Court Agreement contain provisions which are drafted to reflect as closely as possible the corresponding provisions in the European Community. As in the Community, the main rule is that aid which distorts or threatens to distort competition and affects trade between the EEA States is prohibited. There are, however, several possibilities for exemption.

New measures to grant state aid must be notified to the Authority prior to implementation. They must not be put into effect before the Authority has decided upon the case. The Authority examines whether a measure constitutes state aid and, if it does, assesses whether it is eligible for exemption from the general prohibition. The Authority must decide, after a preliminary examination of the measures notified, either that a measure does not involve aid or that there are no objections to the measure. If neither of these are the case, the Authority must open a formal investigation procedure.

1. The Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice may be found at http://secretariat.efta.int/Web/legaldocuments/

Introduction

Following the formal investigation, a final decision on a measure to grant state aid can be positive (approving the aid), negative (prohibiting the aid), or conditional (approving the aid subject to conditions). If the Authority concludes that aid which is now the subject of a negative decision was in fact granted, it will, as a rule, order the EEA EFTA State to reclaim the aid from the recipient.

In addition to deciding on all national plans to grant or alter aid, the Authority is also obliged to keep all systems of existing aid in the EEA EFTA States under constant review. It can, thus, also open a case either on its own initiative or after having received a complaint.

Organisation

College

The EFTA Surveillance Authority is headed by a College consisting of three Members. These Members are appointed by common accord of the Governments of the EEA EFTA States for a renewable period of four years. A President is appointed for periods of two years from among the Members, also by common accord of the Governments. In June 2005, Bjørn T. Grydeland was appointed President of the Authority with effect from 1 January 2006. The Members are independent in the performance of their duties, and must not seek or take instructions from any Government or other body. They must also refrain from any action which would be incompatible with their duties.

Each College Member has responsibility for certain areas of work. The allocation of responsibilities is agreed upon among the Members themselves. During 2006, the composition and division of responsibilities of the College was:

Members	Field of activity
Bjørn T. Grydeland (President)	• Administration • Co-ordination and general policies • External relations • Legal & Executive Affairs • State aid
Kurt Jäger	• Free movement of persons • Free movement of services • Free movement of capital • Horizontal areas (*e.g.* social policy, consumer protection, environment, statistics, company law)
Kristján Andri Stefánsson	• Free movement of goods • Competition • Public undertakings • State monopolies • Public procurement

Departments

In its work College is assisted by two directorates, namely the Competition and State Aid Directorate, the Internal Market Affairs Directorate, and the Legal & Executive Affairs Department and the Administration Department.

Public relations

During the course of the year, College Members and staff gave presentations on the EEA Agreement and the work of the Authority to visitors and at conferences, seminars etc. together totalling more than 2000 persons. The groups were composed of, *inter alia*, elected representatives, professional associations, trade unions, and students.

Budget

The activities and operating expenses of the Authority are financed by contributions from Liechtenstein, Iceland and Norway. The three EEA EFTA States contribute 2%, 9% and 89%, respectively, to the Authority's budget. The Authority's budget for 2006 and 2007 breaks down as follows:

	Budget 2006	Budget 2007
Chapter 1 - Salaries	5,291,900	4,467,685
Benefits, allowances & turnover costs	2,547,100	3,916,200
Chapter 2 - Travels, training, representation	657,500	730,700
Chapter 3 - Office accommodation	1,082,900	1,104,700
Chapter 4 - Supplies and services	1,271,900	1,297,400
Total expenditure	10,851,300	11,516,685
Chapter 5 - Financial income and expenditures	4,000	4,000
Chapter 6 - Contributions and other income	29,000	24,000
Contributions from the EEA EFTA States	**10,818,300**	**11,488,686**
Total income	10,851,300	11,516,685

Personnel

In 2006, the Authority had a staff of 56 people, representing 16 different nationalities. A majority (53%) of the staff members come from the EEA EFTA States, of which staff of Norwegian nationality constitute the major part (38% of total staff), followed by Iceland (13%) and Liechtenstein (2%).

In accordance with staff regulations established by the EEA EFTA States, staff are employed for a three year period, normally renewable only once. As a result, no staff member has a contract which extends beyond 2010. Staff turnover was 12.5% in 2006.

College assistants
Charlotte Schaldemose and Isabel Tribler.

College 2006
Bjørn T. Grydeland, Kristján Andri Stefánsson and Kurt Jäger.

Organisation chart
(End 2006)

A Assistant
SO Senior Officer
O Officer
NE National Expert
T Trainee
TO Temporary officer

College

Kristján Andri Stefánsson – Bjørn T. Grydeland – Kurt Jäger
President

Isabel Tribler A
Charlotte Schaldemose O

Competition & State Aid

Amund Utne
Director
Diane Tanenbaum A

Competition

Tormod Sverre Johansen
Deputy Director
Dessy Choumelova SO
Kjersti Bjerkebo SO
Hrafnkell Óskarsson O
Justin Menezes O
Hanne Zimmer O
Runa Monstad NE
Kjell-Arild Rein NE
Siri Bjune T

State Aid

Annette Kliemann
Deputy Director
Maria J. Segura-Catalán O
Lena Sandberg-Mørch O
Marianne Clayton O
Marie Wiersholm O
Agnieszka Montoya-Iwanczuk TO

Legal & Executive Affairs

Niels Fenger
Director
Claire Taylor A

Michael Sanchez Rydelski
Deputy Director
Per Andreas Bjørgan SO
Arne Torsten Andersen SO
Bjørnar Alterskjær O
Lorna Young O
Sigríður Eysteinsdóttir T

Library

Matthildur Steinsdóttir

Press & Information

Tor Arne Solberg-Johansen SO
Charlotte Schaldemose O

Administration

Erik Jønsson Eidem
Director

Finance & Human Resources

Kåre Antonsen SO
Anne Günther O
Claudia Candeago A
Robin Parren A

Registry

Anne Valkvae A

IT

Jurg Jacobsen
Deputy Director
Torbjørn Strand Rødvik SO
Battista Vailati O

Internal Market Affairs

Hallgrímur Ásgeirsson
Director
Adinda Batsleer A
Tuija Ristiluoma A
Inger-Lise Thorkildsen A
Danielle De Borger A

Goods & Persons Unit

Tuula Nieminen
Deputy Director
Eeva Kolehmainen SO
Mia S. Hodgson SO
Ólafur J. Einarsson O
Bernhard Zaglmayer O
Karin Büchel NE
Martin Haugberg T

Services & Capital Unit

Ragnhild Behringer
Deputy Director
Erik A. Mathisen SO
Frank Büchel SO
Einar Hannesson O
Rúnar Örn Olsen O
Camilla Rise O
Tor Bjørdal O
Eirik W. Sandå T

Food Safety & Environment Unit

Ketil Rykhus
Deputy Director
Nicola Britta Holsten SO
Ólafur Valsson SO
Patricia González Gálvez O
Claire Koeniguer O
Helen Pope O

Administration
From left to right: Battista Vailati, Anne Valkvae, Robin Parren, Director Erik J. Eidem, Torbjørn Strand Rødvik, Claudia Candeago, Jurg Malm Jacobsen, Anne Günther, Kåre Antonsen.

Case developments during 2006

At the end of 2006, the Authority had 644 pending cases[1], down 7.5% from the previous year. The reduction was the result of a conscious effort to re-assess and act upon cases which had been pending for a number of years. As a result, more pending cases were closed than new cases opened during 2006 in all areas except the free movement of services (especially transport and financial services) and state aid. A detailed review of important cases and case developments by sectors is to be found in chapters Internal Market, Competition and State Aid, respectively.

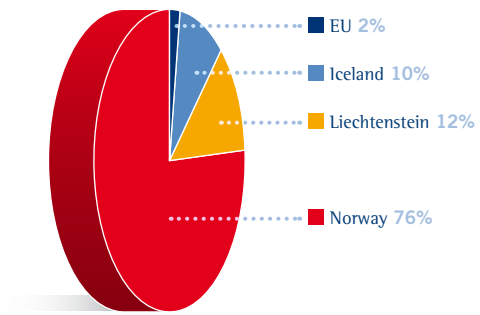
The Authority may exercise discretion in opening cases, and, in addition to matters brought to its attention by complaints, the Authority frequently opens cases on its own initiative. About 137 of the 317 (43%) new cases opened during 2006 were own-initiative cases. For the purposes of this introduction, the Authority has classified the cases handled by its Directorates in the categories used in the tables and figures below. In the following chapters of the Report, a more detailed classification is used to provide information on each Directorate's activities. It must be stressed that the work and use of resources associated with individual cases vary considerably depending on the substantive and legal issues at stake. Case load cannot, therefore, be seen as a decisive indicator of work load.

Complaints

Anyone may submit a complaint to the Authority, which is competent to examine complaints directed against the EEA EFTA States or economic operators in those States. Complaints are written communications sent to the Authority by economic operators and individuals reporting measures or practices which they consider are not in conformity with EEA rules. 15% of new cases registered during 2006 were complaints. However, in terms of pending cases at year-end, complaints make up 25%.

Figure 1 illustrates that the vast majority of complaints are directed towards Norway.

Figure 1 Complaints 2004-2006



1. "Case" is defined here as an assessment relating to the implementation or application of EEA law, or to other relevant tasks registered during the year for the purpose of fulfilling the Authority's objectives. Such cases do not necessarily lead to the initiation of infringement procedures against EEA EFTA States or undertakings.

Notifications

These are cases resulting from the submission of notifications *e.g.* draft technical regulations, eCom-notifications, or state aid measures taken by the EEA EFTA States. Following an initial examination, the Authority may raise objections or initiate formal investigations or infringement proceedings against the EEA EFTA States. Around 13% of pending cases at year-end were notification cases.

Obligatory Tasks

These are cases which are opened on the basis of obligations arising from the EEA Agreement or secondary legislation. Such tasks include on-the-spot inspections relating to food and feed safety, or aviation security, but also cover various reports and notices in all areas of EEA law. 15% of pending cases at year-end related to obligatory tasks.

Own-initiative cases

Finally, the Authority opens cases on its own initiative. Such cases include non-transposition by Iceland and Norway of regulations which have been incorporated into the EEA Agreement, and the examination of the correct implementation (*e.g.* the verification of the adoption of national laws meant to implement EEA legislation or a conformity assessment of those laws) and application of EEA law. The latter covers, for example, examinations of individual award procedures for procurement, state aid or concessions where the Authority, on the basis of official documents, sector inquiries, press reports or anonymous sources thinks such examinations are warranted. Almost 50% of pending cases at the end of 2006 were own-initiative cases (see figure 2).

Tables 1 to 6 show case development over the period 2004-2006, by case type, sector and State, respectively.

Figures 2-4 illustrate the number of pending cases at the end of 2006, sorted by case type sector and State, respectively.

Figure 5 illustrates developments by sector, expressed in number of pending cases per sector at year-end for the years 2004-2006.

Table 1 Case development by case category | Cases opened

	2004	2005	2006
Complaint	57	57	46
Notification	49	67	51
Obligatory tasks	63	69	82
Own-initiative	192	153	138
Total	**361**	**346**	**317**

Table 2 Case development by case category | Cases closed

	2004	2005	2006
Complaint	71	45	62
Notification	24	59	53
Obligatory tasks	62	73	89
Own-initiative	151	118	167
Total	**308**	**295**	**371**

Table 3 Case development by sector | Cases opened

	2004	2005	2006
Competition	19	14	16
Free movement of capital	6	7	3
Free movement of goods	139	171	108
Free movement of persons	30	27	8
Free movement of services	82	70	102
Other areas	39	18	19
Public procurement	16	9	8
State aid	30	30	53
Total	**361**	**346**	**317**

Table 4 Case development by sector | Cases closed

	2004	2005	2006
Competition	15	14	19
Free movement of capital	10	–	3
Free movement of goods	121	168	142
Free movement of persons	35	17	36
Free movement of services	59	28	76
Other areas	32	21	34
Public procurement	22	14	18
State aid	14	33	43
Total	**308**	**295**	**371**

Table 5 Case development by State | Cases opened*

	2004	2005	2006
EEA / Third countries	10	13	21
Iceland	136	121	100
Liechtenstein	84	50	51
Norway	179	201	170
Total	**361**	**346**	**317**

Table 6 Case development by State | Cases closed*

	2004	2005	2006
EEA / Third countries	7	12	22
Iceland	94	92	129
Liechtenstein	69	61	61
Norway	183	190	201
Total	**308**	**295**	**371**

* It should be noted that, as cases may concern more than one State, the total number of cases, when sorted by State, is not equal to the sum of cases per State. The category labelled "EEA / Third countries" represents cases relevant to all States (*e.g.* guidelines etc) or third countries (*e.g.* joint EU/EEA inspections in third countries).

Figure 2 Pending cases at end of 2006 by case category

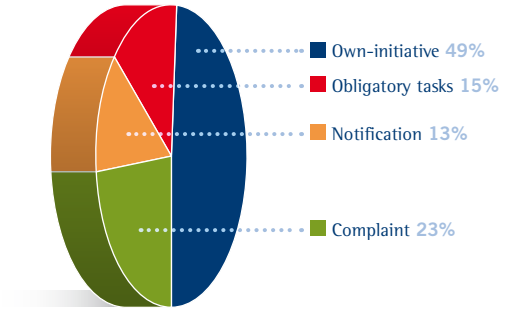


Figure 3 Pending cases at end of 2006 by sector

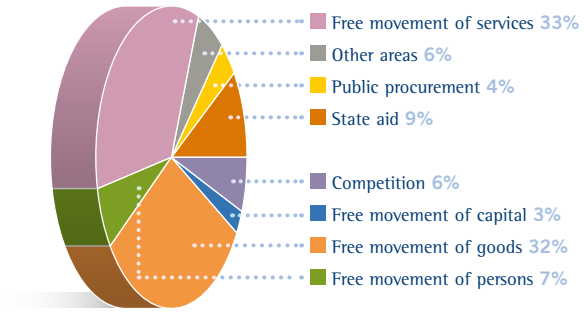


Figure 4 Pending cases at end of 2006 by State

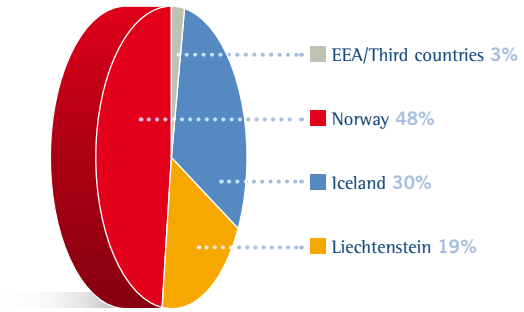
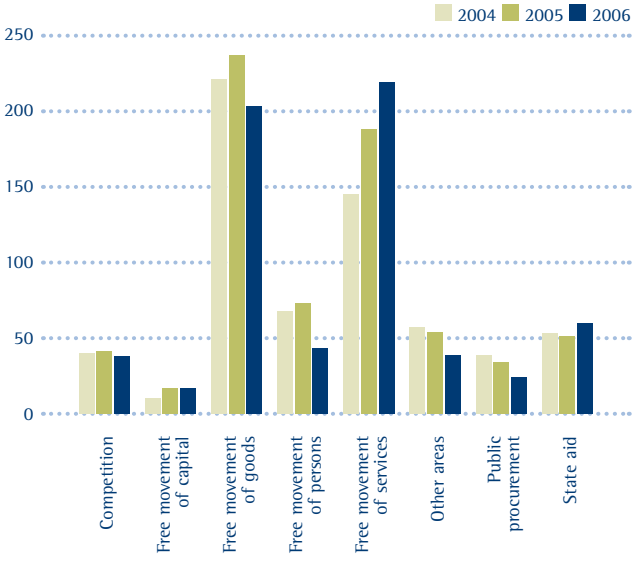


Figure 5 Case development by sector 2004-2006



Chapter 2

Internal Market

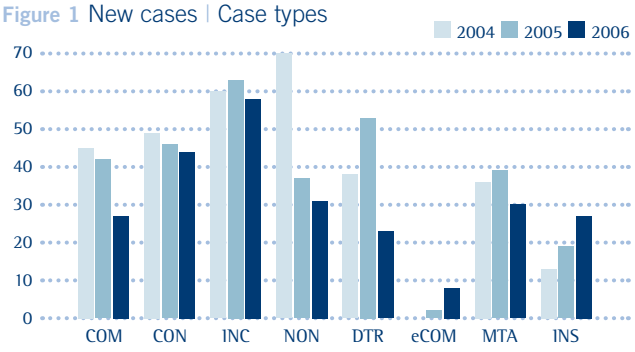
Case handling in 2006

The task of the Authority's Internal Market Affairs Directorate (IMA) is to monitor the EEA EFTA States' obligation to make the Internal Market rules part of their internal legal order and to apply the rules correctly. The Internal Market rules concern the four freedoms, *i.e.* free movement of goods, persons, services and capital, supplemented by a number of so-called horizontal provisions covering matters such as health and safety at work, labour law, equal treatment of men and women, consumer protection, environment and company law.

New cases

A total of 248 Internal Market cases were opened during 2006.

Figure 1 New cases | Case types



Compared to 2005, the number of new complaints decreased by 36% in 2006. As in previous years, a majority of new complaints, 24 or 86%, were directed against Norway, whereas 3 complaints were received against Iceland and none against Liechtenstein. At the end of 2006, a total of 102 complaint cases remained open and thus under examination by IMA.

Figure 2 New cases | Complaints by State

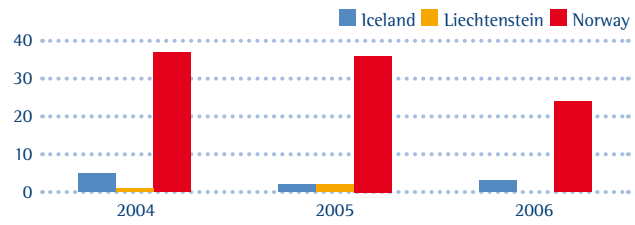
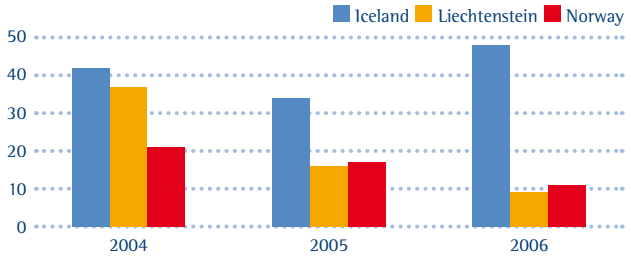


Figure 3 New cases | Own-initiative by State



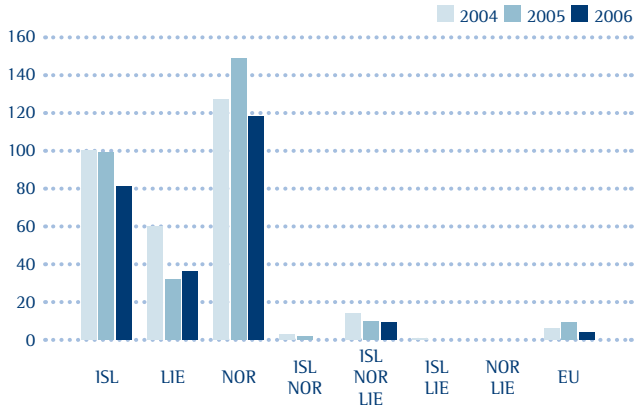
A majority of the new cases in 2006 were opened on the Authority's own initiative in order to assess compliance of national legislation or practice with Internal Market rules (58 cases). Such cases are opened by the Authority where it considers that EEA law may have been infringed. However, such cases do not necessarily lead the Authority to initiate formal infringement proceedings, as the cases might be solved informally or proven unfounded. Of the 58 cases, most related to an apparent failure by Iceland to timely make regulations part of its internal legal order in good time.

In 2006, the Authority opened 31 non-notification cases due to the EEA EFTA States' failure to implement directives timeously.

The Authority initiated 44 conformity assessment cases during 2006 in order to assess whether national laws were in conformity with the EEA Agreement.

As in the previous two years, the majority of the new cases opened in 2006 concerned Norway (118 cases). The corresponding figures for Iceland and Liechtenstein are 81 and 36 respectively. The number of new cases which concern two or more countries decreased from previous years (see figure 4 "New cases – States").

Figure 4 New cases | States

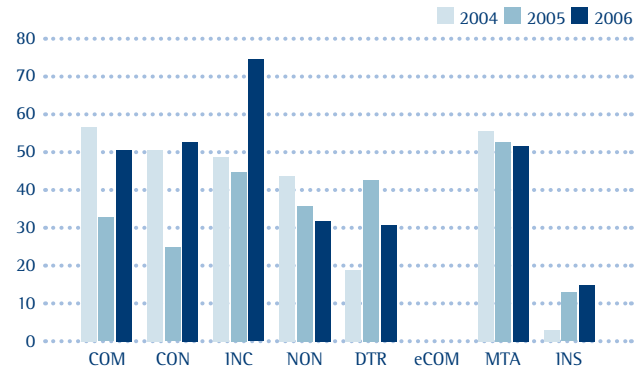


Closed cases

Over recent years, the total number of cases being dealt with by IMA has been increasing. During 2006, a total of 309 Internal Market cases were closed, which represents a 20% increase on closures as compared to 2005.

At the end of 2006, the total number of pending IMA cases stood at 543 (see below), or 58 cases less than at the beginning of the year.

Figure 5 Closures | Case types



Types of cases handled by the Internal Market Affairs Directorate

Complaints (COM)

Anyone may submit a complaint against any of the EEA EFTA States. The Authority examines all complaints falling within its competence and passes on to the European Commission any complaints which fall within the competence of the Commission.

Own-initiative cases

Non-notification of implementation of directives (NON)

Non-notification cases are opened when the EEA EFTA States have failed to adopt national measures to implement directives by the relevant compliance date.

Conformity assessments (CON)

Conformity assessment cases are opened on the Authority's own initiative in order to carry out a systematic assessment of conformity of the national measures notified by an EEA EFTA State with the provisions of a certain act they are intending to implement.

Incorrect implementation or application of EEA rules (INC)

Where the Authority has information that national legislation or practice might not be in compliance with EEA rules, and decides to examine the issue further, a so-called incorrect implementation/ application case is opened at the Authority's own initiative. This could be *e.g.* regarding incorrect implementation of EEA rules, national rules or practices that are incompatible with EEA rules or misapplication of EEA rules or a failure to incorporate EEA regulations into national law.

Notifications

Draft Technical Regulations (DTR)

The Authority examines draft technical regulations, which the EEA EFTA States are obliged to notify to the Authority. Such regulations concern products and information society services.

eCom (ECOM)

The national regulatory authorities in the EEA EFTA States have an obligation to notify draft regulatory decisions to the Authority in a number of specified instances before they can be adopted and put into effect in the national markets. The Authority has a duty to examine the draft measures in order to ensure their compatibility with EEA law.

Obligatory tasks

Management tasks and reporting obligations (MTA)

Management tasks and reporting obligations include various administrative tasks concerning, for example, examinations relating to the telecommunications sector, or adoption of guidelines relating to product safety, summary reports of national reports on health and safety, or calculation and publication of thresholds applicable in the field of public procurement.

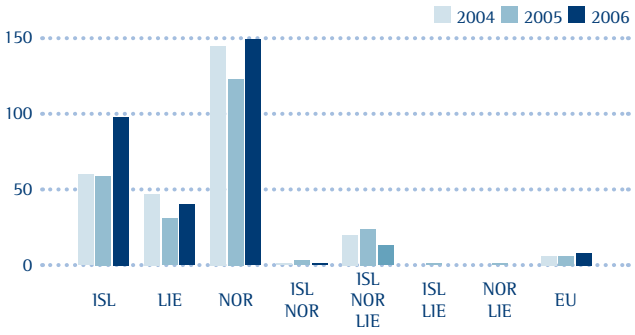
Inspections (INS)

The Authority performs on-the-spot investigations to verify that the EEA EFTA States comply with their obligations relating to, for example, food and feed safety and aviation security.

Internal Market

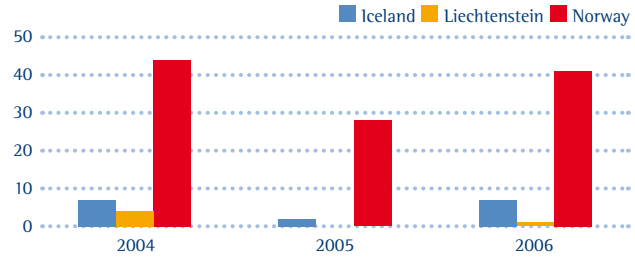
Of the cases that were closed, 149 concerned Norway, 98 Iceland, and 40 Liechtenstein.

Figure 6 Closures | States



There was a 63% increase in closures of complaint cases in 2006 compared to 2005, *i.e.* up from 30 to 49. At the end of 2006, there were 102 complaint cases pending, *i.e.* 19% fewer than the 126 complaint cases pending at the end of 2005.

Figure 7 Closures | Complaints by State

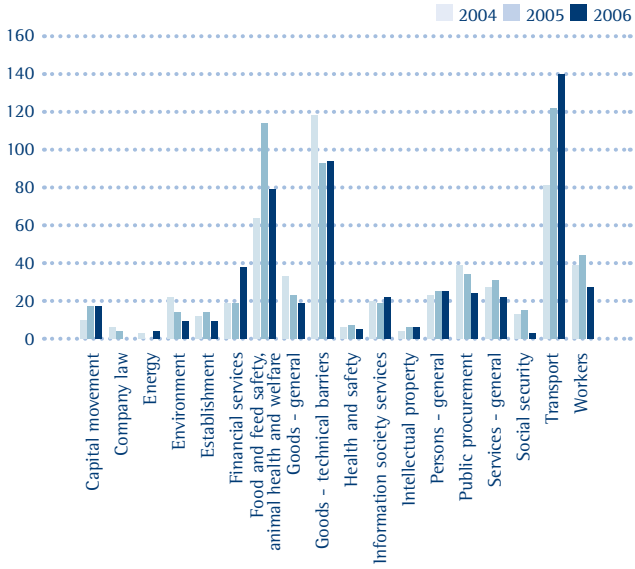


Pending cases

At the end of 2006, the Internal Market Affairs Directorate was examining 543 cases, of which 102 were complaint cases. The remaining 441 cases were initiated either to carry out tasks entrusted to it by EEA legislation (*i.e.* reporting tasks, examination of draft technical regulations, food safety and aviation security inspections), or on the Authority's own initiative to examine whether the EEA EFTA States comply with their EEA obligations.

The sectors with the highest number of pending cases are transport (140), goods (113), food safety (79) and financial services (38). Despite a general decrease in case load (58 cases), there was an increase in case load in financial services (19) and transport (18) during 2006.

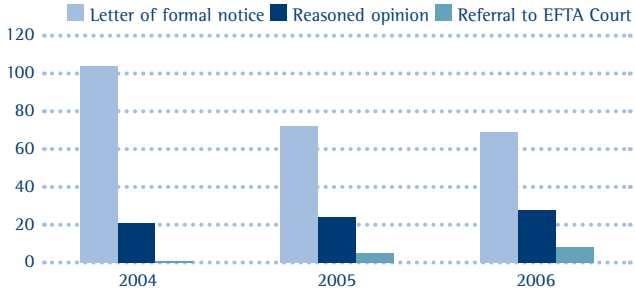
Figure 8 Pending cases | Sectors



Formal infringement proceedings

While there was a slight decrease, of 4%, in the number of new infringement cases, *i.e.* new letters of formal notice, the number of reasoned opinions (*i.e.* second stage of infringement proceedings) increased by 17%. A further eight cases were made subject to a Court referral. Five of these were, however, filed before the EFTA Court as a single case. This means that four new litigation cases were filed before the Court in 2006.

Figure 9 Infringement actions



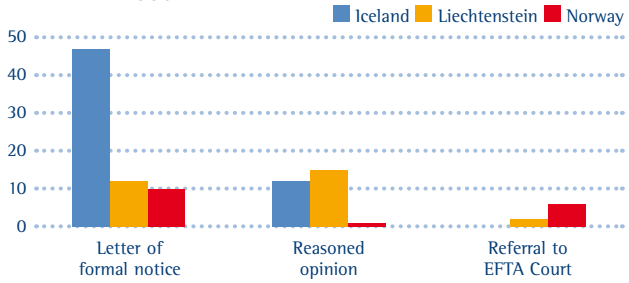
The total number of pending infringement cases against the EEA EFTA States stood 96 at the end of the year.

Of the new infringement cases, 47 (68%) were directed against Iceland, 12 (17%) against Liechtenstein, and 10 (14%) against Norway. Failure to transpose EEA acts into national

law by the EEA EFTA States accounted for 57% of the new infringement proceedings launched by the Authority.

The Authority issued 28 reasoned opinions in 2006, most of which related to the failure of the EEA EFTA States to transpose EEA acts into national law (64%). Eight cases were made subject to a referral before the EFTA Court, five of which were filed as a single case.

Figure 10 Cases subject to infringement actions by State in 2006



Selected infringement cases within the Internal Market field are described in individual reports in this Chapter.

Twice a year, the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard.[1] The Scoreboard indicates how well the EEA EFTA States perform with regard to implementation of directives. The Scoreboard does not contain information on the performance of the EEA EFTA States in making EC regulations part of their internal legal orders.

With an average transposition deficit of 1.4% as at 11 November 2006, the EEA EFTA States met the interim target of 1.5% set by the European Council as the highest acceptable transposition deficit:

- Iceland 1.5%
- Liechtenstein 1.9%
- Norway 0.7%

1. The latest Internal Market Scoreboard for EEA EFTA States was published in February 2007, showing the implementation status of directives as of 11 November 2006. The EEA EFTA Scoreboard can be found at www.eftasurv.int/information/internalmarket/

Implementation of EEA Directives

Directives

By the end of 2006, the total number of directives incorporated into the EEA Agreement was 1627. Iceland was required to implement 1404 of these directives, Lichtenstein 1380 and Norway 1562. At the end of the year, Iceland had notified full implementation of 98.1% of the directives. For Liechtenstein and Norway, the figures are 97.8% and 98.8%, respectively.

The Implementation Status Database, available on the Authority's website[1], contains information on all directives referred to in the Annexes to the EEA Agreement for which the deadline for implementation has expired, the notified status of implementation (full, partial, no implementation) and the titles of the national implementing measures. The database is updated daily.

It should be noted that the implementation figures do not reflect the quality of the implementing measures notified by the EEA EFTA States, or how they are applied. An assessment by the Authority can reveal problems concerning the conformity of the notified measures with the EEA rules they are intended to implement. Due to the Authority's limited resources, less than half of the notified acts have been made subject to a full conformity assessment.

1. The Implementation Status Database is available at www.eftasurv.int/information/implementationstatus/

Internal Market Affairs Directorate

In front from left to right: Einar Hannesson, Patricia González Gálvez, Lindsay Jore, Eirik Wold Sandå, Frank Büchel, Claire Koeniguer, Rúnar Örn Olsen, Bernhard Zaglmayer, Director Hallgrímur Ásgeirsson, Tuula Nieminen, Erik A. Mathisen, Ólafur J. Einarsson, Tuija Ristiluoma, Eeva Kolehmainen, Mia Salborn Hodgson, Ólafur Valsson, Martin Haugberg, Danielle De Borger, Nicola Britta Holsten, Ketil Rykhus.
Not present: Ragnhild Behringer, Tor Bjørdal, Helen Pope, Camilla Rise.

FREEDOM OF ESTABLISHMENT

The Norwegian Gaming Machines case before the EFTA Court

In summer 2003, the Norwegian Parliament adopted new legislation providing for a monopoly for the state-owned Norsk Tipping AS on the operation of gaming machines offering money prizes. Norsk Tipping already enjoyed a monopoly on other popular forms of gambling such as lotto and football betting.

In October 2004, the EFTA Surveillance Authority delivered a reasoned opinion to Norway concluding that the legislation constituted an infringement of Articles 31 and 36 of the EEA Agreement. Restrictions on the right of establishment and the freedom to provide services may only be accepted if they are non-discriminatory, justified by imperative requirements in the general interest, suitable for achieving their objective and do not go beyond what is necessary to attain it.

The Authority does not dispute that the objective of combating gaming addiction is laudable and might, in principle, justify a restriction. Similarly, the Authority does not question Norway's competence to regulate the market, for instance by reducing the number of gaming machines. However, the Authority considers that Norway had not shown that its gaming policy is consistent and systematic enough to justify the imposition of the monopoly. Moreover, in light of the principle of proportionality in EEA law, the Authority considers that the objectives pursued by the legislation could have been reached by less restrictive means, *e.g.* by imposing more stringent conditions on the private operators currently running the gaming machines.

Having decided, in November 2005, to bring the case before the EFTA Court, the Authority submitted its application in March 2006 and asked the Court to declare that Norway had infringed Articles 31 and 36 of the EEA Agreement. The case was registered as case E-1/06.

The case attracted considerable interest. Belgium and Iceland intervened in support of the position of the Norwegian Government. Furthermore, Finland, Greece, Hungary, the Netherlands, Portugal, Sweden and the European Commission submitted written observations to the EFTA Court; a record number of observations received by the Court from the EU Member States. An oral hearing was held in November 2006. The judgment is expected in the first half of 2007.

Another case is now pending before the EFTA Court regarding other aspects of the Norwegian gaming legislation; Oslo Tingrett has requested an advisory opinion in case E-3/06 *Ladbrokes Ltd. v Staten v/ Kultur- og kirkedepartementet and Staten v/Landbruks- og matdepartementet*. The case concerns restrictions in the Norwegian gaming legislation on other types of gaming than gaming machines and their compatibility with Articles 31 and 36 EEA. The number of written observations submitted to the EFTA Court from EU Member States has exceeded that in the Gaming Machines case, with nine EU Member States as well as Iceland sending their observations to the Court. An oral hearing in the case was held in January 2007.

The Norwegian Waterfalls case before the EFTA Court

In April 2006, the EFTA Surveillance Authority decided to bring a case concerning the Norwegian Industrial Licensing Act before the EFTA Court. According to the Act, all waterfall concessions in private hands are subject to reversion to the Norwegian State, *i.e.* the concession-holders are required to transfer the waterfall and all facilities and installations to the State after 60 years.

The Authority delivered its reasoned opinion in 2002, in which it concluded that the current Norwegian system of reversion of waterfall acquisition rights was contrary to Articles 31 and 40 of the EEA Agreement concerning the right of establishment and the free movement of capital. The Norwegian Government claimed that the rules related to the management of natural resources and fell outside the scope of the EEA Agreement. Furthermore, the Government maintained that the system of ownership of waterfalls was covered by Article 125, which provides that the Agreement shall in no way prejudice the system of property ownership of the EEA States. Nevertheless, the Government decided to initiate a process to amend the system. However, the Government announced in spring 2006 that it maintained its original position and would not make any amendments to the rules.

The Authority does not claim that a system of reversion of waterfalls is in itself contrary to the EEA Agreement. However, the Authority is of the opinion that the Agreement requires such a system to be non-discriminatory. Nothing in the EEA Agreement excludes economic activities involving the management of natural resources from its scope of application. While recognising that, according to Article 125 EEA, the system of property ownership is a matter for each EEA EFTA State, the Authority considers that it follows from established case law that the Article does not have the effect of exempting the system of reversion from the fundamental rules of the Agreement. Under the current Norwegian rules, State-owned enterprises, municipalities and entities where minimum two thirds of the capital is owned by public bodies, will be granted time-unlimited concessions for the operation of waterfalls. Private operators, on the other hand, will have to surrender their waterfalls and the accompanying installations to the State after 60 years. This means that an operator from another EEA State cannot exercise this economic activity under the same conditions as Norwegian public operators. In the Authority's view, this discrimination between public Norwegian rights holders and other rights holders – public as well as private entities from other EEA States – is in breach of Articles 31 and 40 of the EEA Agreement.

An oral hearing in the case has been scheduled for March 2007.

Legal & Executive Affairs Directorate

From left to right: Claire Taylor, Matthildur Steinsdóttir, Sigridur Eysteinsdóttir, Bjørnar Alterskjær, Director Niels Fenger, Per Andreas Bjørgan, Michael Sánchez Rydelski, Lorna Young, Arne Torsten Andersen, Charlotte Schaldemose.

Discriminatory taxation

In 2004, the EFTA Surveillance Authority reported on the judgment delivered in case E-1/04, in which the EFTA Court ruled on discriminatory tax rules in Norway. In 2005, very similar questions of interpretation were raised in the Community pillar of the EEA by a reference from the French *Conseil d'État* to the European Court of Justice, in case C-170/05 *Denkavit*. In light of the identity of the issues and the existence of highly relevant case law from the EFTA Court, the Authority intervened in the case before the European Court of Justice. The latter handed down its judgment in December 2006.

The main question referred by the French Court was whether the rules on freedom of establishment prohibited legislation whereby dividends paid by a French company to its parent were subject to withholding tax if the parent was established in another Member State whilst French parent companies were almost entirely exempt from tax. As a subsidiary point, the Court asked whether the existence and content of a double taxation treaty had any effect on the answer to the first question.

The European Court of Justice re-stated its basic proposition that, although direct taxation is a matter for the Member States, they must exercise that competence consistently with Community law. It concluded that, in the case of companies, this meant that there could be no discrimination, however minimal, based on the place in which a company has its seat. Under EEA law, discrimination exists where there is no objective difference between two situations such as to justify them being treated differently.

Recent case law had established that, as soon as a Member State imposes a tax on the income of non-residents, their situation becomes comparable to that of resident taxpayers. Since France had chosen to relieve residents of liability to tax on dividends from subsidiaries, it had to extend that relief to non-residents. Moreover, since France did not charge tax internally, it could not rely on the argument that the rules were intended to prevent companies established elsewhere from escaping the tax.

Finally, the European Court of Justice concluded that the double taxation treaty did form part of the framework for assessment of the case but found that the combined application of it and the Dutch legislation did not serve to overcome the effects of the restriction on the freedom of establishment which existed in the present case.

The Authority also intervened in another, broadly similar, case before the European Court of Justice, Case C-379/05 *Amurta*, in which the Court is called upon to interpret the provisions on the free movement of capital. The case essentially concerns the tax treatment of shareholders in Dutch companies: those domiciled in Portugal are subject to a Dutch withholding tax whereas those domiciled in the Netherlands are exempt from that tax. An oral hearing in the case was held in January 2007.

SCOPE OF EEA AGREEMENT

Internal taxation

The EEA Agreement does not contain rules on harmonisation of national taxation. As a general rule, the tax system of an EEA EFTA State is not covered by the EEA Agreement. However, the EFTA Court and the European Court of Justice have repeatedly stated that EEA States must exercise their powers of taxation in a manner consistent with EEA law.

The EFTA Surveillance Authority has, in recent years, received a number of complaints alleging that national rules concerning direct or indirect taxation infringe the four freedoms. Such complaints have concerned, *inter alia*, registration tax on imported used vehicles, restrictions on temporary import of company cars, discriminatory taxation of imported beverage packaging, taxation of products temporarily exported for replacement during the guarantee period, discriminatory tax treatment of capital gains from the sale of real estate and discriminatory tax treatment of dividends paid to non-resident shareholders. In addition, the Authority has received an increasing number of complaints and enquiries relating to value added taxation of imported used products, such as cars, boats and other second-hand goods.

Discriminatory taxation of imported used cars

Over the years, the European Court of Justice has dealt with a number of cases regarding taxes levied upon importation of used cars. Most of the cases have involved systems of taxation where the amount of tax is calculated on the basis of fixed criteria or a pre-determined scale rather than the value of the car. The European Court of Justice has strived to ensure that the rules for calculation do not have the effect of discriminating against imported cars, and has repeatedly stated that it is incompatible with the EC Treaty to levy on imported used cars a tax which, calculated on the basis of fixed criteria or scales without taking the car's actual depreciation into account, exceeds the residual tax incorporated in the value of similar used cars already registered in the national territory. Furthermore, the European Court of Justice has insisted that such a system must provide a right for the taxpayer to adduce evidence that the fixed scale is inadequate to determine the real value of the used car imported by him.

In February 2005, the Authority delivered a reasoned opinion to Norway noting that the depreciation in the actual value of imported used cars is calculated in a general and abstract manner, on the basis of a fixed depreciation scale, and that the system does not provide a right for the taxpayer to adduce evidence that the fixed scale is inadequate to determine the real value of the imported car. It therefore cannot be guaranteed that the amount of the tax due does not exceed, even if only in a few cases, the amount of the residual tax incorporated in the value of similar cars already registered in the national territory.

In 2006, Norway worked on setting up a new system for taxation of imported used cars. The new system, which will allow importers to request an individual assessment of the value of an imported used car, is expected to enter into force in 2007. The Authority will monitor the adoption of the new system in order to ensure that it complies with the EEA rules and the case law of the European Court of Justice.

Restrictions on temporary import of company cars

According to the European Court of Justice, national rules which hinder residents of an EEA State from temporarily using a foreign registered company car in that country may deter employers established in another EEA State from employing a person resident in the first EEA State. Such rules amount to a restriction on the free movement of workers, which is prohibited unless it can be justified.

In 2004, the Authority issued a letter of formal notice to Norway because it considered that the Norwegian rules concerning temporary import of foreign registered company cars were not in compliance with EEA law on the free movement of workers and the freedom to provide services.

In 2006, Norway adopted new rules concerning temporary import of foreign registered company cars by persons resident in Norway. Following an examination of the rules, the Authority decided, in November 2006, not to pursue further a number of complaints in that field.

Discriminatory taxation of products temporarily exported for replacement during the guarantee period

In January 2006, Iceland introduced new customs legislation ensuring that duties would no longer be levied on re-import of products, or parts of products, which have been sent abroad for repair under the terms of a guarantee. Furthermore, when

a foreign seller of a defective product decides to deliver a new product instead of repairing the defective one, the new product is exempted from customs duties. As the exemption introduced in the new customs legislation thus ensures that goods sent abroad for repairs because of defects during their guarantee period are no longer taxed in a discriminatory manner upon re-importation into Iceland, the Authority closed the case it had initiated on the basis of a complaint related to the old rules.

Discriminatory taxation on lottery prizes

In 2005, the Authority received a complaint against Norway from a Norwegian resident concerning discriminatory taxation of a lottery prize he had won in a Swedish lottery in 1998.

Norwegian legislation at the time reserved an exemption from income tax to lottery prizes won in lotteries established in Norway. In 2004, the Authority closed a case against Norway concerning such discriminatory taxation on lottery prizes after Norway had amended its legislation. The amendment came following a reasoned opinion by the Authority, and in light of the judgment of the European Court of Justice in case C-42/02 *Lindman*. In that case comparable Finnish legislation was held to be contrary to the principle of free movement of services.

Following the amendment of the law, the complainant had been reimbursed for the tax he had paid on the lottery prize. However, a new complaint was lodged when the tax authorities again requested payment of the tax.

According to EEA law, the States are in principle required to repay taxes levied contrary to EEA law. The Norwegian Government had, however, adopted the position that the national tax rules in question were, at the time of collection of the tax, not contrary to EEA law. This position was based on the view that the judgment in *Lindman* constituted a significant legal development such that it could not set aside the existing tax rules.

After discussions on the issue between the Authority and the Norwegian Government during 2006, the Norwegian Government informed the Authority that it had changed its policy and that taxpayers would now be able to rely upon EEA law in individual tax cases. As far as claims of repayment due to the taxation of lottery prizes from other EEA States are concerned, the tax authorities have been instructed to rely on EEA law as it was laid down by the Court of Justice in *Lindman*. Following this the complainant informed the Authority that the case before the tax authorities had been resolved in his favour and the Authority closed the case.

Export restrictions on fish compatible with Protocol 9

In May 2006, the EFTA Surveillance Authority closed a case concerning the compatibility of a provision in the Icelandic Act on Fisheries Management with the EEA Agreement.

The Authority had received a complaint in which it was alleged that the power enjoyed by the Minister of Fisheries to decide that catches of certain species exported unprocessed to markets abroad would count for more than their actual weight when set against the quota of the vessel was incompatible with the Agreement. The effect of such a decision could be to restrict exports, due to the detrimental impact they have on the quota. Article 12 of the EEA Agreement prohibits quantitative restrictions on export and measures having equivalent effect.

However, according to Article 8(3) of the EEA Agreement, unprocessed fish falls outside the product scope of the Agreement. Consequently, the prohibition in Article 12 is not applicable.

Article 20 of the EEA Agreement stipulates that provisions and arrangements that apply to fish and other marine products are to be found in Protocol 9 to the Agreement. The issue raised by the complaint therefore fell to be examined under the special rules in Protocol 9. As the Protocol contains no provision covering restrictions on exports either in the form of customs duties or as quantitative restrictions or measures having equivalent effect, the Authority concluded there were no grounds to examine the case further.

FINANCIAL SERVICES

Financial Services Action Plan

In order to ensure rapid progress towards a single financial market, the European Commission, in 1999, launched its *Financial Services Action Plan* (FSAP).[1] The FSAP set out 42 measures aimed at creating an integrated, deep and liquid financial market to serve as a motor for growth, job creation and improved competitiveness in the European economy. At the end of 2006, 23 FSAP directives were in force in the EU, of which 18 have been incorporated into the EEA Agreement. So far, 14 of those have been notified as fully implemented by all three EEA EFTA States, while the remaining four are overdue for notification.

The aim of creating a single financial market in the whole EEA, *i.e.* including the financial markets in the EEA EFTA States, requires uniform surveillance of the transposition of the FSAP measures, not only in the EU Member States, but also in the EEA EFTA States. Transposition of FSAP measures has been given high priority within the Community. In January 2006, the Authority launched a project aimed at systematically examining the conformity of national measures notified by the EEA EFTA States as implementing the FSAP acts.

During the course of 2006, the EEA EFTA States were required to submit so-called "tables of correspondence", outlining which provisions in national legislation are meant to implement the corresponding provisions of the directives. So far, tables have been received in respect of almost two thirds of the FSAP directives.

In a number of cases, the EEA EFTA States have been asked to submit further information or clarifications regarding implementation, but these requests generally concern minor points. Certain amendments to national provisions appear to be necessary in order to ensure full compliance in some cases, and where it is the case, the EEA EFTA State in question has indicated a willingness to make the necessary changes. Thus, no infringement cases have so far been initiated as a result of the review.

Due to the large number of directives being assessed, this is a project which has made substantial demands on the Authority's resources during 2006. It has also entailed a considerable workload for the national administrations of the EEA EFTA States, which have shown good co-operation and willingness to provide the necessary information.

The project will continue in 2007.

1. See http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm

SECURITY INSPECTIONS

Aviation security

Since the events of 11 September 2001, major aviation security measures have been introduced in the EEA States. The aim is to safeguard civil aviation against acts of unlawful interference.

The *Aviation Security Framework Regulation* (2320/2002/EC) establishes the framework for aviation security in the EEA States. It is supplemented by European Commission implementing regulations; the *Common Basic Standards on Aviation Security Regulation* (622/2003/EC) is the most important of these. Both Regulations were incorporated into the EEA Agreement in April 2004.

The main responsibility of the EFTA Surveillance Authority in the field of civil aviation security is to monitor the application of the civil aviation security measures in Iceland and Norway, and to conduct inspections of national administrations and of airports in these States to ensure that EEA rules on aviation security are being complied with. The civil aviation security legislation does not apply to Liechtenstein, there being no airport engaged in public commercial operations on its territory.

The legal basis for the inspections is laid down in the *Aviation Security Framework Regulation*. The inspections are carried out according to an Inspection Programme, which is adopted by the Authority. The Programme establishes that the Authority shall take all necessary action to seek rectification by the EEA EFTA States of any deficiencies which might be identified either at national level or at the airports in Iceland and Norway.

During 2006, the first full year of Authority aviation security inspections, the Authority carried out eight unannounced security inspections of airports in Iceland and Norway. In addition, one inspection of a national authority was conducted.

The Authority may request the assistance of nominated national auditors from all the EEA States in their inspections. National auditors assisted the Authority in four inspections during 2006. The Authority inspectors may also participate as observers in inspections carried out by the European Commission in the EU

Member States, in the same way as observers from the Commission may participate in Authority inspections. During 2006, the Authority invited the Commission to participate in four airport inspections and the Commission invited the Authority inspectors to participate in two airport inspections. This exchange of observers between the Authority and the Commission is particularly important in order to ensure that the aviation security inspections are carried out in a homogeneous manner in all EEA States.

Maritime security

In the aftermath of the events of 11 September 2001, initiatives were launched at international level to establish obligatory security standards also in the maritime field. In this context, the European Union harmonised the maritime security legislation within the EU. The *Ship and Port Facility Regulation* (725/2004/EC) introduces measures aimed at improving the security of ships used in international trade and domestic shipping and associated port facilities. In addition, the *Port Security Directive* (2005/65/EC) establishes Community measures on port security and the *Regulation on Inspections in the field of Maritime Security* (884/2005) lays down rules on how to perform maritime security inspections. Both Acts were incorporated into the EEA Agreement in 2006 and are expected to enter into force during 2007, following notification of the fulfillment of constitutional requirements by Iceland.

It is expected that the EFTA Surveillance Authority will start conducting maritime security inspections in Iceland and Norway at some point during the course of 2007. To assist the Authority in these new tasks, a maritime security inspector will be recruited early in 2007.

The aim of the inspections is to monitor the application by the EEA EFTA States of the *Ship and Port Facility Regulation* and the *Port Security Directive*. This monitoring activity will include inspections of an appropriate sample of ships, port facilities and relevant companies as well as of the relevant national administrations. The inspection framework is laid down in the *Maritime Security Inspections Regulation* (884/2005/EC).

As has been the case for aviation security inspections, the Authority will co-operate closely with the European Commission when conducting inspections in the EEA EFTA States. It is expected that the European Maritime Safety Agency (EMSA) will also assist the Authority with maritime security inspections.

FOOD SAFETY AND ANIMAL HEALTH

Introduction

The EFTA Surveillance Authority is responsible for monitoring the EEA EFTA States' compliance with applicable EEA legislation related to feed and food safety and to animal health and welfare. This is done by controlling implementation and application of EEA legislation relating to all elements of the food chain. The control also includes verification through on-the-spot inspections of the effectiveness of the national control systems.

In 2006, the Authority carried out 10 inspections in the EEA EFTA States. In addition to a general review inspection in Iceland, the Authority carried out one inspection in Norway related to border inspection posts, four inspections in Norway related to food safety, three inspections in Norway related to animal health and welfare and one inspection in Iceland related to animal nutrition. The relatively low number of inspections carried out in Iceland reflects the fact that only the acts in Chapter I (veterinary issues) of Annex I (Veterinary and phytosanitary matters) to the EEA Agreement related to fish and fishery products, bivalve molluscs and diseases in aquatic animals are applicable to Iceland.

The aim of the general review inspection in Iceland was to review and resolve any outstanding issues following conclusions from previous inspections undertaken by the Authority between 2001 and 2006. The Authority observed that the Icelandic competent authorities had taken the necessary corrective action in relation to many of its conclusions. For some of the conclusions it was agreed that Iceland should send the Authority relevant information confirming the action taken, while for other issues information on the intended corrective action was still outstanding.

During the inspections carried out in 2006 in Norway and Iceland, improvements on earlier years were recorded. Nonetheless, inadequate co-operation between different competent authorities, insufficient staff resources and lack of staff training, approval of establishments not fully complying with legal requirements, as well as persistent imperfection related to the official controls carried out by competent authorities, and inadequate enforcement of legislation were brought to the attention of national authorities.

The Authority's inspection reports, including the EEA EFTA States' comments, are published on the Authority's website.[1]

1. www.eftasurv.int/information/reportsdocuments/vetcontrolmatters/

Feed and food safety inspections

One inspection was carried out in Iceland relating to the application of the *Directive on Official Inspections in Animal Nutrition* (95/53/EC) and the *Directive on Establishments and Intermediaries in the Animal Feed Sector* (95/69/EC) which relate to the official control of feed. In the inspection report the Authority concluded that Iceland had not notified it of follow-up measures taken after an alert was received from one of the other EEA States concerning contamination of fishmeal of possible Icelandic origin. It was also concluded that feed materials of fish origin produced in Iceland were, at the time of the inspection, not controlled in accordance with EEA requirements. Furthermore, contrary to what is laid down in the Directives, Icelandic establishments and intermediaries had to apply for permission from the Agricultural Authority before arrival in Iceland of products from other EEA States.

In 2006, the Authority carried out an inspection in Norway relating to the application of the *Directive on Official Control of Foodstuffs* (89/397/EEC), the *Directive on the Hygiene of Foodstuffs* (93/43/EEC), the *Regulation on Contaminants in Food* (315/93/EEC) and the *Regulation on Monitoring the Maximum Levels of Pesticide Residues in and on Cereals and Products of Plant Origin* (645/2000/EC). In its report the Authority concluded that the competent authority did not have a sufficient number of staff and thus that the official controls could not be carried out adequately. Furthermore, the Authority also concluded that the measures required by the relevant national legislation were not always taken by the competent authority.

In 2006, the Authority carried out an inspection of border inspection posts in Norway. The main purpose of that inspection was to visit the border inspection posts and inspection centres which Norway had proposed be added to the Authority's "list of border inspection posts in Iceland and Norway approved for veterinary checks on live animals and animal products from third countries". The inspection was carried out jointly by inspectors from the Authority and the Food and Veterinary Office of the European Commission. Following the joint inspection the inspection team issued a common recommendation to the Authority which then adopted Decision 320/06/COL updating the list of approved border inspection posts in Iceland and Norway by adding one border inspection post and an additional category for an inspection centre.

In the reports for all of the above inspections, conclusions were also drawn on deficiencies relating to the own-checks systems, the facilities, and the maintenance and cleaning of the establishments.

In 2006, the Authority carried out an inspection in Norway relating to the application of the *Directive on Monitoring Certain Substances, and Residues thereof, in Live Animals and Animal Products* (96/23/EC) and the *Directives on Medicinal Products and Medicated Feedingstuffs* (2001/82/EC and 90/167/EEC). In its report the Authority concluded that improvements had been made to the national residues control plan and how it is applied since the last inspection in 2003. However, the inspection team observed that some shortcomings still existed with regard to the scope, implementation and supervision of the plan, and in the follow-up of laboratory results. Furthermore, the Authority concluded that, contrary to what is provided for in Directive 90/167/EEC, not only veterinarians, but also fish health biologists, are authorised to prescribe medicated feedingstuffs.

In 2006, the Authority carried out an inspection in Norway to verify the application of the *Directive on Rabbit Meat and Farmed Game Meat* (91/495/EEC) and the *Directive on Wild Game Meat* (92/45/EEC). In its report the Authority concluded that the corrective action notified by Norway following the inspection carried out in 2001 had not been implemented. The Authority also concluded that the requirements with regard to approval of farmed and wild game meat establishments and supervision of approved establishments were not fully applied. Furthermore, official inspections of wild game meat were not always carried out within the relevant time limits and wild game meat was not always handled hygienically and labelled (health marked) in accordance with the relevant legal provisions.

In 2006, the Authority carried out an inspection in Norway regarding the application of the *Directive on Poultry and Hatching Eggs* (90/539/EEC), the *Directive on Fresh Poultrymeat* (71/118/EEC) and the *Directive on Egg Products* (89/437/EEC). Particular emphasis was put on the system for official control and enforcement of relevant legislation. In its report the Authority concluded that the system of supervision of poultry establishments was not fully harmonised. Furthermore, in the district offices visited, the competent authority did not have a sufficient number of adequately trained personnel to perform the duties assigned to them, including inspection of establishments at a frequency required by EEA legislation. In addition, the measures required by the relevant national legislation were not always taken by the competent authority.

Animal health and welfare inspections

In 2006, the Authority carried out an inspection in Norway relating to the application of the *Regulation on Certain Transmissible Spongiform Encephalopathies* (999/2001/EC) and the *Regulation on the Identification and Registration of Ovine and Caprine Animals* (21/2004/EC). During that inspection, particular emphasis was put on the application in Norway of certain protective measures against scrapie. The Authority observed deficiencies related to the identification of live animals and the information registered in the holding registers. Deficiencies were also observed with regard to representative sampling, including sampling of those animals that died on pasture and the number of samples taken. Furthermore, a sheep breeding programme to select animals resistant to transmissible spongiform encephalopathies had not yet been established in Norway and there was no system set up to ensure that specified risk material was correctly disposed of.

The Authority also carried out an inspection in Norway relating to the application of the *Directive on Measures for Control of Avian Influenza* (92/40/EEC) and the *Directive on Measures for Control of Newcastle Disease* (92/66/EEC). In its report the Authority concluded that the contingency plans for these diseases were either not finalised or not updated. Furthermore, the Authority concluded that it could not always be shown that national measures corresponding to the safeguard measures adopted by the European Commission had been adopted and notified to the Authority forthwith. Finally, it was observed that the Norwegian competent authority did not co-operate with the designated national reference laboratory.

In 2006, one inspection was carried out in Norway in relation to the application of the *Directive on Protection of Animals Kept for Farming Purposes* (98/58/EC), the *Directive on the Protection of Animals During Transport* (91/628/EEC), and the *Directive on the Protection of Animals at the Time of Slaughter or Killing* (93/119/EEC). The main objective of that inspection was to evaluate the Norwegian system for supervision of animal welfare during transport and at the time of slaughter or killing. Some conclusions from the inspection carried out in 2003 were also followed up. In its report the Authority concluded that staging points were not under the control of an official veterinarian and were not inspected regularly. Requirements on stocking density were still not respected with regard to transport of pigs and it could not be ensured that official inspections of the means of transport and animals at the place of departure, during transport and at the place of destination other than at slaughterhouses were carried out. It could also not be ensured that animals which had experienced pain or suffering during transport or upon arrival at the slaughterhouse were slaughtered within two hours of arrival.

During an inspection on animal welfare in Norway, the Authority, in collaboration with representatives from the European Commission, gathered information on animal welfare during the stunning and killing of farmed fish. This will serve as useful background information for the European Commission in drafting a proposal for legislation relating to animal welfare of fish.

Co-operation with the European Commission

In order to ensure that EEA legislation relating to food, feedstuffs and animal health is applied in a uniform manner throughout the EEA, the Authority co-operates closely with the European Commission. In addition to discussions on individual cases, exchange of information and consultations, inspectors from the Food and Veterinary Office (FVO) of the European Commission can participate as observers during the Authority's inspections in the EEA EFTA States and the same is true of the inspectors from the Authority during FVO inspections in the EU Member States.

The Authority and the FVO also exchange information on their inspection programmes for the forthcoming year. The inspection programme for 2006 was approved in October 2005 and, thereafter, sent to the EEA EFTA States and the FVO, and published on the Authority's website.[1]

In 2006, the Authority's inspectors participated in four FVO inspections in EU Member States related to salmonella in eggs, residues, animal welfare and a general review inspection. Inspectors from the FVO participated in inspections related to border inspection posts, game meat and animal welfare in Norway.

The Authority was assisted by national experts in the inspections relating to residues and to scrapie in Norway. The national experts assisting the Authority and the FVO normally work in laboratories in the EU Member States. The experts' contribution is important in the more technical inspections because of their scientific competence and in-depth knowledge of work in the laboratories.

Implementation of new EEA legislation

The Authority has registered a continued trend of late implementation by the EEA EFTA States of EEA legislation in the veterinary field. In 2006, the Authority monitored more closely the adoption of national measures corresponding to regulations incorporated into the EEA Agreement and issued seven letters of formal notice concerning feedingstuffs legislation and six reasoned opinions relating to veterinary and food legislation.

Safeguards and protective measures on imports from third countries in respect of veterinary issues are set out in Annex I to the EEA Agreement. These measures are applied when there is a risk to animal or human health. The EEA EFTA States are obliged to adopt measures simultaneously with the EU Member States. During 2006, the EEA EFTA States have improved their ability to adopt national safeguard measures closer in time to the measures adopted by the European Commission.

Contingency plans in the field of animal nutrition

The *Directive on Official Feed Control* (93/53/EC) requires EEA States to prepare contingency plans to respond to a situation where a product for animal nutrition has been found to pose a serious risk to human or animal health, or to the environment. In 2006, the Authority examined the EEA EFTA States' draft contingency plans and suggested some amendments, in particular, to ensure that it is clear from the plans when a risk would be considered serious enough to warrant implementation of the plans. The EEA EFTA States have, on the basis of the Authority's comments and suggestions, made amendments to their national contingency plans.

Recommendations and decisions on food safety and animal health

In order to ensure a harmonised approach concerning the official controls carried out by national authorities in the field of food safety, it has been the Authority's practice to issue recommendations based on the programmes recommended by the European Commission to the EU Member States.

In 2006, the Authority issued three recommendations to the EEA EFTA States. The recommended

1. www.eftasurv.int/fieldsofwork/fieldgoods/foodvet/dbaFile8063.html

programmes are not legally binding, however the Authority was simply informed by the EEA EFTA States of the extent to which they were followed up at national level.

The recommendations adopted related to the reduction of the presence of dioxins, furans and PCBs in feedingstuffs and foodstuffs, the monitoring programme for 2006 to ensure compliance with maximum levels of pesticide residues in and on cereals and certain other products of plant origin and national monitoring programmes for 2007, as well as a coordinated inspection programme in the field of animal nutrition for 2006.

In 2006, the Authority continued its work on updating the list of veterinary border inspection posts in the EEA EFTA States. One Decision, adopted in September, addressed the delisting of certain inspections centres and border inspection posts which are no longer used in Iceland and Norway. As mentioned above, a second Decision, adopted by the Authority in October, added a new border inspection post and updated the product category for one inspection centre in Norway.

The Authority has the legal competence to adopt decisions regarding the status of the EEA EFTA States in the field of animal health. In 2006, the Authority continued its work on updating the decisions regarding, *inter alia*, the enzootic bovine leucosis status of Norway and the Norwegian withdrawal scheme relating to fish in farms infected with infectious salmon anaemia. The Authority also continued its work assessing the Norwegian control plan related to national scrapie and the additional guarantees proposed by Norway as well as the Norwegian plan on the preventive vaccination of birds kept in zoos against avian influenza. In addition, the Authority undertook a thorough assessment of the annual Norwegian control residues plan.

Reports on food safety and animal health

A number of EEA acts on feedingstuffs, organic production, veterinary issues and foodstuffs oblige the EEA EFTA States to send, periodically, to the Authority monitoring plans, results of official controls, and results of monitoring of certain substances and residues thereof. These reports from the EEA EFTA States often constitute parts of more comprehensive reports issued by the European Commission. In the field of animal nutrition and foodstuffs the EEA EFTA States used the harmonised EEA format for the reporting of data relating to national official controls.

The reports cover different areas such as identification of live animals, status for a number of contagious animal diseases and certain zoonoses, results of analyses of a number of hormones, antibacterials and other veterinary drugs, environmental contaminants and residues of pesticides. Furthermore, the EEA EFTA States are required to regularly report the outcome of checks of consignments of products and animals imported from third countries and the results from the official controls in the field of feedingstuffs and foodstuffs.

In general, the reports describe a favourable situation in the EEA EFTA States for most of these areas. A thorough assessment of the reports will continue in 2007.

ENVIRONMENT

Liechtenstein referred to the EFTA Court for non-implementation

In December 2006, the EFTA Surveillance Authority lodged an application with the EFTA Court seeking a declaration that by not implementing the *Environmental Noise Directive* in due time, Liechtenstein had failed to fulfil its obligations under the EEA Agreement. The EEA EFTA States were required to implement that act into their national law no later than July 2004.

FREE MOVEMENT OF GOODS

Preventing new technical barriers to trade

The *Draft Technical Regulations Directive* (98/34/EC) establishes a notification procedure the aim of which is to provide transparency.

This procedure prevents the creation of new, unjustified barriers to trade which can arise from the adoption of restrictive technical regulations. According to the Directive, the EEA EFTA States shall notify technical regulations in draft form to the EFTA Surveillance Authority. Following the notification, there is a three month standstill period during which the Authority, the European Commission and other EEA States have time to examine the measures and issue comments if it appears that questions exist as regards the draft regulation's compatibility with the EEA Agreement.

In 2006, the Authority received 23 notifications of draft technical regulations from the EEA EFTA States. Of these, 21 came from Norway, 1 from Iceland and 1 from Liechtenstein. Six of the notifications prompted the Authority to send comments. The Commission commented upon 8 of the notifications, of which 4 were not commented on by the Authority.

The Authority received 668 notifications from the EU Member States, forwarded to it by the Commission. In one case, the EEA EFTA States decided to send comments through the Authority in the form of a single coordinated communication.

Year	EFTA notifications	Comments from the Authority	EU notifications	Single coordinated communications
2000	19	3	751	0
2001	22	5	530	1
2002	49	4	508	1
2003	29	5	486	0
2004	37	10	557	1
2005	55	11	733	0
2006	**23**	**6**	**668**	**1**

SOCIAL SECURITY

Liechtenstein helplessness allowance

In November 2006, the EFTA Surveillance Authority brought a case before the EFTA Court regarding the Liechtenstein helplessness allowance *("Hilflosenentschädigung")*, granted to persons in need of help to carry out daily tasks. The Authority's submission concluded that the helplessness allowance cannot be restricted to persons residing in Liechtenstein.

According to the *Social Security Coordination Regulation* (1408/71/EEC), all social security benefits, with the exception of social assistance, are coordinated in the EEA. This means that such benefits must be exported, *i.e.* provided also to beneficiaries who reside in another EEA State. An exception to this principle of exportability is made for so-called "special non-contributory benefits". Annex IIa to the Regulation contains a list of such benefits as notified by the EEA States, including the helplessness allowance in Liechtenstein.

The Authority disputes that the helplessness allowance constitutes a "special non-contributory benefit", even if it is listed in the said Annex. It is of the view that recent case law of the European Court of Justice supports the conclusion that the mere listing in Annex IIa is not sufficient in order for a benefit to be classified as a "special non-contributory benefit" and therefore not exportable. Rather, all the criteria for defining such a benefit, namely that it is both "special" and "non-contributory", have to be met.

While the "non-contributory" character of the benefit is undisputed, its nature as "special" is questioned. The Authority cannot see that the helplessness allowance displays the characteristics of social assistance which characterise the benefits which the Court of Justice has found to be of a "special" nature. The helplessness allowance is not intended to provide a minimum overall income to a group of recipients who otherwise would have no or insufficient means of subsistence. The benefit is rather similar to a sickness benefit and therefore constitutes the same kind of benefit as those care allowances which have already been classified as social security benefits by the European Court of Justice.

The Authority considers that the allowance does not fulfil the criteria to be classified as "special" and that, consequently, the benefit should be exportable. The Authority's application was registered with the EFTA Court in November 2006 as case E-5/06.

Calculation of sickness contributions

In December 2006, the EFTA Surveillance Authority closed two complaint cases concerning the Norwegian rules on determination of the basis for the calculation of sickness insurance contributions and their compatibility with *Social Security Coordination Regulation* (1408/71/EEC).

The Authority did not contest the right of Norway to levy such contributions from Norwegian statutory pensions, but it did not share the Norwegian view on the application of Article 33(1) of Regulation 1408/71 as regards the levy of contributions calculated on the basis of pension payments of other EEA States. The Authority was of the opinion that the lack of an explicit provision in EEA law must be taken to mean that contributions can only be calculated on the pension paid by the State which is authorised to make the deduction. Accordingly, the Authority issued a letter of formal notice in July 2004.

In 2005, the European Commission brought similar cases against EU Member States before the European Court of Justice with the result that also the disagreement between Norway and the Authority was clarified: the judgment rendered in July 2006 in case C-50/05 *Nikula*[1] led to a change in the Authority's assessment.

The Court held that Article 33(1) of Regulation 1408/71 does not preclude that a Member State, which is competent for the payment of a pension and in which the beneficiary resides, takes into account the pension which is provided on behalf of another Member State when determining the calculation basis of sickness insurance contributions. This principle is however subject to two caveats: first, the calculated sickness insurance contributions must not exceed the amounts paid in the State of residence of the pensioner; and second, the amount of pensions received from institutions of another EU Member State may not be taken into account by the State of residence of a pensioner, if the pensioner has already paid sickness insurance contributions out of his income from work in that other State. The proof that such contributions have been paid is up to the beneficiary.

Social security: A complaint concerning an early retirement (AFP) pension scheme

A complaint was lodged with the EFTA Surveillance Authority in April 2006 concerning the application of the Norwegian AFP pension scheme *(Avtalefestet pensjon)*. The AFP pension scheme is an early retirement scheme based on an agreement between national associations/organisations of employers and employees, in both the private and public sectors. These schemes are negotiated as part of employees' wage agreements and are thus closely related to the workplace. The Norwegian authorities did not grant the AFP pension benefit to the complainant on the basis that he had been working in Spain for the ten years before his retirement. The complainant alleged that as pension rights are coordinated by the *Social Security Coordination Regulation* (1408/71/EEC) within the European Economic Area, *i.e.* insurance periods gained in other EEA States are counted together, a refusal to apply the AFP scheme to him would amount to a breach of the EEA Agreement.

According to Article 1(j) of Regulation 1408/71, the definition of the term "legislation" explicitly excludes industrial agreements from its scope of application, unless it is an instrument for implementing a compulsory social security scheme to which the provisions of Regulation 1408/71 apply, or it has been explicitly declared by the Government as a scheme covered by that Regulation.

Due to the work-related characteristics of the AFP scheme and the fact that Norway has not declared the AFP scheme as being covered by Regulation 1408/71, the AFP pension scheme does not fall within the scope of Regulation 1408/71 and, consequently, the Spanish insurance periods cannot be taken into account. Therefore, the case was formally closed in November 2006.

1. Judgment of 18 July 2006 in Case C-50/05 *Nikula*, not yet reported.

Finnmark judgment

In May 2006, the EFTA Court rendered its judgment in a case concerning a supplement to family allowances in the Norwegian county of Finnmark, the so-called *"Finnmarkstillegget"*.

The origin of the case was a complaint to the Authority from a frontier worker employed in Finnmark but who was not granted the supplement because she and her child did not reside in Finnmark but across the border in Finland. The case was a direct action brought before the EFTA Court by the Authority.

The plea of the Authority before the Court was primarily based on the *Social Security Coordination Regulation* (1408/71/EEC), which states that an emplyed or selfemployed person subject to the legislation in one EEA State shall receive family benefits for the members of his family as if they were residing in that State.

The EFTA Court found that the residence requirement was indirectly discriminatory. This was so because most of the workers who fulfil the regional residence requirement for receiving the *"Finnmarkstillegget"* are likely to be Norwegian nationals. However, in applying a justification test, the EFTA Court concluded that the residence requirement was suitable and necessary for securing the aim of sustaining settlement in the scarcely populated Finnmark County. Thus, the Application was dismissed and the Court found in favour of Norway.

EQUAL TREATMENT OF MEN AND WOMEN

Norwegian rules on calculation of survivor's pension

In December 2006, the EFTA Surveillance Authority took a decision to bring a case before the EFTA Court concerning Norwegian rules on the calculation of survivor's pensions. However, the Application was not sent to the EFTA Court before the new year.

The Norwegian Public Service Pension Act provides that a widow, whose now deceased spouse became a member of the Public Service Pension Fund before 1 October 1976, receives a survivor's pension without curtailment irrespective of whether she has other income. By contrast, the survivor's pension of a widower is, in identical situations, subject to curtailment if the widower has a pension or other income. Thus, widowers are treated less favourably than widows.

A survivor's pension is granted to the survivor by reason of the spouse's employment relationship and, according to the European Court of Justice, is therefore covered by the concept of "pay". Consequently, the Authority maintains that the Norwegian rules are contrary to Article 69(1) EEA, which provides that men and women shall receive equal pay for equal work, and to the *Directive on Equal Treatment in Occupational Social Security Schemes* (86/378/EEC).

In terms of correcting the situation, the Authority is of the view that, according to EEA law, equal treatment as regards survivor's pensions must be ensured in the EEA EFTA States for all rights accrued on the basis of periods of employment after 1 January 1994.

FREEDOM TO PROVIDE SERVICES

Collective agreements

In 2006, the Authority submitted written observations to the European Court of Justice in Case C-341/05 *Laval*, a reference from *Arbetsdomstolen* (the Swedish Labour Court) for a preliminary ruling regarding the right to take industrial action in Sweden.

The questions raised by this reference concerning the extent of action which trade unions may take to fight for salary level and union membership are of relevance across the EEA and are particularly important in defining the limits placed on the ability of service providers from countries with lower wages to compete on high salary markets, such as those in the EEA EFTA States. While no cases are currently pending on this matter, the Authority considers that important issues of EEA law are at stake such as to merit a statement of principle by the Authority.

The *Laval* case concerns a Latvian company providing services in Sweden which was confronted with industrial action from Swedish labour unions when it refused to sign a Swedish collective agreement. According to the *Posting of Workers Directive* (96/71/EC), a service provider posting workers to another EEA State is obliged to grant those workers certain minimum rights which apply to all undertakings in the host State.

The collective agreement that the Latvian company was asked to sign by the Swedish trade union is not universally applicable in Sweden. One of the questions before the European Court of Justice is, therefore, whether the Swedish trade union still could require that the collective agreement had to be signed. The case also raises questions as to the trade unions' right to take industrial action against a foreign service provider and the extent to which this is contrary to the freedom to provide services.

In addition, the case is further complicated by the fact that the Latvian workers posted to Sweden had already signed a Latvian collective agreement. Swedish law, however, allows trade unions to disregard foreign collective agreements when initiating industrial action.

A judgment is expected during the course of 2007.

FREE MOVEMENT OF WORKERS

Discriminatory rules on granting of study loans

The Icelandic legislation on student loans makes the granting of a study loan conditional on the applicant being resident in Iceland. Furthermore, the applicant must also have been permanently resident in Iceland during two consecutive years leading up to the time of application for a loan, or, alternatively, for three out of the last ten years.

EEA law provides for equal treatment between migrant workers and national workers as regards the granting of social advantages. According to the case law of the European Court of Justice, study finance is considered a social advantage. Even if the residence requirements also apply to Icelandic nationals, such requirements are indirectly discriminatory because, in practice, they are more likely to be met by Icelandic nationals than by nationals of other EEA States. Thus, the EFTA Surveillance Authority considers that, insofar as the granting of study loans to migrant workers, self-employed persons and their dependants is concerned, the residence requirements in the Icelandic legislation on student loans are contrary to Articles 28 and 31 of the EEA Agreement and to the *Free Movement of Workers Regulation* (1612/68/EEC).

A reasoned opinion was delivered to Iceland in July 2006. The Authority will continue the assessment of the case in 2007.

PUBLIC PROCUREMENT

Brand names in tenders

In the past, several Norwegian contracting authorities referred in tender documents for the purchase of microprocessors to particular brand names, such as "Intel/AMD or equivalent", or solely to clock rates. The Authority concluded in a letter of formal notice issued in April 2005 that such a practice infringed the provisions of the *Supplies Directive* (93/36/EEC), the *Utilities Directive* (93/38/EEC) and Article 11 of the EEA Agreement. The Norwegian Government acknowledged during 2006 that the practice did not support competition and equal treatment of suppliers in the microprocessor market and undertook to provide specific and clear guidance stating that references to specific brands of microprocessors violate the public procurement rules. Guidelines on the matter are now available on the Ministry of Government Administration and Reform's webpage.

Upcoming new rules

On 31 January 2006, the existing rules on public procurement were replaced by a new set of rules in the EU. By a decision of the EEA Joint Committee on 2 June 2006, the new public procurement rules were incorporated into the EEA Agreement. However, due to constitutional requirements, the decision has not yet entered into force and the EEA EFTA States continued to apply the "old" rules during 2006. The decision and the new rules will enter into force upon fulfilment of constitutional requirements in the EEA EFTA States, which is expected during 2007. The legislative package aims at simplifying and modernising the public procurement procedures in an effort to facilitate the aim of increasing cross-border competition and getting the best value for tax money.

Definition of a contracting authority

The Authority also decided to intervene in a case before the European Court of Justice (Case C-337/06 *Bayerischer Rundfunk*) concerning the definition of a contracting authority under the public procurement rules. This definition lies at the heart of the application of the rules on public procurement since only bodies which satisfy it will have to follow the procedures they prescribe.

A German court has sought guidance on whether the regional broadcasting stations fall outside that definition on the basis of their financing structure and a date for the oral hearing is awaited.

The broadcasting stations are financed, for the most part, by licence fees paid by the viewing public. The question is, therefore, whether they are caught by the definition, one element of which extends the rules to bodies which are financed principally by the State. As the fees are set by legislation, the Authority suggested to the Court that the broadcasting stations could not, for that reason alone, be said to escape the procurement rules.

INFORMATION SOCIETY SERVICES

Most relevant markets examined

At the close of 2006, the EFTA Surveillance Authority had examined draft measures notified by the EEA EFTA States' national regulatory authorities (NRA) covering most of the 18 different markets listed in its *Recommendation on relevant markets*. However, disparities between the three EEA EFTA States remain with regard to the pace of progress of the market analysis: whereas Norway is concluding its first full round of market reviews and Iceland is making considerable steps forward, Liechtenstein has not yet commenced the review process.

Advances by NRAs have not only been made regarding the number of markets notified, but also with regard to the expertise gained in carrying out the reviews. In general, there has been a marked improvement in the quality of the notifications received. The Authority has not, as yet, had to express serious doubts with regard to the compatibility of notified measures with EEA law, nor to avail itself of its right to take a decision requiring the NRA concerned to withdraw the draft measure. The Authority believes that the good co-operation and regular exchanges with NRAs at the pre-notification stage contribute significantly to this outcome.

How many markets were already notified?

In 2006, the Authority assessed a total of 10 notifications covering 15 different product markets and 18 national markets. Three of these notifications were received from Iceland and seven from Norway. With the notification of the remaining retail and wholesale leased lines markets expected shortly, Norway will be the first EEA EFTA State to conclude the initial round of reviews of the state of effective competition in the 18 markets recommended by the Authority for *ex ante* regulatory examination.

In most of the recommended markets notified thus far, the NRA concerned concluded that the market under investigation was not effectively competitive and required the imposition of regulatory remedies on one or more operators with significant market power. The Norwegian notification of the national wholesale market for international roaming concluded that neither of the two major mobile operators possessed significant market power, either alone or jointly. In the wholesale broadcasting transmission services markets in Norway, the NRA considered it necessary, in the specific national circumstances, to re-assess the fulfilment of the so-called three criteria test for *ex ante* regulatory intervention. It concluded that with regard to the different market segments defined, that one or more of the test's criteria were not met: it either found no significant and persistent barriers to entry into the market, or that the market was tending towards effective competition over time, or that general competition law was sufficient to address any competition concerns in the market.

What was the Authority's response to the notifications received?

Although the Authority did not have to raise serious doubts as to the compatibility of notified draft measures with EEA law, it nevertheless considered it necessary to address a number of comments to the NRAs concerned, both relating to market definition and the analysis of significant market power,

as well as the regulatory obligations proposed relating, in particular, to:

- The desirability of conducting the national consultation and the EEA consultation with other NRAs and the Authority at the same time;
- The improvement of product market definition and substitutability analysis;
- Criteria to test monopolistic markets with a serious potential for market failure and abuse of market power;
- Inclusion of voice over broadband (VoB) services in the relevant product markets for call origination, call termination and transit on the fixed public telephone network;
- The analysis of significant market power (SMP): exceptional circumstances required to find operator not having SMP on mobile call termination market;
- Limitations by law on the powers of an NRA to impose the most appropriate remedies;
- Monitoring of market developments in retail fixed telephony call markets due to rapid emergence of VoIP[1] competition;
- Cost methodology: imposition of a cost and pricing methodology that allows consumers to benefit fully from the efficient production of the service concerned;
- Lack of specification of the cost-orientation obligation for carrier selection and pre-selection access in fixed access markets;
- Lack of specifications of price cap obligation;
- Appropriateness and effectiveness of obligations imposed regarding interconnection-related services.

While mere comments issued by the Authority are not formally binding, the NRA concerned must nevertheless take utmost account of them when adopting its final measures. However, in spite of the lack of binding character, the Authority observed during 2006 that its comments are regularly relied on to mount national appeals against NRA's decisions and can, therefore, be said to carry additional weight in national procedures.

1. Voice over internet protocol.

What is the eCOM notification procedure?

The current regulatory framework for electronic communications, which entered into force in the EEA in November 2004, provides that national regulatory authorities (NRAs) in the EEA EFTA States have to notify draft regulatory decisions to the EFTA Surveillance Authority in a number of important areas before they can be put into effect in the national markets. This notification mechanism is also referred to as the Article 7 Framework Directive (2002/21/EC) notification procedure.

The Authority has the right and duty to examine draft measures before their adoption in order to ensure their compatibility with EEA law. Moreover, the Authority has the power to veto notified measures if it finds that the definition of a relevant market or the assessment of market power proposed by the NRAs to be incompatible with EEA competition law. The Authority may also comment on the regulatory remedies proposed.

To facilitate the good functioning of the notification system, the Authority has adopted several recommendations and guidelines and established an eCOM Task Force, a joint effort between the Authority's Internal Market Affairs Directorate and its Competition & State Aid Directorate. The Authority publishes documents relating to all notifications online on its eCOM Notification Registry.

In order to ensure homogeneity throughout the EEA, the eCOM Task Force co-operates with the European Commission and participates in the work of the Communications Committee and the European Regulators Group (ERG).

Under its new enforcement powers, the Authority may:

- adopt decisions making commitments offered by undertakings concerned binding on these undertakings;
- impose behavioural or structural remedies in order for an infringement of Articles 53 or 54 EEA to be brought to an end;
- adopt decisions on its own initiative, when required by the EEA public interest, finding that an agreement or practice does not infringe Articles 53 and 54 EEA;
- exercise increased powers while inspecting undertakings located in the EFTA States;
- impose higher fines when procedural rules have not been complied with; and
- issue guidance letters relating to novel questions concerning Articles 53 and 54 EEA.

Liechtenstein implementation delay in telecoms

The EFTA Surveillance Authority remains concerned by the lack of progress made by Liechtenstein in fully implementing and applying the 2002 regulatory framework for electronic communications.

The 2002 regulatory framework aims at further liberalising and harmonising the market for electronic communications networks and services in Europe. It provides for regulation with a lighter touch, allowing EEA States to roll back rules as soon as markets are competitive. Delays in the transposition and application of the new rules are, therefore, detrimental to businesses and consumers and create disparity across the EEA.

The regulatory framework entered into force in the European Communities in mid 2003. Its incorporation into the EEA Agreement was, however, delayed. Liechtenstein was required to transpose the framework into national law before 1 November 2004.

Despite the fact that the EFTA Court ruled in June 2006 that Liechtenstein had failed to comply with its obligations under the EEA Agreement by not ensuring full and timely transposition of the five main Acts[1] regulating the EEA electronic communications sector, major parts of that framework are still not in place. Notwithstanding the promulgation of a new Communications Act *(Kommunikationsgesetz)* in June 2006, significant implementation gaps remain and a number of implementing ordinances, identified as necessary to ensure full compliance, had still not been adopted by the Government. For example, the Liechtenstein authorities did not commence the crucial review of the state of effective competition in the telecommunications markets. Furthermore, certain key provisions benefiting users, for example number portability when switching mobile operators, are still not effective.

1. The main Acts constituting the 2002 regulatory framework are: the *Access Directive* (2002/19/EC), the *Authorisation Directive* (2002/20/EC), the *Framework Directive* (2002/21/EC), the *Universal Service Directive* (2002/22/EC) and the *Directive on competition in the markets for electronic communications networks and services* (2002/77/EC).

Chapter 3

Competition

Introduction

In 2006, the EFTA Surveillance Authority finalised its electricity sector inquiry and devoted significant resources to its inquiries into the financial services sector which were still pending at the end of the year. The Authority carried out one unannounced inspection at the premises of an undertaking in Norway and continued its in-depth investigations of other, complex, cases.

At the beginning of 2006, there were 18 cases pending with the Authority in the field of antitrust. A total of five new cases were opened during the year and nine cases were closed. At the end of 2006, there were thus 14 antitrust cases open.

There were two cases pending at the start of the year concerning State measures possibly in conflict with the EEA competition rules. Three new cases were registered during the year. No cases were closed. Five cases were thus pending at the end of the year.

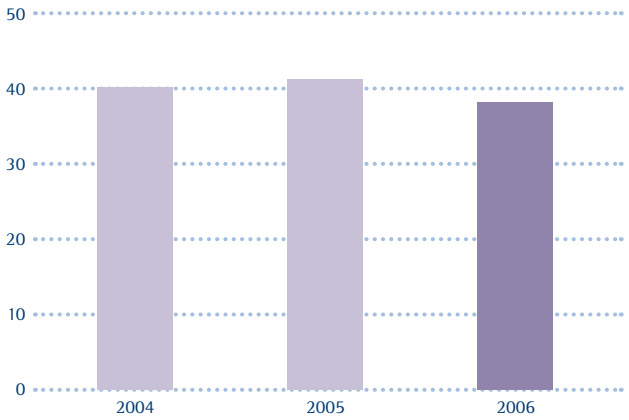
The Authority received relatively few formal complaints during the year relating to Articles 53 or 54 of the EEA Agreement which fulfilled the requirement for formal complaints laid down in the applicable procedural rules. However, correspondence from citizens and companies in the EEA EFTA States was received in several instances alleging infringements of the competition rules.

At the end of 2006, four merger cases and more than 20 antitrust cases which qualified for co-operation with the Authority under the EEA Agreement, were registered by the Authority as pending with the European Commission.

Under the co-operation mechanism established between the Authority and the competition authorities of the EEA EFTA States, the Authority was informed of five cases from Norway and one case from Iceland in which the national authorities foresaw that Articles 53 or 54 of the EEA Agreement could be applied.[1] However, draft decisions from the national competition authorities finding an infringement of Articles 53 or 54 of the EEA Agreement had yet to be received. During 2006, no requests from national courts for information in the Authority's possession or for the Authority's opinion on questions concerning the application of the EEA competition rules were received. At the end of 2006, the Authority had 19 pending cases concerning national proceedings and other obligatory tasks in the area of competition.

Finally, resources were devoted to the Authority's eCOM task force for the assessment of notifications from the EEA EFTA States in the field of electronic communications (see the report on the activities of the eCOM task force on page 37).

Figure 1 Pending competition cases 2004-2006



1. Liechtenstein does not have a competition authority which enforces Articles 53 and 54 of the EEA Agreement but participates in the network of EEA EFTA competition authorities.

Complaints in competition cases

The EFTA Surveillance Authority received relatively few complaints during 2006 relating to Articles 53 and 54 of the EEA Agreement which fulfilled the requirement for formal complaints laid down in the applicable procedural rules. However, more general correspondence from citizens and companies in the EEA EFTA States alleging infringements of the competition rules was received in several instances.

Natural or legal persons that can show a legitimate interest are entitled to lodge a complaint to ask the Authority to investigate a possible infringement of Articles 53 or 54 EEA and to require that any infringement found be brought to an end. Complainants must submit comprehensive information in relation to their complaint. In general, they should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Authority.[1]

In return, complainants have certain procedural rights in connection with antitrust proceedings such as the right to receive and comment upon the non-confidential version of any statement of objections and, where appropriate, express their views at an oral hearing. If the Authority rejects a complaint, the complainant is entitled to a decision of the Authority explaining why the complaint has been rejected.

The Authority is entitled to give different degrees of priority to complaints made to it according to the interest under the EEA Agreement which the case presents. The Authority may decline to look into a complaint when it considers that the case does not display sufficient interest under the EEA Agreement to justify further investigation. A complainant cannot therefore require that the Authority takes a position on the substance of a complaint.

With respect to cases where an investigation is deemed to be necessary, complaints received by the Authority can be re-allocated to the competition authorities of the EEA EFTA States if this is considered appropriate according to the principles for case allocation.[2] The Authority will be particularly well placed to deal with a case if it is closely linked to other EEA provisions or if the EEA interest requires the adoption of a decision by the Authority to develop EEA competition policy or to ensure its effective enforcement.

Correspondence to the Authority that does not comply with the requirements described above does not constitute a complaint within the meaning of the procedural rules in antitrust cases. Such informal complaints are considered by the Authority as general information that may, where it is useful, lead to an own-initiative investigation. In 2006, correspondence from citizens and companies in the EEA EFTA States alleging infringements of the competition rules did not lead to any such investigations being initiated.

The competition rules of the EEA Agreement

In contrast to the Authority's activities in other areas which are directed towards the EEA EFTA States, the EEA competition rules contained in Articles 53 to 60 EEA mainly concern individual economic operators.

The substantive competition rules under the EEA Agreement are virtually the same as those in the EC Treaty and can be summarised as follows:

- A prohibition on agreements or practices that distort or restrict competition (Article 53(1) EEA) with the exception of restrictions necessary for improvements which benefit consumers and which do not eliminate competition (Article 53(3) EEA);
- A prohibition on the abuse of a dominant position by market players (Article 54 EEA);
- The requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- Restrictions on certain State measures that may result in infringement of Articles 53 and/or 54 EEA (Article 59 EEA).

The Authority and the European Commission apply the EEA competition rules to enforce a level playing field for market players in the European Economic Area. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of attribution rules laid down in Articles 56 and 57 EEA. Only one authority is competent to decide on any individual case.

The EEA Agreement requires that the Authority and the European Commission co-operate to develop and maintain uniform surveillance throughout the European Economic Area in the field of competition and to promote homogeneous implementation, application and interpretation of the EEA competition provisions.

The Authority enjoys the same investigation and enforcement powers as the European Commission. The procedural rules relevant to the application of the EEA competition rules by the Authority are set out in the Surveillance and Court Agreement.

The Authority's website provides further information on the EEA legal framework in the field of competition at: www.eftasurv.int/fieldsofwork/fieldcompetition/

1. For further information on complaints in competition cases see the Authority's Notice on the handling of complaints under Articles 53 and 54 of the EEA Agreement available at: www.eftasurv.int/fieldsofwork/fieldcompetition/faq/
2. See the Authority's Notice on cooperation within the EFTA Network of Competition Authorities, available at: www.eftasurv.int/fieldsofwork/fieldcompetition/otherpublications/

Operation of ferry services to and from Norway

In April 2006, the EFTA Surveillance Authority carried out an unannounced inspection at the premises of Color Line AS, a major Norwegian ferry operator, and its parent companies.[1] The inspection was carried out in the context of an investigation into possible breaches of the competition rules of the EEA Agreement by Color Line in relation to its operation of ferry routes to and from Norway.

After the inspection, the information obtained was examined with a view to ascertaining whether there was evidence of infringements of the EEA competition rules. In this regard additional information was obtained from Color Line and third parties by way of information requests. At the end of 2006, the assessment of the information gathered was still ongoing.

1. See press release PR(06)17: Statement on EFTA Surveillance Authority inspection in Norway, available at www.eftasurv.int/information/pressreleases/2006pr/dbaFile8995.html

Inspection of undertakings

The Authority has the power to conduct all inspections of undertakings and associations of undertakings necessary in order to carry out the duties assigned to it in the field of competition. Inspections are a preliminary step in antitrust investigations and do not mean that the company inspected is guilty of anti-competitive behaviour. During an antitrust investigation the rights of defence of the companies involved are fully respected.

Satellite distribution of a public broadcaster in Norway

In 2006, the EFTA Surveillance Authority continued its in-depth investigation of a complaint from Viasat (a company which provides pay-TV services via a Direct-To-Home satellite platform) alleging that the exclusive distribution of Norwegian TV2 on the satellite TV platform of Viasat or TV2 competitor Canal Digital is contrary to the EEA competition rules.

In 2003, the Authority expressed its competitive concerns about a long running exclusivity arrangement for the distribution of TV2 on the satellite platform of Canal Digital. In response to these concerns, the arrangement was abolished. Thereafter, TV2 has on two occasions invited both Canal Digital and Viasat to bid for the right to distribute TV2 on their satellite platforms for a two-year period. On both occasions TV2 granted an exclusive distribution contract to Canal Digital. Viasat maintains that this exclusive distribution is anti-competitive.

The Authority assessed the tender procedure organised by TV2 in 2005 with a view to ascertaining whether the procedure had been fairly conducted. Moreover, in order to better understand the impact of the exclusivity on competition, the Authority focussed its attention on the scope of TV2's terrestrial shadow zone (*i.e.* areas where terrestrial signals of TV2 transmission cannot be received). During 2006, various requests for information were sent to Canal Digital, Viasat and Norkring, the operator of the Norwegian analogue terrestrial broadcasting network. The examination of the case was still on-going at the end of 2006.

NORWAY POST

Distribution of mail-order and e-commerce parcels to consumers

Norway Post is the leading provider of parcel services to mail-order and e-commerce companies in Norway, often referred to as business-to-consumer, or B-to-C parcel services. In Norway, most B-to-C parcels are collected by consumers in post offices or retail outlets. There is a growing market for B-to-C parcel services since more and more consumer goods are purchased over the internet. Yet it has proved difficult for other companies to challenge the leading position of Norway Post in respect of these services. In the context of an investigation into possible anti-competitive practices on the part of Norway Post, the Authority has followed the developments in this market closely. This included an on-the-spot inspection at Norway Post's premises in 2004.

Following a complaint from a competitor of Norway Post, the Authority has carried out an extensive investigation of the agreements Norway Post concluded from 2000 onwards with retail groups and outlets for the establishment of so-called Post in Shops *(Post i Butikk)*. These are retail outlets such as grocery stores, kiosks and petrol stations from which postal services are provided. By replacing post offices with Post in Shops Norway Post has been able to reduce its overhead costs substantially while increasing the availability of postal services to the public. However, in doing so Norway Post opted for an exclusivity strategy preventing competing suppliers of parcel services from using certain retail chains and retail outlets as collection points for their parcels.

In 2006, Norway Post decided to remove or waive all exclusivity provisions in its agreements with retailers. This means that retail chains and outlets which have been prevented from delivering B-to-C parcels for competitors of Norway Post in the past are now free to do so. The Authority welcomed this development which removes possible obstacles for new entrants to the market for B-to-C parcel services. However, the Authority still considered it necessary to continue the investigation of whether the exclusive agreements of Norway Post have had appreciable anti-competitive effects in the past.

The Authority has also kept under observation the rebates which are granted by Norway Post to mail-order and e-commerce companies when they purchase B-to-C parcel services. The main concern about rebates, when granted by a firm with significant market power, is the possibility that they enhance the loyalty of buyers thus making it increasingly difficult for competing suppliers to compete. On the other hand, competition rules should not discourage dominant firms

from lowering their prices when this is the result of competition on the merits. The aim of the EEA competition rules is to protect the competitive process to the benefit of consumers. The aim is not to protect competitors against a dominant firm offering better products at a better price.

Norway Post has made several changes to its rebate system during the course of the investigation in response to concerns expressed by the Authority. However, concerns remain that certain aspects of the rebate system of Norway Post could lead to anti-competitive effects. Consequently, in 2006, the Authority requested that Norway Post submit further information regarding the rebates it had granted to mail-order and e-commerce companies since 2004. This information is currently being assessed.

Sector inquiry: electricity

In December 2006, the Authority adopted its concluding report on the sector inquiry into competition in the EEA EFTA electricity markets.

A well-functioning electricity market is essential in meeting the challenges of sustainability, security of supply and competitiveness which the EEA economies are facing. In June 2005, the Authority launched a sector inquiry into the conditions of competition in the electricity markets of the EEA EFTA States.[1] The Authority decided to open the sector inquiry in order to investigate a number of concerns which had been identified on the electricity markets in the EEA. In the EEA EFTA States, such concerns included high levels of market concentration and issues regarding unbundling of distribution and supply activities.

The sector inquiry was carried out in close co-operation with the European Commission which conducted a parallel sector inquiry into the European gas and electricity sectors.

In February 2006, the Authority published its preliminary report opening a two-month consultation period.[2] Publication of the Authority's findings took place on 10 January 2007, in parallel with the publication of the European Commission's report.

The public consultation largely confirmed the analysis presented in the preliminary report and provided additional useful information. Following the public consultation exercise, the Authority was able to strengthen and deepen its analysis of the sector.

A common theme emerging from the sector inquiry is the existence of a relatively high level of concentration in the wholesale electricity markets of the EEA EFTA States. Several customers expressed concerns about the market power of the main electricity generators.

Norway

Compared with the situation in many EU Member States, competition appears to be functioning fairly well in the wholesale electricity market in Norway. However, certain concerns remain. In the view of certain of the respondents to the sector inquiry, there may be some limited issues in Norway concerning unbundling of distribution and supply activities. At the time of publication of the concluding report, the Norwegian government was formulating legislative proposals to address these issues. In addition, the Authority noted that long term power purchase agreements under which power intensive energy users obtain electricity pursuant to favourable conditions were gradually being phased out in Norway. The Authority observed that such long term power purchase agreements may raise competition concerns.

Iceland

Certain issues of concern were identified in relation to the high levels of market concentration in power generation in Iceland. The electricity market in Iceland is, however, rather unique as large power intensive users tend to consume a high proportion of electricity generated there. It is also geographically isolated with no possibility for import or export of electricity. In addition, the process of liberalisation in Iceland is at an early stage.

Liechtenstein

Due to its geographical location, Liechtenstein is to a significant extent dependant on the main Swiss electricity generator for its electricity supplies, the possibilities to obtain electricity from Austria being fairly limited due to infrastructural restrictions. However, pending the outcome of the liberalisation proposals in Switzerland and bilateral negotiations between the EU and Switzerland for network access, customers in Liechtenstein may, in the future, be able to switch to other EEA suppliers and transit electricity across Switzerland.

1. See press release PR(05)19: The EFTA Surveillance Authority opens a sector inquiry into the electricity sector, at www.eftasurv.int/information/pressreleases/2005pr/dbaFile7270.html
2. See press release PR(05)42: Public presentation of the preliminary findings of the energy sector inquiry, at www.eftasurv.int/information/pressreleases/2005pr/dbaFile8190.html

FINANCIAL SERVICES SECTOR INQUIRIES
(CARD PAYMENTS, RETAIL BANKING, BUSINESS INSURANCE)

Sector inquiries in the field of financial services

During 2006, the EFTA Surveillance Authority continued its inquiries into the financial sector. The areas under examination are retail banking and business insurance.

The Authority's inquiry into retail banking covers payment cards and core retail banking products (*e.g.* current accounts and non-secured loans). In 2006, the Authority finalised its fact-finding in relation to the payment card market and embarked upon an analysis of the data obtained from market players. Fact-finding in relation to core retail banking products is on-going. Questionnaires were sent to banking associations, regulators and payment system operators in the three EEA EFTA States. Moreover, interim reports outlining the findings for the payment cards and core retail banking markets were prepared. These reports follow, to a large extent, a methodology comparable to that adopted by the European Commission, which published interim reports for its parallel inquiries in 2006. It is expected that the Authority's interim reports will be published for consultation in the first half of 2007.

Fact-finding was also the major task during 2006 in the field of business insurance. In May and June, questionnaires were sent to insurance undertakings, insurance brokers and insurance associations in the EEA EFTA States. In the autumn, further information was requested from associations of insurers. An interim report for the business insurance inquiry will be drawn up and made available to the public for comments during the course of 2007.

Following the consultation period, the Authority will conclude its inquiries into the financial sector with two final reports dealing with retail banking and business insurance respectively.

Sector inquiries in the EEA

Sector inquiries serve as a tool to initiate market investigations into particular sectors of the economy where the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the territory covered by the EEA Agreement.

The use of sector inquiries enables comparative information to be gathered across industry sectors for all of the EEA EFTA States, or the entire EEA if the inquiry is carried out concurrently with the European Commission.

In the course of a sector inquiry, the Authority may request the undertakings concerned to supply the information necessary for an examination of whether there may be any actual or potential restriction or distortion of competition on the market in question. The Authority may publish a report on the results of its inquiry and invite comments from interested parties.

New notices in the field of competition

In 2006, the Authority adopted two new notices in the field of competition.

Access to file

First, the Authority revised the rules for access to its file in cases under Articles 53, 54 and 57 of the EEA Agreement.[1] Access to the file is one of the important procedural guarantees intended to implement the principle of equality of arms and to protect the rights of defence. The Notice, which replaces the previous access to file notice dating from 2003, clarifies the extent of the right of access to the file and increases the transparency of competition procedures.

The setting of fines

Second, the Authority adopted new Guidelines on the method of setting fines to be imposed on undertakings that infringe Articles 53 and 54 of the EEA Agreement.[2] These Guidelines replace those from 2003. The aim of the new Guidelines is to increase the deterrent effect of fines. Under its procedural rules, the Authority may impose fines of up to 10% of an undertaking's total turnover. Within this limit, the new Guidelines provide that fines may be based on up to 30% of the company's annual sales of goods or services to which the infringement directly or indirectly relates, multiplied by the number of years of participation in the infringement and thus place added emphasis on the duration of the infringement.

In addition, the Guidelines introduce a so-called "entry fee" – a specific amount which may be imposed irrespective of the duration of the infringement in order to deter undertakings from entering into seriously illegal conduct. Finally, the Guidelines also entail a stricter approach to undertakings which continue or repeat the same or a similar infringement after the Authority or a national competition authority has found that the undertaking infringed Articles 53 or 54 of the EEA Agreement. In such cases, the fine can be increased by 100% for each prior infringement. The new Guidelines will be applied in all cases where a statement of objections is notified after 21 December 2006, *i.e.* the date of publication in the Official Journal of the European Union and the EEA Supplement thereto.

Adoption of notices in the field of competition

In order to maintain equal conditions of competition in the EEA, the EFTA Surveillance Authority adopts notices and guidelines in the field of competition which provide detailed guidance on how the Authority intends to interpret and apply the competition provisions of the EEA Agreement. These acts correspond to notices and guidelines adopted by the European Commission concerning the interpretation and application of the Community competition rules. They are "soft law" instruments which are not legally binding in the strict sense.

1. Notice on the rules for access to the EFTA Surveillance Authority file in cases pursuant to Articles 53, 54 and 57 of the EEA Agreement, not yet published. The notice is available at www.eftasurv.int/fieldsofwork/fieldcompetition/otherpublications/
2. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Chapter II of Protocol 4 to the Surveillance and Court Agreement, OJ C 314, 21.12.2006, p. 84 and EEA Supplement to the OJ No 63, 14.12.2006, p. 44.

Co-operation cases

By virtue of the rules in the EEA Agreement on co-operation between the two surveillance authorities, the Authority was, as in previous years, involved in cases dealt with by the European Commission and took part in discussions on competition policy at European level.

Review of policy on abuse of dominance

In 2006, the European Commission continued the review of its policy underlying Article 82 of the EC Treaty prohibiting the abuse of a dominant market position. This review aims to set out, in a clear and consistent manner, theories of harm based on sound economic assessment and to develop practical and workable rules which take into account the reality on the market. The Commission published a Staff Discussion Paper at the end of 2005 on which it received comments in 2006. A public hearing was held in June 2006.

The Authority has followed the policy discussions closely as the outcome of the Commission's review will have an impact on the Authority's policy under Article 54 of the EEA Agreement. If the review results in guidelines on the application of Article 82 EC, the Authority will adopt similar guidelines for the application of Article 54 of the EEA Agreement. The review exercise will continue in 2007.

Mixed merger cases in 2006

In 2006, the Authority was involved in a number of merger cases handled by the European Commission pursuant to the EC Merger Regulation[1] and Article 57 of the EEA Agreement.

Notifications

The Authority received regular notifications from the Commission which qualified for co-operation under the EEA Agreement in the following cases:

- Inco / Falconbridge
- Aker Yards / Chantiers de l'Atlantique
- CVC / Ferd / SIG
- MAN / Scania
- EN+ / Glencore / Sual / UC Rusal

Referral Proceedings

Referral proceedings are proceedings whereby a merger case is referred from the European Commission to one or more national competition authorities or vice versa. By virtue of Article 6 of Protocol 24 to the EEA Agreement the EEA EFTA States can participate in such proceedings. Documents from the Commission to the EEA EFTA States or from the EEA EFTA States to the Commission are transmitted via the EFTA Surveillance Authority.

The Commission may, provided certain criteria are fulfilled, decide to refer a notified concentration to an EEA EFTA State. The parties to a merger can also request that a concentration with a Community dimension be examined by an EFTA State prior to notification. No such requests or referrals were made in 2006.

On the other hand, where a concentration falls to be reviewed under the national competition laws of at least three EC Member States and at least one EEA EFTA State, the parties to a merger can request that the concentration be examined by the Commission before any notification to the competent authorities. If all competent EFTA States agree to the referral, the Commission will have exclusive jurisdiction over the concentration in the territory of the EEA EFTA States.

After notification to one or more national competition authorities in the EU these authorities can on certain conditions request that the case be referred to the Commission. The competition authorities of the EFTA States has the possibility of joining such requests.

In 2006, more than 50 requests for referral from national competition authorities to the Commission were transmitted from the Commission to the Authority. A large majority of the requests were made by the parties before notification to national authorities. Among these 50 cases, 15 were

reviewable under the Norwegian Competition Act but were referred to the Commission with the agreement of the Norwegian Competition Authority. This included amongst others the following cases:

- Orica Investments / Dyno Nobel Sweden
- Metso / Aker Kvaerner
- Thule AB / Schneeketten
- Thule / Chaas Holdings / Advanced Accessory Systems / Valley Industries
- Boeing / Aviall
- Celsa / Fundia

Mixed antitrust cases in 2006

The Authority was also involved in several cases in 2006 in which the European Commission applied Article 53 or 54 of the EEA Agreement. Five new cases were registered in which the Commission intended to apply one of these articles.

The Commission adopted decisions in which it applied Article 53 or 54 of the EEA Agreement in the following cases:

- Hydrogen peroxide, Perborate and Percarbonate (Cartel)
- Methacrylates (Cartel)
- Fittings (Cartel)
- Butadiene Rubber and Emulsion Styrene Butadiene Rubber (Cartel)
- Universal International Music / MCPS (Cannes Extension Agreement) (Commitment decision)
- Prokent / Tomra (Abuse of dominance)

Prokent / Tomra

In one of the antitrust cases in which the Authority was involved in 2006, the European Commission adopted a decision holding that Tomra System ASA (Tomra) had abused its dominant position and imposed a fine of EUR 24 million.[2] Tomra is a supplier of reverse-vending machines used by retail outlets to collect empty drink containers and has its headquarters in Norway.

In September 2001, at the request of the Commission, the Authority carried out unannounced inspections at the premises of Tomra and its subsidiaries in Norway. The European Commission also carried out inspections of other subsidiaries in some EU Member States.

Upon examination of the information gathered during and after the inspections, the Commission found that Tomra had abused its dominant position and therefore infringed Article 54 of the EEA Agreement and Article 82 of the EC Treaty in five different EEA markets: Austria, Germany, the Netherlands, Norway and Sweden.

The infringement involved three different practices. The first consisted of a system of exclusivity agreements, the second of quantity commitments and the third of retroactive rebates.

The Commission found that such practices led to the foreclosure of the market for Tomra's competitors and, in some cases, to the elimination of certain competitors. The Authority supported the Commission's position both when it issued its statement of objections against Tomra in 2004 and when it adopted its final decision with fines in 2006.

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
2. See European Commission press release IP/06/398 at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/737&format=HTML&aged=0&language=EN&guiLanguage=en

Competition and State Aid Directorate

From left to right: Lena Sandberg-Mørch, Marianne Clayton, Agnieszka Montoya-Iwanczuk, Justin Menezes, Marie Wiersholm, Hanne Zimmer, Director Amund Utne, Runa Monstad, Dessy Choumelova, Kjersti Bjerkebo, Siri Bjune, Kjell-Arild Rein, Hrafnkell Óskarsson.
Not present: Tormod Sverre Johansen, Annette Kliemann, Maria J. Segura Catalán, Diane Tanenbaum.

Chapter 4

State aid

Introduction

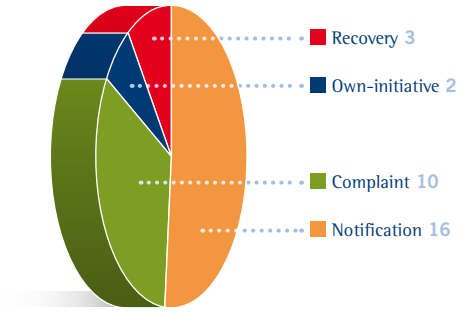
One of the roles of the EFTA Surveillance Authority is to verify whether state aid measures envisaged or taken by the EEA EFTA States are in compliance with the EEA Agreement. This role is similar to the role that the European Commission plays in relation to the EU Member States.

In 2006, 31 new individual state aid cases were opened: 16 were notifications of new aid, ten were complaints and two were own-initiative cases. Three new cases were opened for the monitoring of recovery decisions previously adopted by the Authority. The Authority also opened the formal investigation procedure in seven new cases and extended the scope of one existing formal investigation. In addition, the Authority opened 22 files regarding obligatory tasks such as the adoption of new guidelines on the interpretation of the state aid provisions.

In 2006, out of 44 closed cases, 32 concerned individual state aid cases: five of them had been initiated on the basis of complaints, in 17 there was a notification at the origin of the case, two were own initiative cases and one concerned the monitoring of a recovery decision. The Authority opened the formal investigation procedure in relation to six of the 31 cases closed. It should be noted that when the formal investigation procedure is opened, for reporting purposes, the original case is closed and a new separate case opened.

Of the 59 cases pending at the end of 2006, 54 concerned individual state aid control cases. As in 2005, an increasing number of the pending cases are complaints. Since the Authority is under the obligation to deal with notifications within two months of receipt of a complete notification, such cases are given priority. Nevertheless, the Authority was also able to deal with and close some old complaints during this year. Copies of the College Decisions described below (as well as other decisions) can be found on the Authority's website.[1]

Figure 1 New cases 2006 by case category*



* This chart only refers to new cases of state aid control and does not include the opening of formal investigation procedures in existing cases.

1. www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry/

State aid provisions and revision of guidelines

The rules on state aid procedures are laid down in Protocol 3 to the Surveillance and Court Agreement. EEA EFTA States are under an obligation to notify any plans to grant new aid to the Authority and await the approval of the Authority before putting the aid into effect. Aid that has been paid out in breach of the notification obligation and which does not meet the conditions for approval shall be recovered from the aid beneficiary.

On the basis of Article 61(1) of the EEA Agreement, state aid is in principle prohibited. However, it can be approved by the Authority on the basis of certain conditions designed to ensure its compatibility with the Agreement. Article 61(2) and (3) contain several examples of aid which is or may be declared compatible. The provision which plays the greatest role in the Authority's state aid practice is Article 61(3)(c): "aid to facilitate the development of certain economic activities or of certain economic areas". This Article covers not only sectoral and regional aid measures, but also measures which follow horizontal objectives (*i.e.* research and development, environment, etc.). In addition, compensation for the discharge of public service obligations where these concern undertakings entrusted with the operation of the services of general economic interest referred to in Article 59(2) may also be considered compatible with the Agreement. Various block exemptions in the form of European Commission Regulations are also incorporated into the EEA Agreement. These Regulations provide, on certain conditions, for exemptions for aid to small and medium-sized enterprises, aid for training and aid to facilitate employment. A minimum threshold below which aid need not be notified is also provided for in a block exemption.

In January 1994, the Authority adopted a consolidated document on Procedural and Substantive Rules in the field of state aid, also called the State Aid Guidelines. The purpose of these Guidelines is to explain how the Authority interprets and applies the state aid rules. They also ensure uniform interpretation, application and implementation of Articles 61 and 62 of the EEA Agreement and are in line with the European Commission's approach to state aid.

The Guidelines are regularly amended or supplemented. For 2006, reference must be made in particular to the adoption of the new Chapter 25B State Aid Guidelines for Regional Aid (for further information see page 52). Moreover, the Authority adopted new rules on reference and discount rates (Chapter 34), on the definition of micro, small and medium-sized enterprises (Chapter 10), on short-term export credit insurance (Chapter 17A) and on state aid to promote risk capital investments in small and medium-sized enterprises (Chapter 10B). The Authority also adopted two decisions prolonging the rules relating to state aid to shipbuilding (Chapter 24B) and the rules relating to aid for research and development (Chapter 14).

Regional aid

The EFTA Surveillance Authority adopted new Guidelines on national regional aid in 2006 and approved the regional aid maps for Norway and Iceland for the period 2007 to 2013 as well as various regional aid schemes in those countries.

New regional aid Guidelines

The new Guidelines on regional aid correspond to those adopted by the European Commission. The Guidelines apply from 1 January 2007 until the end of 2013. The aim of the Guidelines is to further the economic development of disadvantaged regions with low population density through investment and job creation. The Guidelines establish the legal basis for granting regional investment aid as well as operating aid in certain disadvantaged areas.

Regional aid maps for Norway and Iceland for 2007-2013

The assisted areas in Norway cover 27.5% of the total population and qualify for regional investment aid because they are low population density regions (*i.e.* less than 12.5 inhabitants per square kilometre).

In the case of Iceland, one map of assisted areas was approved for the year 2007 and another map for the period 2008-2013. For 2007, the map is based on the current classification of geographic regions and covers 31.4% of the Icelandic population. For the subsequent period, the map is based on the forthcoming reform of the classification of geographic regions in Iceland. The areas included have an average population density of 1.2 inhabitants per square kilometre. The population living in these areas represents 37.5% of the total Icelandic population.

It is the responsibility of the national authorities to decide, based on the approved regional aid map, what kind of regional investment aid they would like to grant and to notify to the Authority aid schemes or individual aid grants as appropriate.

Map 1 Regional aid map Norway (2007-2013)

Map 2 Regional aid map Iceland (2008-2013)

Differentiated social security contributions

In July 2006, the Authority authorised a new Norwegian aid scheme concerning regionally differentiated social security contributions paid by employers.

According to the National Insurance Scheme Act *("Folketrygdloven")*, all employers in Norway are subject to compulsory contributions to the national social security scheme. These contributions are calculated in relation to the gross salaries of employees. The general rate in Norway is 14.1%.

The objective of the scheme is to reduce or prevent depopulation in the least populated regions in Norway by stimulating employment in these regions. On this basis, Norway is divided into different zones with varying rates of social security contributions. The delimitation of these zones aims to reflect the specific problems in the different areas while paying special attention to avoiding the creation of high internal tax borders that would lead to critical distortions of competition between the regions. Aid under the scheme will be granted in the form of reduced social security contributions in the least populated areas in Norway, covering 17.7% of the population.

The Authority approved the scheme on the basis of the new Guidelines on regional aid, in particular the provisions concerning operating aid in the least populated regions. The scheme was approved for the period 2007-2013.

Risk loans

In December 2006, the Authority authorised the prolongation of a Norwegian regional risk loan scheme for the period 2007-2013.

By providing loans on favourable conditions, the scheme is aimed at promoting economic development in areas eligible for regional aid.

Continuation of the special tax regime for certain natural gas developments in the north of Norway

In December 2006, the Authority approved the continuation for the period 2007-2013 of the special tax regime for certain natural gas developments in the north of Norway, laid down in the Norwegian Petroleum Tax Act. The scheme consists of an arrangement whereby companies investing in large-scale plants for liquefaction of natural gas which are located in the northernmost part of Norway may defer tax payments by recording extra high depreciation costs in the years immediately following the investment.

The scheme, and its application to the so-called *"Snøhvit"* project, were originally approved by the Authority in May 2002. In that Decision, the Authority concluded that the tax advantages resulting from the accelerated depreciation regime amounted to state aid within the meaning of the EEA Agreement. However, the Authority held that the aid was compatible with the EEA Agreement as the scheme would only be applicable in a region qualifying for regional investment aid according to the Authority's Guidelines on regional aid.

In December 2006, the Authority re-assessed the scheme on the basis of the new Guidelines and concluded that it was compatible with these rules and in line with the Authority's decision of July 2006 on the regional aid map for Norway.

New projects that are to benefit from the scheme will have to be notified to the Authority if the relevant investments exceed EUR 100 million.

Transport aid

In February 2006, the Authority approved certain amendments to the previously authorised Norwegian scheme for direct transport aid.

The aim of the scheme is to offset competitive disadvantages resulting from extra transport costs for firms located in peripheral areas and within sparsely populated regions and thus situated long distances away from their markets. The Authority concluded that the amendments complied with the Authority's Guidelines on regional aid.

Aid to the maritime sector

In 2006, the EFTA Surveillance Authority adopted five decisions regarding the granting of state aid in the maritime sector.

Turborouter

In March 2006, the Authority opened a formal investigation procedure regarding research and development aid granted by the Research Council of Norway to various projects in connection with the development of the software programme Turborouter. Turborouter is a software tool for optimising vessel fleet scheduling, *i.e.* to decide which vessels to assign different cargoes to.

The Authority had received a complaint alleging that certain projects related to the software programme Turborouter had received state aid in violation of the state aid rules of the EEA Agreement. In particular, the complainant claimed that the state aid granted to some projects was not in accordance with the State Aid Guidelines.

On the basis of the information available to it, the Authority had doubts as to whether these projects could be considered compatible with the state aid provisions of the EEA Agreement, in particular the Guidelines on aid for research and development. Therefore, the Authority decided to open the formal investigation procedure in relation to these grants.

Aid to the Hurtigruten companies

In June 2006, the Authority opened a formal investigation regarding compensation for increased social security contributions granted by the Norwegian authorities to the Hurtigruten companies in 2004. The Authority was in doubt whether the aid to these companies, which provide transport services along the Norwegian coast, complied with the state aid rules of the EEA Agreement.

The Authority's concerns were related to the question of whether the companies received more in compensation than what is justified by the public service activities they carry out.

Maritime research, development and innovation

In July 2006, the Authority approved a new Norwegian aid scheme for strengthening research, development and innovation in the maritime industry (Maritime RDI).

The duration of the scheme is six years, from 2006 to 2011. The budget of the scheme for 2006 was NOK 20 million (approximately EUR 2.6 million). Annual budgets for subsequent years are subject to annual parliamentary budget procedures.

Tax refund schemes

In October 2006, the Authority authorised alterations to the Norwegian refund schemes for ships registered in the Norwegian Ordinary Shipping Register and the Norwegian International Shipping Register. According to those refund schemes, which were authorised by the Authority in 1998, 2002 and 2003, a shipowner was reimbursed for income tax paid by seafarers and social security contributions levied on the shipowner and the seafarers.

A complaint alerted the Authority to the fact that the Norwegian refund scheme might lead to discrimination against non-Norwegian seafarers. The refund was, in the past, limited to those seafarers having a tax residence in Norway. The shipowner was not entitled to a refund for seafarers who had no such tax residence, but who nevertheless paid taxes in Norway.

With a view to correcting this situation, the Norwegian authorities notified alterations to the schemes in January 2006. The refund scheme will now also apply to an estimated 600 seafarers who are tax liable in Norway for income earned aboard ships, but who do not have any tax residence in Norway.

In November 2006, the Norwegian authorities notified two further alterations to the scheme which were also approved as compatible aid in accordance with the provisions of the Guidelines on state aid to the maritime sector. The first alteration concerned the extension of the tax refund scheme to cover all ships certified in Ordinary Shipping Register receiving no other public support than that under a tonnage tax scheme previously approved by the Authority. The second alteration concerned passenger ships in international trade registered in Ordinary Shipping Register. Whereas the previous scheme covered the whole crew, under the amended scheme only taxes and social security contributions in respect of safety crew aboard passenger ships according to the vessel alarm instructions are reimbursed.

Enova

In 2006, the EFTA Surveillance Authority closed the formal investigation into Norwegian funding of renewable energy and energy-saving projects via the Norwegian Energy Fund.

In January 2002, Norway established the Norwegian Energy Fund, a finance mechanism for the support of, *inter alia*, renewable energy projects, energy saving measures and information and education in the field of energy efficiency. The Fund is managed by a State undertaking, Enova, which grants lump sum payments to project owners where it is established that state support is necessary to ensure that a project is carried out.

The scheme was notified to the Authority in June 2003. In May 2005, the Authority opened the formal investigation procedure because it had doubts as to whether the system could be declared compatible with the state aid provisions and, in particular, with the Guidelines on aid for environmental protection. The Authority questioned, in particular, whether the conditions of the scheme were really such that overcompensation was precluded. The Authority also doubted whether the grants would be limited to investment support or whether ordinary running costs would be covered as well. The Norwegian authorities agreed to modify the scheme to bring it into line with the State Aid Guidelines.

In May 2006, the Authority authorised the Energy Fund system as amended for the future, provided that certain conditions were respected. For energy saving measures, these conditions provide that only 40% of the extra investment costs of a project can be covered, with the possibility of higher aid intensities (up to 50%) for small and medium-sized enterprises. For renewable energy production, support may be granted to compensate for high investment costs which are often associated with such production.

As the scheme was put in place in January 2002, *i.e.* before notification, the Authority required the Norwegian authorities to recover any aid paid out under the initial version of the scheme, which was not in compliance with the EEA state aid provisions (see also the report on recovery on page 56).

Seed capital

In 2006, the EFTA Surveillance Authority adopted new Guidelines as well as three individual decisions in the field of state aid and risk capital.

In March 2006, the Authority approved notified amendments to the Norwegian regional and nationwide seed capital schemes, both originally approved in July 2005. The amendments concerned conditions for follow-on investments after an initial risk capital investment.

In October 2006, the Authority adopted new Guidelines on state aid to promote risk capital investments into small- and medium-sized enterprises, based on the new Guidelines published by the European Commission in July 2006. The new Guidelines were inserted as Chapter 10B of the Authority's State Aid Guidelines, replacing Chapter 10A, which expired on 30 October 2006. Chapter 10B has been applied by the Authority from the date of adoption and will be valid through until the end of 2013.

Finally, in December 2006, the Authority, applying the new risk capital Guidelines for the first time, approved a private seed capital and equity scheme applicable to the Norwegian county of Møre and Romsdal. The scheme foresees the establishment of a fund for investments in small- and medium-sized enterprises in that county. The aid measure consists of a loan of NOK 75 million granted by the local government on preferential terms. The Authority held that the conditions for compatibility set out in the Guidelines were met and approved the aid.

Recovery

In 2006, the Authority monitored the fulfilment of recovery obligations imposed on EEA EFTA States following the adoption of a negative decision by the Authority in four cases.

Entra Eiendom AS

In December 2005, the Authority closed the formal investigation procedure by adopting a negative decision in relation to the exemptions from document duties and registration fees in connection with the establishment of Entra Eiendom AS, (see Annual Report for 2005). The Authority considered that the exemption from document duties and registration fees involved the grant of state aid to Entra Eiendom AS which was incompatible with the functioning of the EEA Agreement. The Norwegian authorities were therefore ordered to recover the aid, including interest, which had already been paid out. The Authority was informed that the agreed amount of aid (NOK 99 088 462) had been recovered by the Norwegian authorities from Entra Eiendom in June 2006.

Exemptions from environmental taxes in Norway

In 2004, the Authority adopted a negative decision regarding, *inter alia*, state support in the form of a full exemption from the tax on electricity for the manufacturing and mining industries as well as for certain undertakings located in Finnmark and some areas in North Troms (see Annual Report for 2004). Given that a minimum tax rate existed, it was decided to recover only the excess above this minimum.

Although this decision was challenged before the EFTA Court in 2005 by Norway and several third parties, the Court upheld the Authority's recovery order.

During the course of 2006, discussions have taken place between the Authority and the Norwegian authorities concerning the implementation of the recovery decision. After several exchanges of correspondence, the Norwegian authorities have now confirmed that they will comply with the Authority's decision and expect to recover all the unlawful aid from the beneficiaries early in 2007.

Enova

In May 2006, the Authority adopted a decision authorising, under certain conditions, a revised Energy Fund system and ordering recovery of any aid paid out under the system put in place in January 2002 and until the amendment bringing it into line with the EEA state aid provisions (see also the report on the Enova case on page 55).

The Norwegian authorities have drafted a provisional list of undertakings and the amount of aid received. The Authority expects that the Norwegian authorities will comply with the recovery order during the first half of 2007.

International Trading Companies

The Authority adopted a negative decision and requested recovery of state aid granted in application of the International Trading Companies special tax legislation in February 2004 (see Annual Report for 2004). The Authority brought the Icelandic authorities to the EFTA Court for not having implemented the Authority's decision. In November 2005, the Court concurred that Iceland was in breach of its obligations under the Authority's decision. In December 2006, the Icelandic authorities informed the Authority that only one undertaking benefiting from the scheme had received state aid and that the recovery process had been initiated. The tax authorities will determine the exact amount of aid to be recovered. The Authority expects recovery to take place in the first quarter of 2007.

Support to media and film

In 2006, the EFTA Surveillance Authority approved film and media support schemes in all three EEA EFTA States.

In September 2006, the Authority approved the scheme in the Liechtenstein draft Media Support Act according to which media undertakings would receive state support for reporting permanently and to significant extent on politics and events in Liechtenstein. The scheme covers printed media and broadcasting, as well as on-line "publications".

The Authority considered that the state aid involved would distort competition and affect trade within the EEA only to a limited extent and approved the scheme until 31 December 2011.

In November 2006, the Authority approved the prolongation of two Norwegian support schemes to audiovisual production, film related activities and film production companies. These schemes are now valid until 7 August 2008.

In December 2006, the Authority approved a notified prolongation of the Act relating to temporary reimbursements in respect of film-making in Iceland. The Authority originally approved the Act in 2000 for the period until the end of 2006. The decision adopted this year authorises a prolongation through until the end of 2011 as well as certain amendments notified by Iceland, including an increase in the proportion of reimbursed costs from 12% to 14%.

Tax incentives, R&D

Norway operates the so-called "Skattefunn" scheme, according to which a certain percentage of R&D expenditure may be deducted from the amount of tax due. The scheme applies basically to small- and medium-sized enterprises and had been approved by the EFTA Surveillance Authority in September 2002. Wishing to extend the scheme to support unpaid labour in R&D activities, but acknowledging that a tax credit cannot be granted for "unpaid costs", the Norwegian authorities notified an amendment to the Skattefunn scheme (referred to as the "Unpaid R&D Labour Scheme") in the autumn of 2005 by which financial support is awarded to unpaid labour in R&D activities in the form of grants which are exempt from tax.

The Authority has taken the preliminary view that the grants awarded under the Unpaid R&D Labour Scheme involve the grant of state aid. It also considered it doubtful whether the unpaid labour costs qualify as eligible costs under the scheme and whether the scheme provides for sufficient incentives to carry out R&D, as required by the Guidelines on aid for research and development. Therefore, having doubts as to whether the Unpaid R&D Labour Scheme can be considered compatible with the functioning of the EEA Agreement, the Authority decided to open the formal investigation procedure in March 2006.

The notified amendment also included the so-called "Compensation Scheme". Under this scheme, companies will be compensated for financial losses caused to their research and development projects during the period 2002-2004 as a result of the fact that unpaid labour was not covered by the Skattefunn scheme. The Authority, already in its decision to open the formal investigation, has taken the preliminary view that the Compensation Scheme qualifies as a *de minimis* scheme, provided that, in fact, aid is not granted where it is clear that the *de minimis* threshold has been or will be exceeded.

The decision to open the formal investigation procedure was published in the Official Journal of the European Union on 26 October 2006. No comments were received from third parties during the prescribed one month period after the publication. A final decision will be adopted in 2007.

In 2006, the Authority approved a further amendment on the tightening of the criteria for the application of the Skattefunn scheme. Under the revised scheme, a double ceiling has been introduced in respect of personnel and indirect costs that may benefit from the tax deduction: a maximum of 1850 hours per year per employee and a maximum rate of NOK 500 per hour.

Aviation school

In December 2006, the EFTA Surveillance Authority opened a formal investigation into aid granted in the airline pilot education sector in Troms County, Norway.

The Authority received a complaint alleging that state aid had been granted to the Norwegian Aviation College in the form of a direct grant through the Revised National Budget as well as various monies from Troms County and the Municipality of Målselv.

After a preliminary examination of the matter, the Authority had doubts as to whether the monies destined for the airline pilot education sector in Troms County were compatible with the rules on state aid and therefore adopted a decision to open the formal investigation procedure.

TELECOMMUNICATIONS

Farice submarine cable project

In July 2006, the EFTA Surveillance Authority decided that the support measures granted by the Icelandic State in favour of the Farice submarine cable project were compatible with the state aid rules of the EEA Agreement.

The formal investigation procedure had been opened in May 2005 in relation to the telecommunications project to connect Iceland, the Faroe Islands and Scotland (see Annual Report for 2005).

As a result of this investigation, the Authority considered that the two support measures granted by the Icelandic State, *i.e.* a state guarantee and a share capital increase by the Icelandic State in favour of Farice hf., the company responsible for preparing, constructing and operating the cable, constituted state aid. However, the Authority found that the support measures were necessary to secure reliable internet connectivity to Iceland.

Because of its geographic location, Iceland is particularly dependent on having access to reliable and economic telecom connectivity. The existing CANTAT-3 connection could not guarantee this, but the Farice project could not be carried out as a purely private initiative and therefore depended on the Icelandic State's participation. Given the limited amount of aid granted for this project and considering that Farice hf. ensures access to its cables on an open, transparent and non-discriminatory basis and that the competition rules of the EEA Agreement were not infringed, the Authority authorised the measures.

Iceland Cement

In November 2006, the EFTA Surveillance Authority adopted two decisions regarding the Icelandic cement producer, Sementsverksmiðjan hf.

First, the Authority decided to extend the scope of the formal investigation procedure opened in 2004 in relation to the Icelandic State's sale of Sementsverksmiðjan hf. (see Annual Report for 2004). By an agreement signed in 2003 between the Ministry of Finance and the Pension Fund for State Employees, the State took over past and future pension-related obligations of the company. After a preliminary examination of this agreement, the Authority considered that the assumption by the Icelandic State of the company's pension-related liabilities, without any counter-compensation on market terms, may constitute state aid and doubted whether such aid could be considered compatible with the rules of the EEA Agreement. Therefore, the on-going formal investigation into the sale by the Icelandic State of Sementsverksmiðjan hf. was extended to include this aspect of the transaction.

Second, the Authority decided to close part of that formal investigation, having come to the conclusion that the price for the sale of the State's shares in Sementsverksmiðjan hf. to the investors group Íslenskt sement ehf. did not involve any state aid and that Íslenskt sement ehf. had not received any unlawful support in this respect.

Following the adoption of these decisions, the formal investigation procedure remains open regarding all alleged state aid measures having Sementsverksmiðjan hf. as the potential beneficiary, including, in particular, the assumption by the State of the pension liabilities as well as the sale to the State of certain assets. The Authority will adopt a final decision on this case during the course of 2007.

VAT compensation

In July 2006, the EFTA Surveillance Authority opened a formal investigation regarding compensation for input value added tax (VAT) granted by the Norwegian authorities under the VAT Compensation Act.

The provision of certain services, such as social services, health related services and educational services, is exempt from VAT in Norway. Private undertakings providing such services in competition with municipalities or municipal undertakings will have to pay VAT on the acquisition of goods and services used to provide their services. According to the VAT Act, the same is the case for municipalities and municipal undertakings. However, through the VAT Compensation Act, these entities are compensated for the VAT they pay when acquiring goods and services.

As a result of a complaint, the Authority looked into the matter and came to the preliminary conclusion that the VAT Compensation Act may result in state aid within the meaning of Article 61(1) of the EEA Agreement. The Authority was in doubt as to whether such aid could be considered compatible with the EEA Agreement and therefore decided to open the formal investigation procedure.

Wood programme

In May 2006, the EFTA Surveillance Authority adopted a decision to open the formal investigation procedure in respect of the so-called "Wood Scheme". Under that scheme, which was never notified, the Norwegian authorities awarded grants to companies for the purposes of creating value within the sector of woodwork and the wood processing business in order to achieve a more sustainable cycle of production and consumption. The focus of the scheme was to improve the processing and use of woodwork as well as improving relations on different levels of trade between the forest sector and the market. The Wood Scheme was a five-year scheme which was operational from 2000 until 2005.

The preliminary finding of the Authority is that the Wood Scheme involved the grant of state aid. The Authority also took the view that the criteria for awarding grants were vague and that the scheme lacked the information necessary to verify compliance with the State Aid Guidelines or the relevant block exemptions. The Authority therefore concluded that it has doubts as to the compatibility of the Wood Scheme with the state aid rules. The Authority also doubts whether aid qualified as *de minimis* aid under the Wood Scheme actually satisfies the definition of such aid.

The decision to open the formal investigation procedure was published in the Official Journal of the European Union on 9 November 2006 and no comments from third parties have been received in the prescribed one month period. A final decision will be adopted in 2007.

Icelandic Housing Fund

In April 2006, the EFTA Court annulled a decision by the EFTA Surveillance Authority not to raise objections to state aid in favour of the Icelandic Housing Financing Fund ("the HFF"). The annulment action was lodged by the Bankers' and Securities' Dealer Association of Iceland.

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In August 2004, the Authority had found that the HFF's mortgage-secured housing loans to residents in Iceland involved state aid. However, on the basis of the conditions contained in Article 59(2) of the EEA Agreement for so-called "services of general economic interest", the Authority considered that the aid could be declared compatible with the state aid rules.

The Authority's decision had been made on the basis of the preliminary examination provided for in the procedural rules on state aid. However, in the opinion of the EFTA Court, the aid in question had raised "doubts... as to [its] compatibility with the functioning of the EEA Agreement" which had not been overcome by means of the preliminary examination. Hence, the Authority, as it is obliged to do in case of doubt, should have initiated a formal investigation procedure before taking a final decision on the matter. This was not done and, for that reason, the EFTA Court annulled the Authority's decision.

In finding that doubts as to the scheme's compatibility with the functioning of the EEA Agreement had not been dissipated, the EFTA Court made reference, in particular, to certain specific features of the scheme: the "general loans" scheme is not limited to providing loans for the construction or purchase of dwellings that fulfil any particular criteria as to size or value; neither is this lending scheme limited to assisting the borrower in financing his or her own dwelling.

In order to comply with the EFTA Court judgment, the Authority adopted, on 21 June 2006, Decision No. 185/06 to open the formal investigation procedure with regard to the HFF.

Observations lodged before the ECJ

In August 2006, the EFTA Surveillance Authority lodged written observations with the European Court of Justice in Case C-199/06 *Centre d'exportation du livre français* v *Société internationale de diffusion et d'édition*. This case about the procedural rules in the field of state aid was referred to the European Court of Justice by the French *Conseil d'État*.

More specifically, the case concerns the question whether it is permissible under Article 88(3) EC for a Member State, which has granted unlawful aid, not to recover that aid from the aid beneficiary, even when a request for recovery has been lodged with a national court, on the ground that the European Commission later declared that aid to be compatible with the common market. The case has far reaching implications, in a system of supervision of state aid, as to how tasks should be divided between the European Commission (and, by extension, the Authority) and national courts.

Additional information on the EFTA Surveillance Authority and its tasks is available on the Authority's website:
www.eftasurv.int

The electronic version of the EFTA Surveillance Authority Annual Report may be found at:
www.eftasurv.int/information/annualreports

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