EFTA SURVEILLANCE AUTHORITY

Annual Report 2008

Foreword

The year 2008 brought dramatic changes for the world economic outlook that will also have a bearing on the EFTA Surveillance Authority's agenda for 2009.

There is a real danger that the crises in the financial sector will lead to a serious economic recession. Iceland has been particularly hard hit. Compared with the size of the country's economy, Iceland had a large financial sector, which had grown fast and with major expansions abroad. In October the three largest Icelandic banks experienced major liquidity problems and were taken into public administration. National authorities have taken drastic measures in order to control the situation. The Authority is monitoring the developments in Iceland closely with a focus on aspects of potential discrimination and state aid issues.

Questions regarding energy and the environment were also high on the political agenda in 2008. Important decisions were taken by the Authority in this area, among others, the approval of the Norwegian government's participation in the carbon capture and storage (CCS) test centre at Mongstad. The Authority has now given a green light to a full scale CCS facility at Kårstø in Norway. These projects have an important European and climate change dimension. Moreover, national allocation plans (NAPs) of the EFTA States for CO_2 quotas have to be approved by the Authority before such states can participate in the European emission trading system (ETS). The Authority decided last summer to raise objections to the Norwegian plan and an amended draft law is now under assessment in the Authority. The Liechtenstein NAP was already approved at the end of 2007.

In 2008 the EFTA Surveillance Authority issued a high number of letters of formal notice and an unprecedented high number of reasoned opinions. As in 2007, these figures were largely driven by infringement cases concerning the incorporation of regulations in Iceland.

The Authority is particularly mindful of its responsibility to ensure that the monitoring of the EEA Agreement is carried out in a consistent and coherent way. This notwithstanding, the Authority must be expected to continuously endeavour to make improvements when it comes to both efficiency and quality. In 2008 we were able to reduce further the number of old cases, but still had a high number of pending cases. Lead time for the processing of new cases was also shortened.

In an effort to enhance public confidence, the Authority revised its policy on transparency by adopting new rules on access to documents and launching a public document register. A highly qualified and well trained staff from 16 nations also contributes to the Authority's standing and independence.

The year ahead can be expected to be eventful and challenging. A common understanding of relevant legislation and a level playing field within all 30 EEA States is no less important in a period of recession.

Per Sanderud
President

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Chapter 1 Introduction

The EFTA Surveillance Authority is an organisation responsible for ensuring that all legal obligations deriving from the EEA Agreement are met by Iceland, Liechtenstein and Norway. The Authority's task is to supervise the incorporation of EEA acts into their national legislation by these countries and to make sure the rules of the Agreement, such as the free movement of goods, persons, services and capital, are respected. The Authority is led by a College of three Members, one from each EFTA State participating in the European Economic Area.

The EEA Agreement

The **EEA Agreement** entered into force in 1994. The purpose of the agreement is to expand the **Internal Market of the European Union** so that it also includes the **EFTA States**, creating a common **European Economic Area** (EEA). Within this Economic Area, all economic activity shall be governed by the same set of rules and principles which are set at the European level. The aim is to abolish existing and prohibit new distortions of trade and competition based on nationality and to make sure that trade and economic activities across national borders are as free and unhindered as activities within each individual State.

The Agreement was originally negotiated between the then 12 EU Member States and seven EFTA States. Today, all **27 EU Member States** take part in the EEA, while there are only three participating **EFTA States** left: **Norway**, **Iceland** and **Liechtenstein**. However, the structure and principles of the Agreement remain intact. This also applies to the institutional set-up, of which the EFTA Surveillance Authority is an integrated part.

Being part of the European Economic Area implies that the EFTA States must implement all new EU legislation relevant for the functioning of the EU Internal Market. Representatives from the European Commission and the three EFTA States – Norway, Iceland and Liechtenstein – meet regularly in Brussels to decide which new EU legal acts shall be made part of the EEA Agreement.

When a piece of legislation has been incorporated into the EEA Agreement, the obligation arises for the EFTA States to make sure that such legislation is incorporated into their national legal order. This has to be done within a deadline which is determined in each separate case. Furthermore, all participating States are obliged to ensure that the basic principles of the Internal Market are respected. Among such principles are the prohibition of **discrimination based on nationality** and the promotion of **free movement of goods, persons, capital and services**. A functioning Internal Market also means common **competition** rules and regulation of state participation in the market, through rules on **state aid** and the award of **public contracts** (public procurement).

The Role of the EFTA Surveillance Authority

Being part of the European Economic Area entails a set of obligations that must be complied with by **all the States involved in the Internal Market**. For the EU Member States, these obligations will, in general, be covered by EU membership. The European Commission has the responsibility of ensuring that all of these States fulfil these obligations and it also has the authority to pursue any State that does not. To ensure that EU legislation is understood and applied in the same manner across all 27 Member States, a system of European Courts exists. The **European Court of Justice** and the **Court of First Instance** may order a Member State to change its rules, regulations and practices in order to align them with the European Community legislation.

The authority of the European Commission does not, however, extend beyond the borders of the European Union. The EFTA Surveillance Authority has therefore been established in order to make sure that these three countries also fulfil their obligations according to the EEA Agreement.

The EFTA Surveillance Authority (hereafter "the Authority") works to ensure that **the EFTA States conduct a timely and correct implementation of all EU legal acts that have been made part of the EEA Agreement**. In addition, the Authority has to make sure that the EFTA States respect the rules and principles of the EEA Agreement in their own internal legal order. In parallel to the procedure followed by the European Commission, the Authority has the possibility to pursue cases against the EFTA States that are not fulfilling their obligations pursuant to the EEA Agreement, and if necessary bring the matter before the **EFTA Court**. If an EFTA State is found to act in breach of the EEA agreement, the Court may oblige them to amend their legislation in order to bring the violation to an end.

In co-operation with the EFTA Court, the Authority therefore plays an important role in guaranteeing that the EFTA States fulfil their obligations according to the EEA Agreement in the same manner as the EU Member States. This contributes towards ensuring a uniform application of the rules governing the Internal Market throughout the entire European Economic Area so that equal conditions for competition and market access are ensured and safeguarded for all participants in the market, regardless of their nationality.

The structure of the EEA Agreement does, however, imply that all decisions of the Authority and of the EFTA Court must be made on their own merits and independently of the EU Institutions. Nevertheless, the balance of the EEA Agreement is maintained as a result of close cooperation between the Authority and the European Commission, thereby ensuring that the EFTA States are subject to the same set of obligations and same level of scrutiny as the Member States of the EU. Alignment with the enforcement policy of the European Commission in important cases is thus a high priority for the Authority.

KEY TERMS

EFTA
The European Free Trade Association, an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States: **Iceland**, **Liechtenstein**, **Norway** and Switzerland.

EEA
The European Economic Area, an area of economic co-operation that consists of the 27 EU Member States and three of the EFTA States. Inside the EEA, the rights and obligations established by the Internal Market of the European Union are expanded to include the participating EFTA States.

EFTA States
The three EFTA States that participate in the EEA: **Iceland**, **Liechtenstein** and **Norway**.

EEA Agreement
The Agreement which creates a European Economic Area, comprising not only the EU Member States but also the three participating EFTA States.

EFTA Surveillance Authority
The organisation which ensures that the three EEA EFTA States fulfil their legal obligations as stated in the EEA Agreement. Referred to as the Authority for the purposes of this report.

EFTA Court
The judicial authority responsible for judging infringement cases brought against EFTA States.

Case handling by the Authority

General proceedings against an EFTA State

The Authority's task is to monitor the situation in the EFTA States in order to make sure that they fulfil their obligations according to the EEA Agreement. If an EFTA State violates an obligation under the EEA Agreement, the Authority will send a so-called **letter of formal notice** to the government of the State concerned in which it will explain which provision of EEA law it believes has been infringed.

The national government is invited to submit its comments on the matter and propose possible solutions before the Authority decides on whether or not to bring the procedure forward by issuing a **reasoned opinion**. In this document the Authority outlines its final position on the matter and gives the State in question a deadline to comply with its obligations and bring the infringement to an end. If this deadline is not met, it is for the Authority, as the final step of the procedure, **to bring the matter before the EFTA Court**, whose judgment is binding on the State concerned.

Competition cases

The Internal Market would not function without **common rules on competition**. The EEA Agreement contains a set of rules which, in substance, are parallel to those of the EC Treaty. These rules are directed at **economic operators** inside the European Economic Area, not at the States, unless they perform an economic activity. They prohibit different kinds of restrictive practices between businesses, for example, market sharing arrangements, as well as the abuse of dominant positions in any given market.

The Authority has the task of upholding the competition rules in the three EFTA States, while the European Commission fulfils the same role in relation to the EU Member States. If anti-competitive behaviour has taken place, the Authority may initiate proceedings against market players and impose fines. In most cases, however, solutions can be found on the basis of a settlement, whereby concerns raised by the Authority are addressed without the need to initiate any formal proceedings, for example as a result of commitments made by the undertakings in question.

The rules on **merger control** in the European Union are also incorporated into the EEA Agreement. The Authority provides comments and information to the European Commission in cases where markets in one or more of the three EFTA States are particularly affected.

State aid cases

The state aid rules aim at banning distortions of competition caused by making state resources available to selected undertakings. The general rule is that **aid from public institutions** that distorts or threatens to distort competition and that may affect trade between States within the European Economic Area **is prohibited**. There are, however, several **possibilities for exemption** from this rule, provided that certain conditions are met. The Authority's task is to supervise the fulfilment of these criteria and the compliance with the general prohibition on state aid measures by the three EFTA States. The European Commission assumes the same role in relation to the EU Member States.

Any new measure that contains elements of state aid in an EFTA State must therefore be **notified to the Authority prior to implementation** and it must not be put into effect before the Authority has taken a decision on the case. Following a preliminary examination, it may be clear that the aid measure is eligible for exemption from the general prohibition. If no clear conclusion to that effect can be drawn from the initial examination, the Authority is obliged to start a formal investigation procedure.

The result of such an investigation can be **positive** (approval of the notified measure), **negative** (prohibiting the measure) or **conditional** (approving, but only if certain conditions are met). In addition to notifications of aid measures from the EFTA States themselves, the Authority also receives complaints from individuals or companies claiming that state aid has been granted without the necessary prior approval. In cases where aid which cannot benefit from any of the exemption possibilities has been granted, the general rule is that the Authority has to order the State in question to reclaim all granted aid from the recipient.

Organisation of the Authority

College

The Authority is led by a College, which consists of three Members. The Members are appointed by common accord of the governments of the three EFTA States for a renewable period of four years. Among the Members, a President is appointed for periods of two years, also by common accord of the governments. 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 refrain from any action which would be incompatible with their duties.

During 2008, the composition of the College was:

- **Per Sanderud**, President (Norway)
- **Kristján Andri Stefánsson** (Iceland)
- **Kurt Jaeger** (Liechtenstein)

Budget and accounts

The activities and operating expenses of the Authority are financed by contributions from Iceland (9%), Liechtenstein (2%) and Norway (89%).
The Authority's budget for 2008 was adopted in December 2007 by the Committee of Representatives. The increase in contributions from the EEA EFTA States is 3.38% compared to the budget for 2007. The recruitment of an additional food safety inspector was approved.

On 8 June 2008, the Audit Report by the EFTA Board of Auditors (EBOA) for the financial year 2007 was handed to the EEA EFTA States. The audit certificate stated that:

a) the financial statements give a true and fair view of the financial position as at the end of the period and the results of the operations for the period;

b) the financial statements were prepared in accordance with the stated accounting principles;

c) the accounting principles were applied on a basis consistent with that of the preceding financial year;

d) transactions were in accordance with the Financial Regulations and Rules and the legislative authority.

On 11 December 2008, the Authority's Financial Statement for the financial year 2007 was approved by the EEA EFTA States, and the Authority discharged of its responsibilities for the same period.

The Authority's budget for 2008 breaks down as follows (figures for 2009, adopted in 2008, inserted for comparative purposes):

Total budget proposal		Budget 2008	Budget 2009
Chapter 1	Salaries & benefits, allowances	8,536,843	9,311,645
	Salaries	5,753,970	5,753,970
	Benefits, allowances & turnover costs	2,782,873	2,962,334
Chapter 2	Travel, Training, Representation	784,816	710,300
Chapter 3	Office Accommodation	1,133,322	1,055,000
Chapter 4	Supplies and Services	1,323,317	1,116,907
Total expenditures		**11,778,298**	**12,193,851**
Chapter 5	Financial income and expenditures	-4,000	-13,478
Chapter 6	Other income	-18,000	-27,052
Contributions from the EFTA States		**11,756,298**	**12,153,321**

Personnel

In 2008, the Authority had **58 staff members** (College Members not included) on **fixed-term contracts**, in addition to temporary staff, national experts seconded from the EFTA States' public administrations, and trainees. Half of staff members come from the EFTA States.

At the end of the year, the number of people employed by the Authority totalled **65 persons**, including **College Members**, as well as **temporary staff**.

In accordance with staff regulations established by the EFTA States, staff are employed for a **three year period**, normally **renewable only once**. Staff turnover was 23% in 2008, compared to 25% in 2007.

Public relations and work to promote increased transparency

In 2008, two important measures were taken in order to improve transparency and public knowledge about the activities of the Authority. In June, new **Rules on Public Access to Documents** were adopted by the College. The new Rules are, to the extent possible, aligned with those applicable to the EU Institutions, and the Authority intends to follow the practice set by the European Court of Justice with regard to their application. Hence, citizens will have at least the same right to access Authority documents as is the case for documents from EU Institutions.

Also this year, the Authority began publishing a **document register** on its website, which includes references to its most important decisions. The register is updated weekly, and is intended to give the public a better overview of which cases are dealt with by the Authority and to facilitate the possibility of making requests for access to specific documents.

Seen together, these two measures **increase the transparency and accountability** of the Authority, and make it easier for interested parties to obtain information about its activities.

As in previous years, staff and College members have given presentations to, and participated in discussions with, a large number of visitors, ranging from politicians to school children.

Chapter 2 Internal Market

Tasks and activities in the field of Internal Market

The task of the Authority's Internal Market Affairs Directorate (IMA) is to monitor the EFTA States' obligation to make the Internal Market rules part of their internal legal order and to apply the rules correctly.

The Internal Market is based on the four freedoms, *i.e.* free movement of goods, persons, services and capital, which have been at the centre of European integration ever since the signing of the Treaty of Rome in 1957. These rules are further 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.

Nowadays, the Internal Market rules cover most areas relevant to commercial activities throughout the entire EEA. IMA examines the fulfilment of the obligations by the EFTA States, which is to make these rules a part of their internal national legal order, in close co-operation with the European Commission.

The EFTA States are obliged to notify the Authority of the implementation of directives and, upon request from the Authority, to provide information about the incorporation of regulations into national law. If a State does not implement the EEA rules into its national legal order within the given deadline, the Authority will intervene. The Authority may then initiate infringement proceedings, the last step of which means bringing the matter before the EFTA Court.

Moreover, where the Authority has information that national legislation or practice might not be in compliance with EEA rules, it can decide to initiate an investigation. This could for instance be regarding incorrect implementation of EEA rules or where national rules and/or practices are deemed to be incompatible with EEA rules.

Such investigations can be initiated on the basis of the Authority's own surveillance of the EFTA States or on the basis of a complaint. Complaints to the Authority relating to a failure to comply with the obligations of the EEA Agreement may be submitted by anyone and may be directed against any of the EFTA States.

When problems are discovered, they are often resolved through informal exchange of information and discussions between the Authority's staff and representatives of the EFTA State concerned. If, however, the matter is not resolved informally, the Authority may decide to initiate formal infringement proceedings against the EFTA State, which (as noted above) may culminate in proceedings before the EFTA Court.

TYPES OF CASES[1] HANDLED BY IMA

COMPLAINTS (COM)

Anyone may submit a complaint against an EFTA State. 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.

NON-NOTIFICATION OF IMPLEMENTATION OF DIRECTIVES (NON)

Non-notification cases are opened when an EFTA State has 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 the conformity of the national measures notified by an EFTA State with the provisions of the EEA act they are intended to implement.

INCORRECT IMPLEMENTATION OR APPLICATION OF EEA RULES (INC)

Where the Authority has information (other than through a conformity assessment) indicating that national law or practice might not be in compliance with EEA rules, and decides to examine the issue further, a case is opened at the Authority's own initiative. This could be, for example, 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.

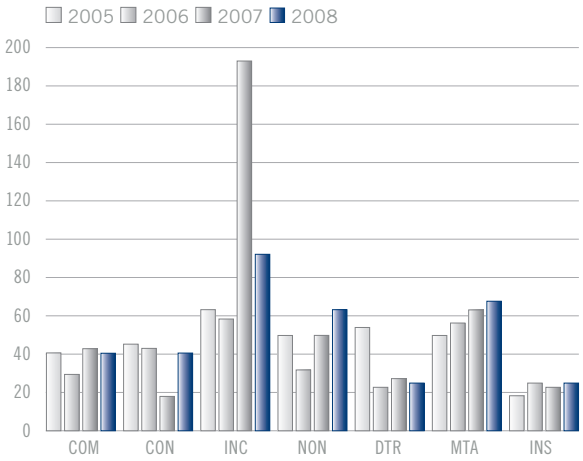
1. "Case" is defined here as an assessment relating to the implementation or application of EEA law, or to other relevant tasks registered during the year for the purpose of fulfilling IMA's objectives. A case does not therefore need to be related to an alleged infringement of EEA rules, but can also concern administrative tasks performed by the Authority.

Case handling developments in 2008

New cases

A total of 356 new cases were opened by IMA during 2008. This amounts to a 15% decrease compared to cases opened in 2007.

Figure 1 New cases / Case types



The number of new complaints was almost the same as in 2007. As in previous years, the majority of the new complaints, 31 (or 74%), were directed against Norway, whereas 7 complaints were received against Iceland and 4 against Liechtenstein.

The majority of the new cases in 2008 were opened on the Authority's own initiative in order to assess compliance of national legislation or practice with Internal Market rules (195 cases). Such cases are opened by the Authority where it considers that EEA law may have been infringed. However, the cases do not necessarily lead the Authority to initiate formal infringement proceedings, as the cases might be solved informally or proven to be unfounded.

Cases are also opened on the Authority's own initiative where Iceland or Norway have failed to incorporate EC regulations into national law. Of the 195 cases opened on the Authority's own initiative in 2008, a large portion related to an apparent failure by Iceland to make regulations part of its internal legal order in a timely manner.

In 2008, the Authority opened 63 non-notification cases due to the EEA EFTA States' failure to implement directives in a timely manner.

The Authority initiated 40 conformity assessment cases during 2008 in order to check that national implementing legislation properly reflected the corresponding EEA rules.

As in 2007, the majority of the new cases opened in 2008 concerned Iceland (172 cases). The corresponding figures for Norway and Liechtenstein were 144 and 23 respectively.

Figure 2 New cases / Complaints by State

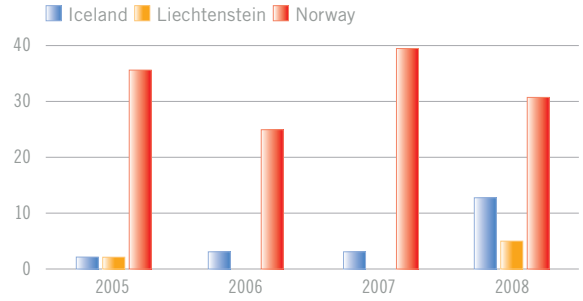
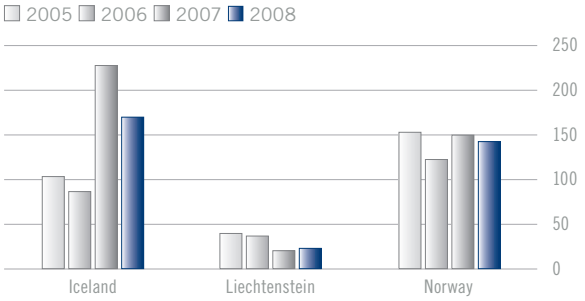


Figure 3 New cases / States



DRAFT TECHNICAL REGULATIONS (DTR)

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

MANAGEMENT TASKS (MTA)

Management tasks include various administrative tasks concerning, for example, assessments relating to food safety, the telecommunications sector, EFTA States' applications for derogations from certain transport rules, reports on health and safety, as well as calculation and publication of thresholds in the field of public procurement. Included in this category of cases are also the so-called eCom cases which concern notifications to the Authority of draft regulatory decisions by the national regulatory authorities in the EFTA States.

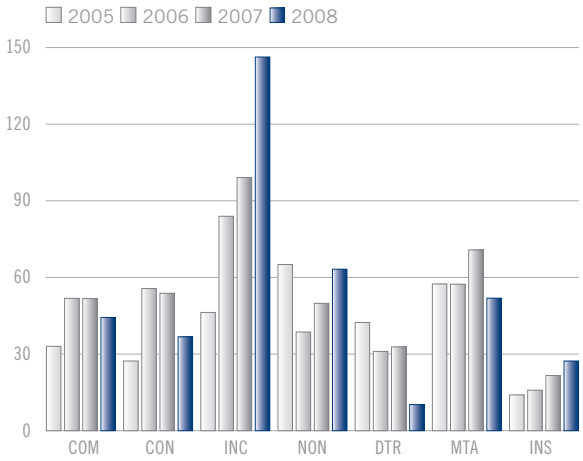
INSPECTIONS (INS)

The Authority performs on-the-spot investigations to verify that the EEA EFTA States comply with their obligations relating to food safety as well as aviation and maritime security.

Closed cases

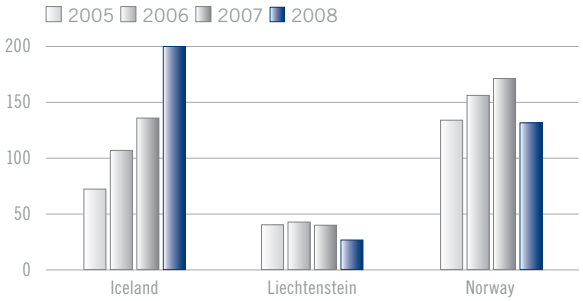
A total of 384 cases were closed during 2008, compared to 386 in 2007.

Figure 4 Closures / Case types



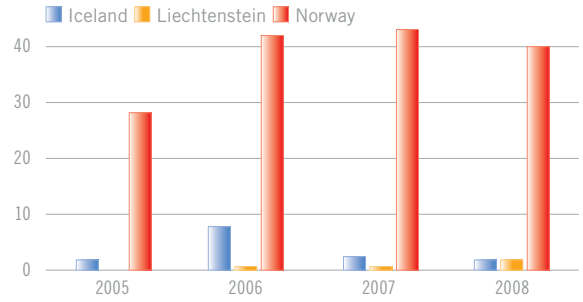
Of the cases that were closed in 2008, 133 concerned Norway, 201 related to Iceland, and 30 concerned Liechtenstein.

Figure 5 Closures / States



Altogether 44 complaint cases were closed in 2008. At the end of 2008, there were 91 complaint cases pending, *i.e.* 2 fewer than at the end of 2007.

Figure 6 Closures / Complaints by State



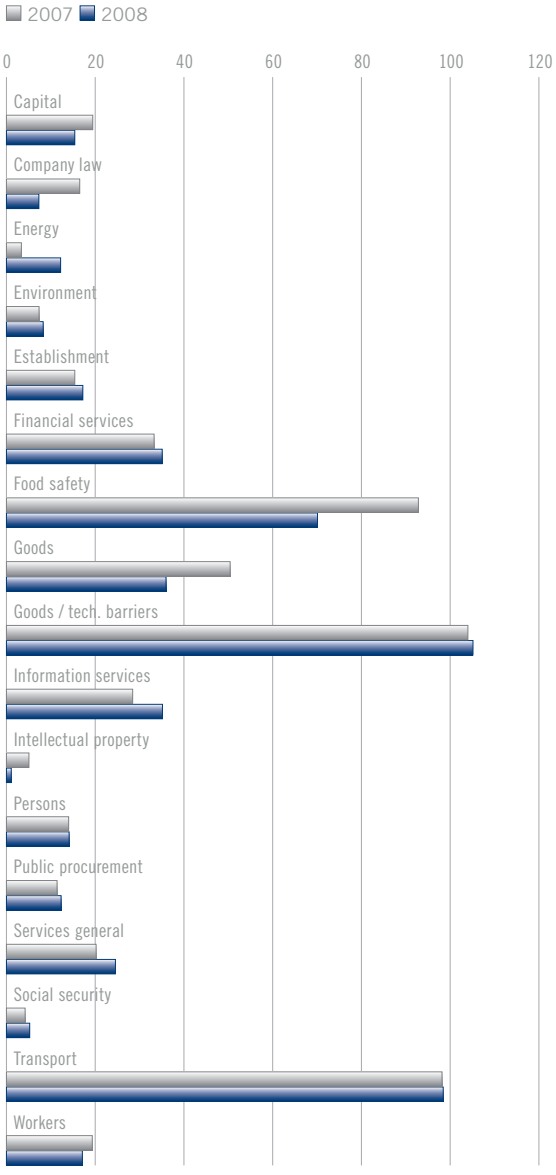
Pending cases

At the end of 2008, 511 IMA cases remained open. This means that there was a slight decrease of 28 cases in the total case load in comparison to the 539 pending cases at the end of 2007. The number of new complaints decreased by two compared to 2007, *i.e.* from 44 to 42.

Out of the pending cases, 91 were initiated on the basis of complaints. The remaining 420 cases were initiated either to carry out tasks entrusted to IMA by EEA legislation (*i.e.* reporting tasks, examination of draft technical regulations, food safety and aviation or maritime security inspections), or on the Authority's own initiative to examine whether the EFTA States complied with their EEA obligations.

The sectors with the highest number of pending cases included transport (98), goods/technical barriers (105), food safety (70), and goods/general (36). The case load decreased in the sectors of company law (9 cases fewer than in 2007), food safety (23), and goods/general (14), and increased most in the sectors of energy (9 more cases) and information society services (7).

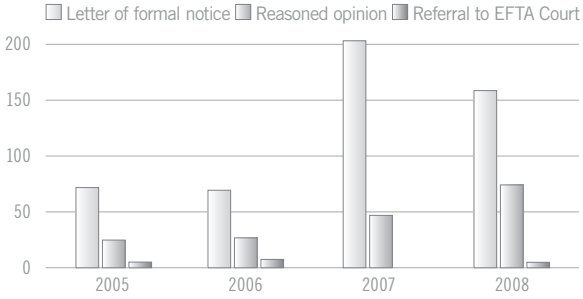
Figure 7 Pending cases / Sectors



Formal infringement proceedings

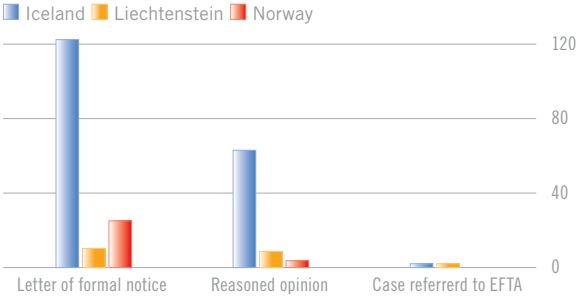
In 2008, there was a slight decrease (by 5.5%) in formal infringement actions (LFN, RDO, EFC) taken by the Authority compared to 2007. The number of actions went down from 253 to 239. The number of new infringement cases opened (by issuing letters of formal notice) decreased by 22% in 2008, whereas the number of reasoned opinions (*i.e.* the second stage of infringement proceedings) increased by 56%. Finally, it was decided to bring five cases before the EFTA Court.

Figure 8 Infringement actions



Of the new infringement cases initiated in 2008, 85% were directed against Iceland, 10% against Norway, and 5% against Liechtenstein.

Figure 9 Cases subject to infringement actions by State



Failure by the EFTA States to implement EEA directives in a timely manner accounted for 38% of the new infringement proceedings launched by the Authority. This is considerably more than in 2007 when the percentage of such cases was 18. On the other hand, in 2008, the number of new infringement proceedings concerning timely incorporation of regulations by Iceland and Norway decreased to 40% from 75% in 2007. However, of the 75 reasoned opinions delivered in 2008, most related to the failure by Iceland to incorporate EEA regulations into national law.

Most infringement actions in 2008 concerned one of three sectors, namely food safety (86), goods/technical barriers to trade (56), and transport (54). Infringement actions increased considerably in the sectors of financial services (10) and goods/technical barriers to trade (15), whereas infringement actions decreased significantly in the sectors of company law (20) and goods/general (26).

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

Delay in implementation of directives and incorporation of regulations – a priority for the Authority

Implementation of directives

By the end of 2008, the total number of directives incorporated into the EEA Agreement was 1 700. Iceland was required to implement 1 464 of these directives, Liechtenstein 1 434 and Norway 1 622. At the end of the year, Iceland had notified full implementation of 97.8% of the directives. For Liechtenstein and Norway, the figures were 99.4% and 98.8%, respectively.

The *Implementation Status Database* available on the Authority's website[2] contains information on all directives referred to in the Annexes to the EEA Agreement in relation to which the deadline for implementation has expired. It indicates the notified status of implementation (full, partial, or 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 EFTA States, nor 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, only around one third of the notified acts have been made subject to a full conformity assessment. Furthermore, these implementation figures do reflect the performance as regards the incorporation of regulations.

Incorporation of regulations

Within the European Union, regulations differ from directives in that they automatically become part of the internal national legal order of the EU Member States, and therefore do not need to be incorporated nationally. In contrast, regulations that are incorporated into the EEA Agreement shall, according to Article 7 of the EEA Agreement, be made part of the internal legal order of the EFTA States. According to the constitutional law in Liechtenstein, regulations are automatically made part of the national legal order as soon as they are taken into the EEA Agreement. In Iceland and Norway however, legal measures need to be adopted in order to make the regulations part of their internal legal order. Furthermore, the Authority systematically requests both States to notify the national measures taken to incorporate regulations "as such" into their legal order.

The situation regarding incorporation of regulations has been particularly problematic in Iceland due to a translation backlog and delays in publication. During 2008, both Iceland and Norway demonstrated significant improvement in their performance in incorporating regulations. Whereas, by the end of 2007, the number of outstanding regulations was 171 for Iceland and 50 for Norway, the corresponding numbers at the end of 2008 were 89 and 11 respectively.[3]

However, cases relating to delays in incorporation of regulations still represent a majority of all infringement proceedings initiated by the Authority. In 2008, about 40% of the new infringement proceedings concerned late incorporation of regulations by Iceland. Furthermore, most of the reasoned opinions delivered in 2008 related to Iceland's failure to transpose regulations into national law.

2. The Implementation Status Database is available at http://www.eftasurv.int/information/implementationstatus/
3. By the end of 2008, the total number of regulations incorporated into the EEA Agreement was 822. Iceland was required to incorporate 750 of these regulations and Norway 820.

Twice a year, the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard.[1] The Scoreboard indicates how well the EFTA States perform with regard to implementation of directives.

With an average transposition deficit of 1.3% on 31 October 2008, the EFTA States were slightly below the interim target of 1.5% set by the European Council as the highest acceptable transposition deficit:

- Iceland 2.2%
- Liechtenstein 0.6%
- Norway 1.2%

1. The latest Internal Market Scoreboard for EFTA States was published in February 2009, showing the implementation status of directives as of 31 October 2007. The EFTA Scoreboard can be found at http://www.eftasurv.int/information/internalmarket/

Important legal activities before the courts

In 2008, the Authority decided to bring a total of five Internal Market cases before the EFTA Court; two against Iceland, two against Liechtenstein and one against Norway. Both cases against Iceland, as well as the one against Norway, had to do with delays in the process of making EEA acts (directives and regulations) part of the national legal order. One case concerned a failure (by Iceland) to incorporate a regulation on time. The cases against Liechtenstein both concerned different forms of residence requirements contained in the national legislation. The Authority finds that the requirements are in breach of the principles of freedom of establishment and free movement of workers laid down in the EEA Agreement.

The Authority has also intervened in a number of other cases before the EFTA Court and the European Court of Justice. When the EFTA Court receives requests for advisory opinion from a court in one the EFTA States, the Authority will always submit observations to the EFTA Court. Furthermore, the Authority is making use of its right to appear before the European Court of Justice in cases that are regarded as being of a special interest also in relation to the EEA. These cases are dealt with in more detail below.

The Financial Crisis in Iceland

The Icelandic economy was particularly hard hit by the financial crisis in 2008. In October 2008, Iceland adopted several measures to restructure its banking system following the collapse of its biggest banks: Kaupthing, Glitnir, and Landsbanki.

During autumn 2008, the three Icelandic banks suffered from refinancing and liquidity problems. In October, they had to halt their business and the Icelandic authorities took control of the banks. Three new separate entities were created, in which the domestic operations of the three banks were continued. Certain assets and domestic deposits were thus transferred to these new entities. As compensation, the new entities are to issue bonds the values of which are to be equivalent to the net fair value of the assets. All the three banks had significant business in other EEA States, to a large extent under the supervision of Icelandic authorities. Non-domestic depositors and other creditors of the banks were strongly affected by the Icelandic measures.

The Icelandic measures have raised questions as regards their compatibility with EEA law, in particular the treatment of depositors outside of Iceland. In October 2008, the Authority started investigations on its own initiative. The Authority has invited the Icelandic Government to submit its observations in relation to these issues. The assessment of the Icelandic measures will continue in 2009.

The EFTA States in the European Emissions Trading Scheme

The EU Emissions Trading Scheme (EU ETS), established by the Emissions Trading Directive[4], is the main market-based instrument to help EU Member States comply with commitments made under the UN Kyoto Protocol. It is developed as a cap and trade system aiming to reduce greenhouse gas emissions among large emitting companies within the EU.

Allowances traded in the EU ETS are held in accounts in national electronic registries. All national registries are overseen by independent transaction logs at EU (Community Independent Transaction Log - CITL) and UN (International Transaction Log - ITL) levels, which were connected for live operation with the national registries in October 2008. Each company with a commitment and any person interested in buying or selling allowances must open an account in a national registry.

The incorporation of the Emissions Trading Directive and its implementing measures into the EEA Agreement in December 2007[5] enables the EFTA States to participate in the EU ETS for the trading period 2008-2012, corresponding to the first commitment period under the Kyoto Protocol.

One core task in the run-up to the implementation of the EU ETS is the development of national allocation plans (NAPs) by EEA States. Each State determines in its NAP the total number of allowances for the country, individual allocation to installations and the limits for use of credits from Kyoto's project-based mechanisms for compliance. The Authority must assess the NAPs notified by EFTA States.

Iceland

A few small Icelandic installations are in principle covered by the EU ETS. However, given their relatively low CO_2 emissions and Iceland's specific commitments under the Kyoto Protocol, these installations can benefit from an exemption from the EU ETS on certain conditions, provided that Iceland provides the Authority with specific emissions data and information on the policies and measures taken in Iceland to reduce the CO_2 emissions of these installations. To fulfil this requirement, Iceland submitted a report to the Authority in November 2008 containing information on its policies and measures envisaged to reduce CO_2 emissions, together with CO_2 emissions data for individual installations. Having examined the information, the Authority has concluded that Iceland has taken measures achieving the same results as the Emissions Trading Directive in terms of reduction of greenhouse gas emissions, and thus that the relevant installations could be exempted. Accordingly, Iceland is not required to submit a NAP.

Liechtenstein

Following the Authority's positive decision on the Liechtenstein NAP of December 2007, Liechtenstein adopted its final allocation for the 2008-2012 period at national level in February 2008 and notified it to the Authority. Having checked the allocations, the Authority instructed the Central Administrator to enter Liechtenstein's NAP table for the period 2008-2012 into the CITL, thus allowing issuance of allowances and transfer to the installations of their annual allocation. However, before transferring the allowances to the installations, Liechtenstein awaited the Go Live in October 2008 from the independent transaction logs (CITL & ITL) and the national registries.

Norway

Norway notified its NAP in March 2008. Having assessed it against the criteria listed in the Emissions Trading

4. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.
5. Decision of the EEA Joint Committee of 26 October 2007, which entered into force on 29 December 2007.

Directive, the Authority raised three main objections in its decision of 15 July 2008. The objections relate to the allocation method chosen to grant allowances to existing installations compared to new entrants. These objections made it necessary for Norway to amend its initial NAP before it could take its final allocation decision and allocate allowances to installations. Thus, Norway notified amendments to the NAP in December 2008, which the Authority will assess and decide on early in 2009.

Furthermore, to extend the EU ETS to other sectors and gases, in June 2008 Norway submitted an application to the Authority for the unilateral inclusion into the EU ETS of nitrous oxide (N_2O) from the production of nitric acid fertilizers. The Authority is assessing the application and will adopt a decision in 2009.

Residence requirements for board members in banks, lawyers, patent lawyers, auditors and trustees

The Authority decided in December 2008 to refer the new residence requirements for board members in banks, lawyers, auditors and trustees that were adopted by the Liechtenstein Parliament in July 2007 to the EFTA Court.

On 1 July 2005, the EFTA Court declared in its judgment in Case E-8/04 that Section 25 of the Banking Act, which imposed certain residence requirements in Liechtenstein, was contrary to the principle of freedom of establishment, as laid down in Article 31 of the EEA Agreement.

As a consequence, a new act was adopted by the Liechtenstein Parliament and entered into force in July 2007. However, Section 25 again contained a residence clause, although different from the one ruled upon by the EFTA Court. The new provision requires that all the members of the management board and of the executive management must, by reason of their residence, be in a position to actually and flawlessly perform their functions and duties. At the same time, similar residence requirements were introduced for lawyers, patent lawyers, auditors and trustees, stating that the authorities may grant a licence to take up and pursue the respective profession only to an applicant who is able, by reason of his residence, to actually and regularly fulfil his tasks.

According to the Liechtenstein Government, a case by case assessment will determine whether a particular place of residence would be acceptable. The requirement is therefore only a part of the whole assessment of whether somebody can be established in Liechtenstein or not.

The Liechtenstein Government has not, in its reply to the letter of formal notice in December 2007 or to the reasoned opinion in July 2008, given more specific reasons for taking residence into account apart from a general explanation that the residence clauses were adopted in order to exclude harmful and abusive behaviour in the financial market.

The Authority does not question the need for effective involvement of the above-mentioned professions in their business. It merely opposes the view that this requirement can be linked to the location of a private residence. The existence of modern telecommunication techniques and transport services implies that it is less important to be present at a particular work place at all times. Moreover, regardless of whether the provision could be applied in an EEA compatible manner, the Authority is of the opinion that the residence clauses must be deemed to be unjustifiable under Article 31 of the EEA Agreement because of the vagueness and lack of transparency as to their meaning. In order to satisfy the requirement of legal certainty, it is important that individuals have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts.

Residence requirements for EEA workers and their families – closure of case related to student loans in Iceland

The Authority has in 2008 decided to close the case against Iceland concerning residence requirements in the Student Loan Fund Act following a decision by Iceland to repeal the contested requirements.

Previously, student loans in Iceland could only be granted to applicants having permanent residence there during two consecutive years or permanent residence for three years out of the ten years preceding the beginning of the loan period. In the opinion of the Authority this requirement represented indirect discrimination of migrant workers and their families, as the residence requirement would in fact be more easily met by Icelandic nationals.

Formal infringement proceedings against Iceland were initiated by the Authority in 2004. The Icelandic Government maintained that the resident requirement did not breach the EEA Agreement. In 2006, the Authority delivered a reasoned opinion in the case. Following that, the Icelandic Government decided to propose an amendment to the legislation to comply with the reasoned opinion.

The Act now states that students who are citizens of an EEA State shall, subject to the legal conditions under the EEA Agreement, be entitled to student loans under the Act, on the same conditions as Icelandic citizens.

Access to health care in another EEA State

The European Court of Justice has, in a series of cases, dealt with access to health care (*i.e.* reimbursement of costs incurred) on the basis of the freedom to provide services. In essence the Court has held that no restrictions can be justified with regard to access to non-hospital medical treatment in another EEA State.

A patient has, thus, the right to go to another EEA State for the purpose of receiving such non-hospital treatment there and to be reimbursed the amount that the same treatment would have cost in the State where he is insured. In contrast, the European Court of Justice has accepted that when it comes to hospital treatment, States may have in place a system of prior authorisation, in order to achieve the necessary financial balance and planning for hospital infrastructure.

Norwegian law does not operate with such a distinction (between hospital and non-hospital treatment) which has led to questions being posed as regards the compatibility with EEA law. Norwegian legislation essentially provides for a system of benefits in kind, which entails free access to health care without any distinction between hospital and non-hospital services. The main rule is that the treatment is to be provided in Norway. There are, however, two main exceptions from this rule. If the regional health undertaking is not able to provide a patient with necessary health care due to lack of adequate medical competence or to provide the service within a set time limit, the patient can receive the health care service from commercial health care providers or health care providers situated abroad.

The Authority sent a letter of formal notice to Norway in April 2008 concluding that, as regards non-hospital services, Norwegian law constituted a restriction on the free provision of services contrary to Article 36 EEA. The Norwegian Government has already launched a procedure to amend its national legislation accordingly.

The Norwegian legislation was also examined by the EFTA Court in an advisory opinion concerning two Norwegians who travelled to other EEA States to receive hospital treatment there. The lawsuits concern the refusal by the Norwegian State to cover the costs of the treatment received abroad. The national courts asked the EFTA Court whether it was compatible with EEA law to refuse coverage of costs for treatment abroad when there is no entitlement to such treatment in the home State.

The EFTA Court answered in the affirmative to this question. Refusal to cover costs is permissible if experimental treatment is not covered by the "home-system", or if the State provides it only in the form of research projects or, exceptionally, on a case by case basis. The assessment of whether or not experimental treatment is recognised must be based on international medical science.

Coverage for treatment received abroad had also been refused on the ground that adequate treatment was available in Norway. In that regard, the Court held that if the patient is otherwise entitled to the treatment in question, it constitutes a restriction on the free movement of services to prioritise treatment from the national public health service. However, this restriction is justified by the objective of maintaining a balanced medical and hospital service open to all, as long as the State provides the treatment within a medically justifiable time limit and on the condition that the domestic treatment is as effective as the treatment which the patient seeks abroad.

Equal treatment – Norway fails to follow up judgment in survivor's pension case

In November 2008, the Authority issued a letter of formal notice to Norway for failing to comply with the judgment of the EFTA Court of 30 October 2007 in the so-called "Golden Widows Case". In the judgment, the Court found Norway to be in breach of its obligations under the EEA Agreement, which require that the EFTA States shall ensure that men and women receive equal pay for equal work. Pensions are part of pay in this respect.

According to the Norwegian Public Service Pension Act, a widow, whose deceased spouses became a member of the Public Service Pension Fund before 1 October 1976, receives a survivor's pension without curtailment regardless of whether she receives a pension in her own account or has other income. By contrast, a survivor's pension for widowers may in identical situations be subject to curtailment if the widower has his own pension or other income. Consequently, widowers are treated less favourably than widows.

In the view of the Authority, Norway has had sufficient time to take the measures necessary to comply with the EFTA Court's judgment. In fact, Norway had in May 2007 already acknowledged the infringement of the EEA Agreement and stated that it would submit a proposal to amend the Public Service Pension Act to the Parliament.

A letter of formal notice is the first step in the Authority's infringement proceedings against an EFTA State for failing to comply with provisions in the EEA Agreement. Norway has been given three months to submit comments to the letter before the Authority will consider taking the proceedings to the next stage by issuing a reasoned opinion. The case may then ultimately reappear in the EFTA Court.

Insurance for non-economic loss and state liability

In its judgment of 20 June 2008 the EFTA Court ruled that excluding redress for non-economic injury from the scope of compulsory insurance coverage in Norway constitutes a sufficiently serious breach of EEA law that it is able to entail state liability.

The plaintiff in the proceedings before the Oslo tingrett (Oslo City Court) lost her husband and two children in a road traffic accident. The plaintiff herself has suffered from psychological afflictions since the accident. In criminal proceedings against the driver of the car that caused the accident, the plaintiff was awarded redress of NOK 400 000. The person having caused the injury has not paid the redress and it could not be claimed from the insurance company covering that person since the Norwegian Automobile Liability Act explicitly excludes redress from the compulsory insurance coverage in such instances. In light of these circumstances, the plaintiff filed a lawsuit before the Oslo tingrett against the Norwegian State with a claim for compensation for incorrect implementation of the Motor Vehicle Insurance Directives, referred to in Annex IX to the EEA Agreement.

The questions referred to the Court by the Oslo tingrett concerned whether rules excluding redress for non-economic injury ("pain and suffering") from compulsory insurance coverage are contrary to the Motor Vehicle Insurance Directives, and if so, whether such rules constitute a sufficiently serious breach of EEA law to entail State liability.

The EFTA Court ruled that if compensation for non-economic loss (redress for "pain and suffering") constitutes a form of civil liability in an EFTA State, it shall be covered by the compulsory motor insurance system in that State. Furthermore, considering that this issue had already been resolved by the European Court of Justice in *Ferreira* (C-348/98), the Court held that excluding redress for non-economic injury, which is a form of civil liability in Norway, from the scope of compulsory insurance coverage, constitutes a sufficiently serious breach of EEA law that could entail the liability of that State. The judgment is in line with the Authority's observations in the case.

Icelandic social security, can you take it with you when you go?

On 1 February 2008, the EFTA Court handed down a judgment in which it rules that the Icelandic provisions for projection of pension rights in cases of invalidity are not in line with EEA law and in particular Regulation 1408/71 on the coordination of social security schemes (Case E-4/07).

An Icelandic sailor challenging those provisions had worked in Iceland before moving to Denmark, where he was injured in an accident leaving him unable to work. He is receiving a pension from the Icelandic funds into which he had paid but has been refused the additional benefit of having that pension calculated on the basis of projected pension points (*i.e.* the future points he would have accumulated had he not been incapacitated). The refusal is based on the fact that, in Icelandic law, the entitlement to projection is subject to the fund member having paid into the fund for at least 6 of the 12 months preceding the accident. Due to the fact that the sailor in question had moved to Denmark and was paying social security contributions in that country, he did not fulfil the condition.

The EFTA Court has now held that the periods of contribution in Denmark must be taken into account as if they had taken place in Iceland. This is in line with Regulation 1408/71 on the coordination of social security schemes, which is based on the principle that a person must not see his rights lost or diminished simply by virtue of the fact of having exercised his right to move freely within the EEA. The judgment is broadly in line with the written and oral submissions of the Authority and underlines the sweeping nature of the provisions intended to ensure a person is not discouraged, as a result of national legislation, from exercising his right to move freely within the EEA.

Temporary import and use of foreign registered rental cars in Norway

The Norwegian regulation on tax-free import and temporary use of foreign-registered vehicles requires that such a vehicle must be re-registered in Norway, including payment of registration tax, when it is to be used by a person considered to be permanently resident in Norway. Exemptions from these obligations are only provided for in very specific circumstances and under very strict conditions, and they are applied in an arbitrary manner by the competent authorities.

Under the current Norwegian legislation it will therefore be less attractive for persons considered to be permanently resident in Norway to rent a foreign-registered motor vehicle than a vehicle registered in Norway. While the former group of vehicles most likely would be owned by non-Norwegian service providers, the latter group would most likely be owned by Norwegian service providers. The Authority has taken the view that the Norwegian legislation and practice amount to a restriction of the free movement of services which cannot be justified by the aim of combating tax circumvention.

The Authority issued a letter of formal notice on 9 August 2004 and a reasoned opinion on 16 July 2008, setting out its conclusions in that respect. In its reply to the reasoned opinion dated 10 October 2008, the Norwegian Government recognised its breach of Article 36 EEA and stated that it would remedy the situation. The Authority is currently awaiting a proposal from the Norwegian Government to that end.

Social conditions in road transport

In April 2008, Iceland applied for several exemptions from the Regulation which would entail that drivers in Iceland could drive longer hours without rest than drivers in other EEA States.

Regulation 561/2006 on social legislation relating to road transport lays down rules on driving times, breaks and rest periods for drivers in goods- and passenger-transport by road. The aim is to harmonise the conditions of competition between the different modes of inland transport, especially with regard to the road sector, and to improve working conditions and road safety. Provided that the aims of the Regulation are not prejudiced, EFTA States may also, after authorisation by the Authority, grant certain exemptions for longer driving times and shorter rest periods to transport operations in exceptional circumstances. When deciding upon a request for exemption, the Authority must consult the EFTA Transport Committee.

As a condition for granting an exemption, the existence of "exceptional circumstances" has to be interpreted narrowly and should be understood as applying to those situations which, by their very nature, require some quick and temporary relaxation or suspension of the limit on driving hours, such as a national emergency, health or security reasons, or a human or natural catastrophe. The concept, therefore, does not cover routine, long-term, established and regular activities.

In its application, Iceland argued that the circumstances in Iceland are exceptional in general as the country is sparsely populated, with no alternative mode of transport for goods and passengers.

After having assessed the Icelandic application, the Authority came to the conclusion that there were no exceptional circumstances that justified the authorisation of the requested exemptions and that the application should be rejected. On 16 December 2008, this proposal to reject the application was submitted to the EFTA Transport Committee for consultation.

Procedure to prevent 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 EFTA States shall notify technical regulations in draft form to the 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 2008, the Authority received 25 notifications of draft technical regulations from the EFTA States. Of these, 15 came from Norway, nine from Iceland and none from Liechtenstein. Six of the notifications prompted the Authority to send comments. The Commission commented upon three of the notifications, of which one was not commented on by the Authority.

The Authority received 601 notifications from the EU Member States, forwarded to it by the Commission. In one case, the 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
2007	28	7	757	0
2008	25	6	601	1

Food and Feed Safety and Animal Health

Tasks of the Authority

The Authority is responsible for monitoring the EFTA States' implementation and application of EEA legislation related to the whole food chain. The legislation covers fields such as seeds, feed and food, animal health and welfare, animal by-products, residues of medicines etc., pesticides and contaminants. The application control consists of verification through on-the-spot inspection of the effectiveness of the national control systems.

The Authority has the legal competence for adopting decisions related to animal disease status, eradication and monitoring programmes, border inspection posts etc. In 2008 the Authority adopted several decisions in these fields, the majority of which related to Norway.

Previously, Iceland was only obliged to apply the legislation on fish and fishery products. However, in 2007 the EEA legislation in the other areas of food law was also made applicable to Iceland, except for the legislation on live animals. In 2007 the EEA Agreement was also amended to incorporate the new Hygiene Package to be applied by both Norway and Iceland.[6] However, until Iceland completes its parliamentary procedures, the date from which Norway and Iceland must comply with the new legislation cannot yet be determined.

Inspections

The Authority carried out six inspections in the EFTA States in 2008. Two of the planned inspections to Norway (related to meat hygiene and to animal by-products) had to be postponed because the new Hygiene Package had not yet entered into force in the EFTA States.

In Iceland inspections were carried out in the fields of veterinary medicinal products and fishery products. In Norway the fields inspected were: identification of bovine, ovine and caprine animals; and control and eradication of Bluetongue. The Authority observed improvements in the application of the EEA legislation compared to previous inspections. The most important issues brought to the attention of the national authorities were related to the need for consistent application of the official controls carried out by the competent authorities and sometimes the lack of adequate enforcement of legislation. In the establishments visited, the Authority often observed imperfect self-checking systems.

The Authority also carried out two preparatory inspections in Iceland relating to requirements which will become applicable in Iceland following completion of the Icelandic parliamentary procedures and after an additional 18 month transitional period. The inspections were on zoonoses and on identification of bovine, ovine and caprine animals. The purpose of these inspections was to review the system in place in Iceland and to identify areas to be improved before the new EEA legislation will become applicable to Iceland.

The reports from inspections carried out in 2008 are available on the Authority's website.[7]

In order to harmonise and coordinate the inspections by the Authority and by the Food and Veterinary Office (FVO) of the European Commission, the Authority participated as observer in a number of inspections by the FVO in EU Member States. Likewise, the FVO participated in inspections by the Authority in the EFTA States. The good cooperation of the two institutions is a key element in ensuring the proper functioning of the EEA Agreement in the field of food and feed safety.

Border Inspection Posts

The Authority amended the list of Border Inspection Posts (BIPs).[8] A new BIP was listed in Iceland and some amendments were listed for other Icelandic BIPs following a joint inspection by the FVO and the Authority in 2007.

Natural Mineral Waters

Extraction, marketing and labelling of natural mineral waters in the EEA is regulated by Council Directive 80/777/EC on natural mineral waters.[9] According to the Directive, the exploitation of a natural mineral water

6. This includes, amongst others, Regulation 178/2002, Regulation 882/2004, Regulation 853/2004, Regulation 854/2004 and Regulation 1774/2002.
7. http://www.eftasurv.int
8. EFTA Surveillance Authority Decision 301/08/COL of 21 May 2008 amending the list contained in point 39 of Part 1.2 of Chapter I of Annex I to the Agreement on the European Economic Area listing border inspection posts in Iceland and Norway agreed for veterinary checks on live animals and animal products from third countries and repealing EFTA Surveillance Authority Decision 378/07/COL of 12 September 2007.
9. *Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters.*

spring shall be subject to permission from the responsible authority in the country where the water has been extracted, after it has been established that the water in question complies with the provisions of the Directive.

The application of these provisions was the scope of inspection in both Iceland and Norway at the end of 2007. One of the findings of the inspection carried out in Iceland was that the only water included in the official list of natural mineral waters was indeed spring water. Furthermore, bottled water that had been marketed and labelled as natural mineral water was not recognised as such by the Icelandic competent authorities and, hence, not included in the related official list.

In view of this, the Authority requested information from Iceland about this matter in order to monitor the correct application of EEA legislation in the field of natural mineral waters. As a result Iceland took corrective action and the list was amended.

The official list of natural mineral waters in Iceland now provides accurate information on the natural mineral water marketed in Iceland. This list is in the process of being published by the EFTA Secretariat and will appear in the EEA Supplement of the Official Journal of the European Union.

Seeds

EEA legislation only permits cereal seed to be marketed if it complies with certain minimum germination requirements. There are occasions, however, when the quantity of seed which satisfies these requirements is deemed to be insufficient. In such a situation the legislation allows for an agreed amount of seed, which does not satisfy the requirements, to be marketed for a limited period of time. During 2008 Norway was permitted to market oat seed, winter wheat seed and red clover seed which did not comply with the minimum germination requirements set out in the legislation. The conditions under which the marketing of such seed is authorised, including the quantities allowed and time period permitted, are published on the Authority's website[10] as well as on the European Commission's website.[11]

Avian influenza

Avian influenza is a highly contagious viral disease which primarily affects birds, but on rare occasions can also be contracted by humans and other mammals. The Authority assessed, and approved, the contingency plan for dealing with an outbreak of avian influenza submitted by Norway on the basis that it appeared to fulfil the minimum requirements laid down in EEA legislation in this field.[12]

Fish diseases

According to Directive 91/67/EEC regulating trade of aquaculture animals and products, a farm, a country or part of a country can be approved as a disease-free zone with regard to a specific fish disease, which allows the country to impose additional protective measures.

Prior to 2008, Norway was recognised as an approved continental zone and as an approved coastal zone, apart from a buffer zone on the border between Norway and Russia, that is free of the fish diseases viral haemorrhagic septicaemia (VHS) and infectious haematopoietic necrosis (IHN). Nevertheless, late 2007, Norway notified the Authority of an outbreak of VHS in two locations in a fjord in the County of Møre and Romsdal. In view of this, and after having assessed the measures taken in order to ensure that the disease was not spreading, in May 2008 the Authority adopted a decision excluding the relevant areas from the approval for this disease in Norway.[13] The Authority continues to monitor the situation in order to make sure that the decisions regarding the status for this disease accurately reflect the actual situation in Norway.

During 2008, Norway was approved as a disease-free zone for the fish parasite *Gyrodactylus Salaris*. Norway is therefore permitted to impose additional protective measures, such as special packaging and labelling requirements, to imports of aquaculture products into the continental parts of Norway considered as free of the mentioned parasite.[14] In addition, the Authority approved the Norwegian programme for the control and eradication of Bacterial Kidney Disease.[15]

10. http://www.eftasurv.int/fieldsofwork/fieldgoods/seeds/
11. http://ec.europa.eu/food/plant/propagation/requirements/index_en.htm
12. EFTA Surveillance Authority Decision 300/08/COL of 21 May 2008 approving the contingency plan on Avian Influenza submitted by Norway.
13. EFTA Surveillance Authority Decision No 302/08/COl of 21 May 2008 concerning the status of Norway with regard to infectious haematopoietic necrosis and viral haemorrhagic septicaemia and repealing the EFTA Surveillance Authority Decision No 71/94/COL of 27 June 1994 as last amended by the EFTA Surveillance Authority Decision No 244/02/COL of 11 December 2002.
14. EFTA Surveillance Authority Decision No 298/08/COL of 21 May 2008 regarding disease-free zones and additional guarantees for *Gyrodactylus salaris* for Norway.
15. EFTA Surveillance Authority Decision No 299/08/COL of 21 May 2008 approving the control and eradication programme for Bacterial Kidney Disease submitted by Norway.

Maritime and aviation security inspections

Tasks of the Authority

In the aftermath of the events on 11 September 2001, the European Commission has introduced far-reaching aviation and maritime security legislation in the EU to prevent unlawful acts against civil aviation and maritime transport operations.

These acts have been incorporated into the EEA Agreement and are applicable to Iceland and Norway. Since Liechtenstein has no airport open for commercial operations, and is landlocked and has no ship registry, none of these acts apply to that state. It is the task of the Authority to ensure the application of these measures in Iceland and Norway, and this is done through a programme of security inspections.

Aviation Security

In aviation security, the Authority monitors the application by Iceland and Norway of the *Aviation Security Framework Regulation* (2320/2002/EC), the *Regulation on common basic standards on aviation security* (622/2003/EC) and the *Regulation on security restricted areas* (1138/2004/EC). In order to measure the level of compliance with these acts, the Authority conducts inspections of the national aviation administrations and of airports. In 2008, four unannounced airport inspections were carried out, all in Norway. In addition, the national administration in Iceland was inspected.

In accordance with its Aviation Security Inspection Programme, the Authority has been focusing on compliance monitoring of airport and aircraft security, screening of passengers and cabin baggage, as well as hold baggage security and standards for technical equipment.

The Authority has also attended, as an observer, an inspection carried out by the European Commission. Likewise, a representative from the Commission has attended an Authority inspection. Moreover, an inspector from the Icelandic Civil Aviation Authorities has attended one of the Authority's inspections as observer. This is to ensure that the methodology used during these inspections is the same in all EEA States.

Maritime Security

In maritime security, the Authority monitors the application by the EFTA States of the *Maritime Security Regulation* (725/2004/EC) and the *Port Security Directive* (2005/65/EC). 2008 was the first year of maritime security inspections by the Authority, and in the course of eight visits, the Authority inspected the competent authorities in both Iceland and Norway, as well as eleven port facilities and three ships in these States.

Close cooperation between the Authority and the European Maritime Safety Agency (EMSA) has been developed, and EMSA has provided valuable technical assistance to the Authority's ship inspections.

As in aviation security, there is also close co-operation with the Commission in this field. The Authority, therefore, attended one European Commission maritime security inspection as an observer, and the Commission likewise observed four Authority inspections. Also in the field of maritime security, the co-operation between the Authority and the Commission ensures that inspections are carried out in a harmonised manner in all EEA States.

Electronic communications

Tasks of the Authority

The regulatory framework of the EEA Agreement provides that national regulatory authorities in the EFTA States have to notify draft regulatory decisions to the Authority in a number of specified instances before they can be put into effect in the national markets. The Authority is obliged to scrutinise these draft measures before they are adopted in order to ensure their compability with EEA law.

In addition, the Authority can veto the notified measures if they contain a definition of relevant markets or assessment of market power that is incompatible with EEA competition law. The Authority is therefore closely associated with day-to-day application of the EEA Agreement in the electronic communications sector on a national state level. This is a closer involvement of the Authority than in most other areas of EEA law.

More notifications submitted to the Authority

In contrast with the previous year, 2008 saw a surge in the number of notifications assessed by the Authority. The Icelandic regulator notified the last of the first round reviews on the state of competition in the telecommunications markets. Liechtenstein formally notified its first market review and Norway examined the area of termination of voice calls. The Authority adopted a new recommendation on the list of relevant markets subject to review by the regulators.

The Authority assessed a total of seven notifications from the national regulatory authorities (NRA) of the EFTA States during 2008, covering fourteen product markets; a significant increase compared to the previous year. Iceland completed the first round of market reviews towards the end of the year, covering the remaining retail and wholesale markets for calls, and the wholesale access to broadband services. Norway focused on the update of its assessment of the markets for termination of calls in both the fixed and mobile networks; basically, this service consists of carrying a call from one telephone company to the handsets of the subscribers of another, and the prices charged between the companies for this service. Liechtenstein notified its first market review, namely on the provision of wholesale call origination on the mobile networks (basically, carrying a call from the handset of the subscriber placing that call). The Authority also started pre-notification contacts at the end of the year with Norway and Liechtenstein on four additional market reviews, expected to be completed by the beginning of 2009.

In the majority of cases, the analysis of the competition conditions in the markets reviewed led the regulators to conclude that there was not sufficient competition on those markets. Therefore, the NRAs addressed the problems identified by imposing obligations on the operators with significant market power. It is interesting to note that there were exceptions to this trend. On the one hand, two of the markets analysed were found to be effectively competitive (transmission of broadcasting services in Iceland and mobile call origination in Liechtenstein). On the other hand, in some of the retail markets for calls in Iceland, the obligations already imposed on closely related markets were deemed sufficient to address the problems identified, and therefore no further specific obligations were imposed.

Adoption of a new Recommendation on relevant product and service markets

During the second half of 2008, the Authority carried out a revision of its Recommendation on relevant product and service markets within the area of telecoms. The process included a public consultation on the revision and a draft recommendation was also discussed with stakeholders in a workshop organised by the Authority in September 2008. As a result, the Authority adopted a new Recommendation replacing the original recommendation of 2004, which listed 18 markets that needed to be examined by the NRAs of the EFTA States. By this revision, the Authority reduced the number of markets to seven and thereby aligned itself with a similar Recommendation revised by the European Commission. The new Recommendation aims at homogenous application of the regulatory framework for electronic communications throughout the EEA. The markets withdrawn from the previous list will continue to be subject to scrutiny by national authorities in the EFTA States. Telecom regulators may decide to maintain regulation on national markets where competitive conditions do not exist and competition authorities may intervene in the case of anti-competitive behaviour in a given market.

Interventions before the European Court of Justice

The standstill obligation and how far a national judge must go to recover aid granted in breach of it

In the field of state aid, the European Court of Justice handed down two judgments defining the extent of the obligation of national courts in relation to the recovery of aid unlawfully granted but subsequently approved by the Commission (Case C 199/06 CELF and Case C-384/07 Wienstrom). The Authority had submitted written and oral observations in both cases.

EEA law provides that aid should not be put into effect until the Commission or the Authority has approved it. The question in both cases before the European Court of Justice concerned the extent of the obligation of a national court to enforce that so-called standstill obligation and recover aid granted in breach of it. The existing case law was confirmed: any final decision by the Commission where aid is approved does not have the effect of regularising, retrospectively, measures which were procedurally invalid because they were granted in breach of the standstill obligation, and national courts must ensure that all appropriate conclusions are drawn from that breach. However, in Case C-199/06 *CELF*, the Court went on to hold that this did not necessarily mean that the aid itself should be recovered, but that interest must be paid in respect of the period during which the grant was procedurally unlawful (*i.e.* before the final approval decision). The judgment in Case C 384/07 *Wienstrom* not only confirmed that position but suggested that existing case law did not preclude a national court from resolving a dispute as to how much aid was due under the (procedurally unlawful) national legislation.

A national court may therefore rule on the proper application of a measure which is procedurally unlawful but the substance of which was later approved.

Minimum price requirement for the sale of books

The case concerns the application of Austrian rules which in essence oblige importers of books in the German language to fix a retail price which is subsequently binding on the retailer. The price cannot be set at a lower level than the retail price fixed by the publisher in the State the book was published, with some exceptions allowing the deduction of certain reductions obtained when purchasing the books. The defendant in the proceedings before the national court had imported books in German from Germany and sold them at a price below the fixed price level.

The Authority submitted written observations in the case in March 2008. The observations of the Authority do not relate to the general characteristics of the various systems for price fixing that exist in several EEA states, but to a small particularity of the Austrian system: the importer of a book published in Germany may not set a price that is lower than the one set by the German

publisher for the German market. By imposing this link, Austrian law prevents the publisher and importer from setting a price that takes account of the competitive situation on the Austrian market. Judgment is awaited from the European Court of Justice.

Where social security stops and discrimination starts

In April 2008, the Authority submitted written observations in a case referred to the European Court of Justice by a Polish court in which the referring court is essentially asking whether the provisions of the Treaty relating to the free movement of workers are to be interpreted as precluding the legislation of a Member State which provides for deduction for the purposes of income tax of social security contributions paid on a pension only if those contributions are paid in the Member State imposing the tax (Case C-544/07 Rüffler).

Mr Rüffler, a German national permanently resident in Poland and liable to tax there, challenges the interpretation of the scope and manner of application of Polish tax law, insofar as it provides for the non-deductibility from tax paid in Poland of health insurance contributions paid in Germany. He receives only German pension benefits and pays all contributions due as a result of those benefits in Germany. The Authority is of the opinion that the Polish rule puts persons having worked in another Member State and liable to pay contributions in that State at a significant fiscal disadvantage and therefore amounts to an obstacle to the exercise of the right of workers to move freely within the EEA.

Given the highly practical effects of the judgment in the EEA labour market as it currently stands, the Authority made particular reference in its observations to the inclusion of the EFTA States within the scope of the interpretation to be given by the European Court of Justice, noting that the free movement of workers is guaranteed in an identical manner by both the EC Treaty and the EEA Agreement.

A house in the sun: unfavourable tax treatment of property located abroad

In May 2008 the Authority submitted written observations in a case concerning the free movement of capital referred to the European Court of Justice because the national court in question felt that, under the applicable national legislation, real estate located on national territory is treated considerably more favourably for tax purposes than real estate abroad (Case C-35/08 Busley/Cibrian).

Two siblings of Spanish nationality permanently resident in Germany and with unlimited tax liability there challenged the German tax rules which only allow the decreasing balance method of depreciation to be applied to property situated on national territory and do not permit persons with unlimited tax liability to request that account be taken of rental income losses relating to property owned by them but situated in another Member State unless it is to offset that loss against positive income from the same source, when no such condition is placed on the deduction of losses in relation to property situated on the national territory.

The Authority agrees with the referring court that the national legislation in question is likely to discourage residents from making or retaining investments abroad and non-residents from transferring their property to persons resident in the taxing State and therefore constitutes a restriction on the movement of capital within the EEA.

The case is the next in a series of cases which approach the classic case law on taxation and the fundamental freedoms from a new perspective: most of the existing case law highlights the comparability of non-residents to residents but more and more frequently, the issues being raised are in relation to 'foreign' residents and the discussion is therefore crucial to the shaping of the limits of the tax freedom Member States have retained.

The Authority has therefore, by its recent interventions, acknowledged the central nature of such matters to the

application of national tax law consistently with EEA law. Moreover, the Authority has, in its own case handling, turned its attention to the matter and the intervention of the Authority in this case could therefore serve a useful purpose in relation to several open cases, concerning both Norway and Iceland, which deal with the issue of taxation and, in particular, rules for depreciation.

Procurement and the general principle of equal treatment of tenderers

In June 2008, the Authority submitted written observations in a case referred to the European Court of Justice for an interpretation of the freedom of establishment and the freedom to provide services in relation to the general principles of procurement in the EEA and public service concession contracts (Case C-91/08 Wall).

Public service concessions are specifically excluded from the scope of the secondary legislation on procurement. Public bodies wishing to grant concessions are nevertheless bound to comply with the general principle of equal treatment and the specific expressions of that principle in terms of establishment and provision of services. The European Court of Justice has held that this principle is intended, in the context of public procurement, to afford equality to all tenderers when formulating their tenders, regardless of their nationality. It is already settled that this principle of equal treatment of tenderers implies a duty of transparency which enables the concession granting authority to verify that the principle is complied with (this translates, in practice, into a duty to ensure a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed). The case at hand seeks to test the limits of this general principle in relation, most notably, to modifications to a concession contract and the remedies available to unhappy tenderers or potential tenderers.

The Authority submitted, in relation to the first issue, that the requirements of transparency would be illusory if a contract duly awarded could be materially changed without recourse to further transparent procurement procedures. This is true irrespective of whether the contract is awarded in accordance with the secondary legislation on public procurement or simply in compliance with the general principle of equal treatment of tenderers. In relation to the second issue, the Authority is of the opinion that there is neither a basis nor a need to extrapolate further obligations directly from the Treaty provisions on free movement, the issue of remedies being more appropriately dealt with by reference to the general principles of procedural autonomy, equivalence, effectiveness and judicial protection.

The scope and extent of the general principle of the equal treatment of tenderers is of considerable interest. An oral hearing is expected during the course of 2009.

Do family members maintain a right of residence when an EU national ceases to work in another EU State?

In November 2008 the Authority submitted written observations in Case C-310/08 that is pending before the European Court of Justice. The Authority proposed to the Court to answer that the spouse and children of an EU national who ceased to work in the host country still enjoy a right of residence even though none of the family members are self-sufficient.

The questions submitted to the European Court of Justice arose in the context of proceedings before the Court of Appeal, London (United Kingdom), by which the right of Mrs Ibrahim, a Somali national currently resident in the United Kingdom, to remain in the United Kingdom with her EU national children is disputed. Mrs Ibrahim's husband, the Danish national Mr Yusuf, came to the United Kingdom in 2002 and worked there until May 2003. From June 2003 to March 2004 he claimed incapacity benefit but was then declared fit to work. Instead of returning to work he left the UK, and returned to Denmark in December 2006. The couple has four children who are Danish citizens and are going to school in the UK. The couple has been separated since 2004. Neither Mrs Ibrahim nor Mr Yusuf are self-sufficient. In January 2007, Mrs Ibrahim applied for homelessness assistance for herself and her four children. Mrs Ibrahim can only benefit from housing assistance if she has a right of residence in the UK pursuant to EC law.

By its questions, the referring court is seeking to ascertain whether the spouse and children of an EU national who ceased to work in the host country enjoy a right of residence when none of the family members are self-sufficient. This raises issues regarding the interpretation of the Court of Justice's ruling in Case C-413/99 *Baumbast* and its relevance since the entry into force of Directive 2004/38.

In *Baumbast* the European Court of Justice ruled that Article 12 of Regulation 1612/68/EEC confirms that the spouse and children of an EU national who ceased to work in the host country still enjoy a right of residence irrespective of whether they are self-sufficient. Pursuant to Directive 2004/38, EEA nationals may reside in another EEA State only if they do not represent an economic burden to the host State. Nevertheless, the Authority considers that Article 12 of Regulation 1612/68/EEC and the interpretation given by the Court of justice in *Baumbast* remain valid.

Chapter 3 State aid

Overview

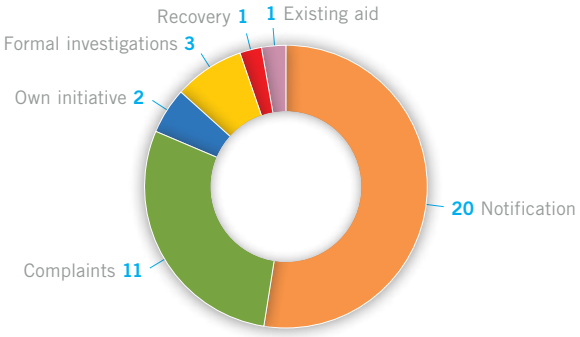
State aid activities in 2008

In 2008, 55 new state aid cases were opened, of which 17 related to the monitoring of recovery, adoption of guidelines and other regulatory tasks. In total 38 new cases were opened concerning individual state aid grants or aid schemes. The Authority registered 11 new complaints (two concerning Icelandic cases and nine on the grant of aid in Norway). Whereas Iceland notified one state aid measure in 2008, 20 new notifications were registered from Norway. Five new cases were launched on the own initiative of the Authority, two of which led to the opening of the formal investigation procedure. One of the cases initiated on the Authority's own initiative concerned an existing aid measure. Two other cases were still subject to preliminary assessments at the end of 2008. A new recovery case was initiated regarding the Norwegian wood scheme. The Authority opened a formal investigation only in three of the 37 new cases, one in each EFTA State.

During the same period, the Authority closed 35 cases regarding individual state aid grants or aid schemes and 22 cases on other obligatory tasks. In addition, a significant number of the chapters of the State Aid Guidelines were amended so that new rules on the assessment of state aid measures could enter into force on 1 January 2009 at the latest. The Authority closed 25 cases regarding notifications, nine of which concerned complaints and one an own initiative case. In five of these cases, the formal investigation procedure was opened.

Of the 82 cases pending at the end of 2008, 73 concern either individual aid measures or aid schemes. The majority of the pending cases (44 cases) are based on complaints and there are only 14 notifications pending. This is so because the Authority is under the obligation to deal with notifications within two months of receipt of a complete notification and, thus, priority is given to this type of case. Ten cases launched on the own initiative of the Authority as well as five recovery cases were also pending at the end of 2008.

Table 1: Origin of new cases in the field of state aid in 2008



A large part of the Authority's state aid cases in 2008 concerned environment and energy related issues, as well as cases falling under the new Research, Development & reviewing measures envisaged/put in place by Iceland and Norway in the context of the international financial crisis.

In this context, Iceland submitted a notification concerning a new Icelandic Housing Financing Fund loan category for lending to banks, savings banks and other financial institutions for the purpose of temporarily refinancing mortgage loans that had already been granted by these institutions against collateral in residential property. Further, the Authority

entered into pre-notification discussions with the Norwegian State regarding aid to Eksportfinans, the Norwegian provider of export credit.

State aid provisions and revision of guidelines

On the basis of Article 61(1) of the EEA Agreement, state aid is in principle prohibited. However, aid may be approved by the Authority on the basis of certain conditions designed to ensure its compatibility with the EEA Agreement. Article 61(2) and (3) contain several examples of aid which is, or may be, declared compatible. Article 61(3)(c) plays the key role in the Authority's state aid practice and refers to *aid to facilitate the development of certain economic activities or of certain economic areas*. This Article covers sectoral and regional aid as well as measures which follow horizontal objectives (*i.e.* research and development, environment, etc.). In addition, public service compensation may also be considered compatible with the Agreement provided these obligations relate to undertakings entrusted with the operation of the services of general economic interest referred to in Article 59(2). In November 2008, the European Commission's General Block Exemption Regulation entered into force for the EFTA States. If certain conditions are fulfilled, aid to small and medium-sized enterprises, research, development, innovation, environmental protection, regional investments, female entrepreneurship, employment and training will automatically be considered compatible with the EEA Agreement. Also public service compensation can be automatically compatible when the conditions of Commission Decision 2005/842 on aid to the public service, which is applicable in the EEA, are fulfilled.

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

The State Aid Guidelines are regularly amended and supplemented. The Authority adopted new sets of Guidelines for Environmental Aid and on State Guarantees. The Shipbuilding Guidelines were prolonged until December 2011. For the first time, chapters on aid to railways and to cinematographic and audiovisual work have been introduced into the State Aid Guidelines, as well as a chapter on recovery of unlawful and incompatible state aid. In the latter, the Authority explains its policy on effective implementation of recovery decisions. The chapter states the main principles of recovery based on case law of the European Court of Justice and the EFTA Court and codifies the Authority's, and the Commission's, common practice regarding the enforcement of recovery decisions.

Recovery decisions

NORWEGIAN WOOD SCHEME

In January 2008, the Authority adopted a negative decision on the Norwegian aid scheme for providing grants to support the wood sector. The Wood Scheme was introduced in 2000 for a five-year period. The purpose of the scheme was to award grants to undertakings which could contribute to the broad objectives of improving woodwork processing and trade relations between the forest and the markets well as increasing the use of woodwork. The Authority took the view that the Wood Scheme involved the grant of state aid. Moreover, in the opinion of the Authority the Wood Scheme did not comply with certain rules for granting regional aid, aid for research, development and innovation and aid to small and medium-sized enterprises. Consequently, the Authority concluded that the Wood Scheme was not compatible with the EEA Agreement. The Authority is still in discussions with the Norwegian authorities regarding the amount to be recovered and the recovery process.

ICELANDIC TRADING COMPANIES

In 2004, the Authority adopted a negative decision requesting recovery of state aid granted in application of the Icelandic International Trading Companies' (hereafter "ITC") special tax legislation. In 2005, the EFTA Court concurred that Iceland was in breach of its obligations. In 2006, the Icelandic authorities informed the Authority that only one undertaking had benefited from aid under the ITC tax scheme and that the recovery process had been initiated. The aid beneficiary has appealed the Icelandic tax authorities' recovery decision. As no payments have been made to date, the case is still open.

NORWEGIAN ELECTRICITY TAX

In 2004, the Authority adopted a final decision regarding the aid granted by the Norwegian State to the manufacturing and mining sector in the form of exemptions from the electricity tax. In 2005, the EFTA Court upheld the Authority's decision which had ordered the Norwegian authorities to recover any illegal aid from the aid recipients. Most of the aid has been recovered by the Norwegian authorities. However, some aid beneficiaries started litigation in the Norwegian courts and, as a consequence, the case has been kept open to follow these developments.

THE NORWEGIAN ENERGY FUND - ENOVA

In 2006, the Authority adopted a final decision regarding the aid granted by the Norwegian Energy Fund (Enova) in the form of investment support for renewable energy production, energy saving, new energy technology and support for energy audits. In this decision, the Authority laid down criteria on the basis of which individual grants under the Enova schemes could be declared compatible with the Authority's Environmental Guidelines. At the same time, the Authority considered that support already granted, which was not in compliance with those criteria, constituted incompatible and unlawful state aid which was subject to recovery by the Norwegian authorities.

The Norwegian authorities transmitted a list of the amounts to be recovered from various aid recipients to the Authority. In total, an amount of NOK 16 million is to be recovered. Recovery orders were made by Enova in November 2008. The Authority is currently awaiting the implementation of these orders under the provisions of the national law.

VAT COMPENSATION

Municipalities and certain other institutions in Norway are compensated for value added tax (VAT) paid on their purchases. In a decision from May 2007, the Authority concluded that in relation to certain transactions, this amounted to state aid which was incompatible with the EEA Agreement. In December 2008, the Norwegian authorities informed the Authority that the recovery process had been completed and an amount of approximately NOK 43 million had been recovered. The Authority has requested more detailed information on the exact amounts due by each beneficiary of the scheme and on the application of the recovery interest rates.

Energy and the environment

In 2008, the Authority adopted new Environmental Guidelines. Key changes and important provisions of the new Environmental Guidelines include an increase in the aid intensities (level of state participation that is accepted) as well as new rules on aid for district heating, waste management and environmental studies. Projects under the new Environmental Guidelines falling below certain thresholds (with reference to aid amounts or capacity) are subject to a standard assessment. Projects above such thresholds will be subject to a more detailed and stricter assessment as they have the greatest potential to distort competition and trade.

In addition, the Authority dealt with several cases involving new issues such as the support of carbon capture technology and tax exemptions for undertakings falling under the emissions trading system.

Test Centre Mongstad

In July, the Authority adopted a decision not to raise objections to the Norwegian State's investment in the company that will construct and own the Test Centre Mongstad (hereinafter referred to as the TCM) in the western part of Norway. The TCM will test, verify and demonstrate different concepts and technologies capable of reducing costs and risks related to large scale CO_2 capture. Starting in 2010, the TCM will test post-combustion carbon capture technologies on emissions

from two different sources: a gas-fired combined heat and power plant currently under construction and an oil refinery cracker at the Mongstad site.

In its decision the Authority concluded that state aid would be granted to the TCM but that the aid would be compatible with the state aid rules of the EEA Agreement as it pursues an objective of EEA interest, which is the development of carbon capture technologies. The Authority concluded that the State's support is necessary for the project for the purpose of testing such technologies on an industrial scale. Considering that the project has a limited duration (five years), the Authority concluded that distortion of competition would be limited and that positive effects related to enhanced knowledge of carbon capture technologies will offset any negative effects.

Norwegian CO_2 tax on mineral oil

The Authority approved measures, notified by Norway, for exempting undertakings covered by the Emissions Trading Scheme from the general CO_2 tax on mineral oil. The Authority also approved a reduction in the rate of the heating oil tax specifically in favour of the pulp and paper industry. The specific grounds for approval were as follows:

- the Emissions Trading Scheme constitutes an alternative to the CO_2 tax as an instrument for protecting the environment;
- undertakings exempt from the general CO_2 tax on mineral oil, in any case, pay either heating oil tax, which is also a tax imposed on mineral oil, or in the case of the petroleum production sector, a specific CO_2 tax in which the exemption does not apply;
- the paper and pulp sector, which will benefit from a lower rate of heating oil tax than others, qualifies as an energy intensive industry;
- the tax level, following both tax exemptions/reductions will remain above the minimum level of corresponding harmonised Community taxes; and
- the tax reductions/exemptions enable Norway to maintain an otherwise high environmental tax on mineral oil.

Norwegian NO_x tax exemption scheme

The Authority decided to approve a NO_x tax exemption scheme proposed by the Norwegian authorities to provide the possibility for undertakings to obtain a full exemption from taxes on NO_x emissions.

From 1 January 2007, the Norwegian Parliament introduced a tax of NOK 15 per kilogram of emission of NO_x.

The tax was introduced in order to enable Norway to fulfill its commitment to reduce national emissions under the Gothenburg Protocol on Long-Range Trans-boundary Air Pollution.

Pursuant to the scheme, 14 business organisations concluded an environmental agreement with the Norwegian State under which it is possible for individual undertakings to gain full exemption from the tax and instead pay a contribution into a privately run fund. The private fund allocates its financial resources among individual participating undertakings to ensure that collectively, the reduction target of 30000 tonnes of NO_x per year is met.

The Authority concluded that the exemption constituted state aid but that the scheme was compatible with the functioning of the EEA Agreement on the basis of the Authority's Environmental Guidelines.

Municipal kindergartens are not subject to EEA state aid rules

The EFTA Court ruled, in Case E-5/07, that Norwegian municipal kindergartens were not undertakings under EEA state aid law and upheld the Authority's decision rejecting a complaint from the Association of Private Day-Care Centres (Private Barnehagers Landsforbund) in Norway. The complaint was filed in 2005 and alleged that the public support to municipally owned day-care institutions was state aid and was incompatible with the EEA Agreement. The Authority rejected the complaint and adopted a decision concluding that the support was not state aid. The state aid rules of the EEA Agreement only apply to undertakings. The Authority concluded that municipal kindergartens are not undertakings performing economic activities, in particular because they are educational institutions financed primarily by the State (around 80% of the cost is covered by the State).

The Association of Private Day-Care Centres requested the EFTA Court to annul the above-mentioned decision of the Authority. The EFTA Court agreed with the Authority that municipal kindergartens cannot be regarded as undertakings and underlined that the Norwegian State is not seeking to engage in gainful economic activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Support granted to the municipal kindergartens is not state aid and the Authority was therefore correct in its findings.

Housing Financing Fund in Iceland

This investigation was first opened following the EFTA Court's judgment in 2006. Some of the measures subject to examination were put in place before the date of entry into force of the EEA Agreement in Iceland on 1 January 1994 and have not undergone any substantial changes since then. Thus, the Authority has, for procedural reasons, decided to close the formal investigation procedure initiated in 2006, and to continue the investigation under the so-called "existing aid procedure". This type of procedure is carried out in close co-operation with the national authorities, and aims at introducing changes to the system for the future in order to bring it in line with the state aid provisions of the EEA Agreement.

The Icelandic national housing agency, the Housing Financing Fund (HFF, is. Íbúðalánasjóður), is a state-owned institution formed as a separate legal entity. Its tasks comprise granting loans to individuals for construction and purchase of private residential housing as well as granting loans to municipalities, companies and associations for construction or purchase of rental housing. Since its creation in the 1950s, the agency has benefited from different forms of state support such as an open-ended state guarantee, tax reliefs and direct contributions from the state budget.

Following a thorough assessment of the different forms of financial support from the Icelandic state to the housing agency, and numerous exchanges of views with the Icelandic authorities and the complainant in the case, the Icelandic Financial Services Association, the Authority took a preliminary view that the aid measures involved were not compatible with the state aid rules of the EEA Agreement. In particular, the conditions of the HFF's current general loans scheme cannot at this stage be considered proportionate to the aim of the social housing service which is deemed to be a service of general economic interest. This is due to certain characteristics of the scheme such as unlimited size and value of the house or apartment benefiting from the scheme and the possibility of enjoying subsidized financing for construction or purchase of residential units for investment purposes. In line with the EFTA Court's findings in its judgment, it is now for the Icelandic authorities to limit the scheme to assisting the average citizen in financing his or her own dwelling.

The Icelandic authorities have presented their first comments on the Authority's findings and initial proposals for amendments of the financing system of social housing in Iceland. The discussions have, however, been temporarily interrupted due to the current difficult situation in the Icelandic financial sector.

In addition, the Authority has decided to open a separate case regarding a potential new aid measure in the form of relief for the HFF from the payment of a state guarantee fee. The Authority has invited interested parties to submit comments on the measure involved and will continue its investigation in 2009.

Research, development and innovation

In 2008, the Authority examined several cases under the Guidelines on State aid for research, development and innovation (R&D&I) adopted in 2007.

Gassnova

The Authority has accepted amendments to the Norwegian Gassnova aid scheme.

In December 2008, the Authority decided not to raise objections to an alteration of the Norwegian aid scheme for strengthening research and development of gas technologies with improved environmental performance (Gassnova). The Gassnova scheme was originally authorised by the Authority in 2005.

The scheme supports research and development for technologies which improve environmental performance in the use of all fossil fuels. In particular, the scheme will include testing and demonstration of new technological solutions for gas- and coal-fired energy production, as well as carbon dioxide handling technology. The objective of the scheme is to strengthen the intensity of research and development concerning fossil fuel-fired power stations with carbon capture and storage (CCS) in order to reduce carbon dioxide emissions from such stations.

In addition, the Norwegian authorities have made some amendments to the scheme which were necessary in order to comply with the Authority's new Guidelines on Research, Development & Innovation (R&D&I).

The Norwegian SIVA scheme

The Authority decided not to raise objections to the innovation aid scheme administered by the Norwegian Industry Development Corporation (SIVA SF), on the basis of Article 61(3)(c) EEA and the Authority's R&D&I Guidelines. The scheme is valid until 2013.

SIVA is a national policy instrument with the objective of contributing to increased innovation, business development and employment in Norway. SIVA's aim is to help offset market imperfections in areas with a modest or uniform economic activity, in particular in rural areas.

To this end, SIVA ensures that SMEs (Small and Medium sized Enterprises) get access to services at reduced prices. SIVA's primary aim is to arrange for the establishment of structures which enable SMEs and start-up enterprises to get access to consultancy and support services.

Norwegian Wood-based Innovation Scheme

The Authority approved the Wood-based Innovation Scheme in Norway for a period of six years. The target of the scheme is to increase profitability and the use of wood within the wood-based production chain. The target is to be reached through increased emphasis on research, development and innovation within the forestry and wood-processing sector.

Public funding will be available to all enterprises in innovation, and to large enterprises in research and development, for projects contributing to the objectives of the scheme. The scheme envisages cross-border co-operation and collaboration between research organisations and private undertakings. The scheme will be administrated by Innovation Norway (Innovasjon Norge).

The Authority considered the measures notified under the scheme to be compatible with the EEA Agreement on the basis of the R&D&I Guidelines.

Unpaid labour scheme

The Authority approved a scheme proposed by the Norwegian authorities to provide grants to support unpaid labour in research and development activities (the "Unpaid R&D Labour Scheme").

The Unpaid R&D Labour Scheme was introduced because the Norwegian authorities considered that the existing "Skattefunn Scheme", under which research and development activities are supported by means of a tax deduction, could not apply to so called "unpaid labour" (*i.e.* where the worker, often a one man enterprise, does not receive a salary).

With reference to the principles established in the Community's Seventh Research Framework Programme, the Authority concluded that the costs under the Scheme qualify as eligible costs within the meaning of the R&D&I Guidelines. The proposed aid intensities are also within the maximum limits allowed under those Guidelines. Furthermore, during the formal investigation procedure the Norwegian authorities decided to limit the Scheme to small and micro enterprises and to limit the duration of the scheme to 31 December 2013, when the current Guidelines expire.

On this basis, the Authority took the view that the Unpaid R&D Labour Scheme fulfilled the relevant conditions set forth in the State Aid Guidelines.

Tax concessions

In 2008, the Authority investigated two new cases regarding tax concessions. In one of these cases, the Authority initiated the formal investigation procedure. Tax measures have also been investigated in the context of environmental and maritime support.

The Norwegian Tonnage Tax

The new Tonnage Tax system is an exemption regime, under which shipping income is tax exempt on a permanent basis. Instead of paying corporate tax on profit generated by eligible maritime activities, the ship owner pays an amount of tax linked directly to the tonnage operated. Undertakings opting for the new regime must remain within the system for a minimum period of ten years. In addition, all companies belonging to the same group must opt for the regime.

In addition to the new Tonnage Tax system, the Norwegian authorities also notified measures related to the transition from the prior Tonnage Tax system to the new one. These measures allow up to one third of the deferred tax to be set aside in an environmental fund, which can be used for different kinds of environmental investments. Furthermore, up to two thirds or more of the deferred tax may be subject to corporate tax over ten years with a 10% linear depreciation. Undertakings will, however, only benefit from these transitional measures if they opt for the new Tonnage Tax system.

The Authority considered that both the transitional measures and the amended Tonnage Tax regime amounted to state aid, but considered that such measures were compatible with Article 61(1) and 61(3)(c) in conformity with the Maritime Guidelines.

Refund of taxes and social security charges for the employment of seafarers

A state aid scheme which enables shipping companies to be refunded for taxes and social security charges levied on seafarers aboard vessels registered in the Norwegian Ordinary Shipping Register (NOR) was approved by the Authority in October 2006.

The Authority approved an alteration to this scheme whereupon a maximum refund per seafarer per year is set. For 2008, this ceiling has been set at NOK 198 000. The ceiling for 2009 and subsequent years will be subject to a decision by the Norwegian Parliament.

The Authority has not raised any objections to this limitation which is in line with the provisions of the Maritime Guidelines. These Guidelines provide for the possibility for EEA States to grant state support in the form of reductions in labour-related costs as long as there is no over-compensation and the system is transparent and not open to abuse.

Taxation of captive insurance companies in Liechtenstein

In September, the Authority opened the formal investigation procedure regarding taxation of captive insurance companies in Liechtenstein.

In general, captive insurance companies provide various insurance services to a limited and defined group of entities seeking insurance coverage, and not to the public at large. They are in this sense “captive”. Typically, large corporations establish such companies to cover insurance needs for themselves and their subsidiaries.

Captive insurance companies in Liechtenstein have been fully exempted from the regular business income tax since 1998. Moreover, they pay only half, or less, the normal capital tax levied upon undertakings. They are also exempted from collecting a special coupon tax on distributed dividends.

The Authority assessed these tax rules in the light of the state aid rules and came to the preliminary conclusion that these exemptions constitute state aid within the meaning of the EEA Agreement. The Authority had doubts that these measures could be regarded as compatible with the EEA Agreement and accordingly opened the formal investigation procedure.

Other cases/areas of priority

Film production

The Authority decided to authorise the prolongation of the existing support schemes in the field of film production until 1 July 2009. The first scheme relates to audiovisual production and covers different film support mechanisms which concern, *inter alia*, support for feature films and short films. The second scheme relates to support for film production companies.

Rescue and Restructuring

In 2008, the Authority adopted one decision applying the Rescue and Restructuring Guidelines. The Authority considered aid granted in favour of the Icelandic cement producer *Sementsverksmidjan hf.* to be restructuring aid compatible with the rules of the EEA Agreement.

In the context of privatisation of the former state-owned cement producer Sementsverksmidjan hf., the National Treasury of Iceland purchased various properties and assets of the company, mostly unused for cement production, as well as shares and bonds owned by *Sementsverksmiðjan hf.* in other companies. *Sementsverksmidjan hf.* leased some of the sold assets. According to the information provided by the Icelandic authorities, the company paid a market price for these transactions.

Moreover, the State took over the undertaking's liabilities in regard to the Pension Fund of State Employees in 2003. The Authority considered this measure to be state aid. The Authority assessed whether the aid could be considered compatible on the basis of the Rescue and Restructuring Guidelines issued in 1999. Rescue and restructuring aid measures can be granted to ailing companies only once under certain predefined conditions. The Authority came to the conclusion that the aid granted by the State in the framework of the restructuring of Sementsverksmidjan hf. was in line with the requirements of the Guidelines.

Telecommunications - Danice submarine cable

In November 2007, the Icelandic authorities notified the Authority of the Icelandic State's participation in a share capital increase in E-Farice (a limited company) necessary to carry out the so-called Danice project. The project concerns a telecommunications cable that would link Iceland with the rest of the EEA through Denmark. The Danice cable would be operated as one system with the existing Farice 1 cable, which links Iceland with the Faroe Islands and Scotland. According to the information provided by the Icelandic authorities, this would be a technically safe system with seamless redundant connectivity if failure to one cable occurs.

In December 2008 the Authority concluded that the Icelandic State's participation in the share capital increase in E-Farice in connection with the Danice project had been made in accordance with the market economy investor principle. The Authority based its assessment on the Guidelines on public authorities' holdings. According to these guidelines, no state aid is involved where fresh capital is contributed to an undertaking in circumstances that would be acceptable to a private investor operating under normal market conditions. Despite the increase in capital provided by the Icelandic State, its shareholding in the company decreased. This was so because the existing shareholder Og fjarskipti (Vodafone), as well as three new shareholders (the three energy companies Landsvirkjun, Orkuveita Reykjavíkur and Hitaveita Sudurnesja), participated in the capital increase with higher contributions than the Icelandic State.

As a result of its decision in this case, the Authority also closed a complaint from a competitor which concerned the alleged grant of state aid to E-Farice in relation to the above-mentioned share capital increase.

Chapter 4 Competition

Activities in 2008

In 2008, the Authority carried out two inspections, adopted one commitment decision, sent a statement of objections to the incumbent postal operator in Norway and finalised its sector inquiries in financial services.

In terms of case load, the Authority opened three new cases and closed seven cases in the field of antitrust including cases relating to sector inquiries. It opened one new case and closed two cases relating to State measures possibly in conflict with the EEA competition rules. There were 10 antitrust cases and three cases concerning State measures pending at the end of the year.

There were, moreover, 34 pending cases concerning other obligatory tasks in the area of competition. The largest number of these cases related to different policy issues which were being discussed among European competition authorities.

Resources were also devoted to the Authority's eCOM task force for the assessment of notifications from the EFTA States in the field of electronic communications (see the report on the activities of the eCOM task force).

THE COMPETITION RULES OF THE EEA AGREEMENT

In contrast to the Authority's activities in other areas which are directed towards the 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 participants (Article 54 EEA);
- The requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- A prohibition on State measures in relation to public undertakings or undertakings with special or exclusive rights which are contrary to the rules contained in the EEA Agreement, hereunder 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 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/

The telecoms sector in Liechtenstein

The EFTA Surveillance Authority adopted a commitments decision resolving competition issues in the telecoms sector in Liechtenstein.

In September 2008, the Authority closed its investigation into the telecommunications sector in Liechtenstein with a decision making certain commitments legally binding upon the parties to the procedure: Liechtensteinische Kraftwerke Anstalt (LKW) and Telecom Liechtenstein AG (Telecom Liechtenstein).[1]

The case originated from a complaint received in 2006, alleging that the restructuring of the telecommunications market in Liechtenstein was contrary to the competition rules in the EEA Agreement. In 2007, the Authority issued a Preliminary Assessment concluding that the agreement between LKW and Telecom Liechtenstein infringed the EEA competition rules because the two companies (i) committed not to compete with each other for an unlimited period of time; and (ii) concluded a strategic alignment with regard to development of the telecommunications network in Liechtenstein, under which LKW was required to fulfil the network infrastructure requirements of Telecom Liechtenstein. The Authority expressed its concerns that these provisions might restrict competition and might have a foreclosure effect on actual and potential telecommunications operators in Liechtenstein.

In response to the Authority's Preliminary Assessment, the parties submitted commitments at the beginning of 2008 aimed at addressing the Authority's concerns. In particular, the parties removed the non-compete clause and the clause regarding strategic alignment from the agreement. In addition, in relation to network development planning, LKW committed to regularly ascertain the requirements of all service providers for network infrastructure with a view to providing non-discriminatory access to all market participants.

In May 2008, those commitments were made subject to a public consultation across the EEA. Following the public consultation, the Authority concluded that the above-mentioned commitments met the competition concerns identified in its Preliminary Assessment. The Authority thus decided to make the commitments legally binding on the parties by means of a decision. The effect of the Authority's decision is the establishment of a more level playing field among all providers of electronic communications networks and services, including smaller as well as possible new operators, in Liechtenstein.

1. LKW is an electricity and telecommunications undertaking, whereas Telecom Liechtenstein is a telecommunications operator in Liechtenstein. Both companies are wholly owned by the Principality of Liechtenstein.

WHAT IS A COMMITMENTS DECISION?

In competition investigations where the Authority finds that there are reasons to intervene against anti-competitive practices, it can decide to adopt a decision making commitments by the undertakings binding on them.

In such cases the Authority will open proceedings and issue a Preliminary Assessment to the undertakings involved setting out the substance of its competition concerns. If the undertakings are willing to change their behaviour they may then formally submit commitments which are aimed at addressing the concerns raised by the Authority. These commitments will then be made public in order to give competitors and other interested third parties a possibility to comment upon the proposed commitments.

If the Authority is satisfied, after the public consultation, that the commitments will adequately address the competition problems in question, the Authority can adopt a formal Commitments Decision. That decision will conclude that there are no longer grounds for action by the Authority and bind the undertakings to the commitments. Should the undertakings later act contrary to their commitments, the Authority can take appropriate enforcement action to ensure that the commitments are fully respected. This includes the imposition of fines or periodic penalty payments for non-compliance.

The Authority objects to the market behaviour of the Norwegian incumbent postal operator

In December 2008, the EFTA Surveillance Authority sent a so-called "Statement of Objections" to Posten Norge AS outlining its preliminary view that Posten Norge had abused its dominant position in contravention to the EEA competition rules.

As the national postal operator, Posten Norge is the leading provider of postal services in Norway. The case at hand concerns the distribution of parcels from mail-order and e-commerce companies (distance selling companies) to Norwegian consumers. This is also referred to as distribution of Business-to-Consumer parcels. Posten Norge has had a particularly strong position in this market as the only provider with a delivery network covering the whole of Norway.

The Statement of Objections outlines the Authority's preliminary view that Posten Norge's strategy and behaviour from 2000 to 2006 in relation to its Post-in-Shop network in Norway violated Article 54 of the EEA Agreement. The Authority's preliminary view is that in the absence of this behaviour, other suppliers offering delivery of business-to-consumer parcels could have challenged Posten Norge's leading position in this market to the benefit of mail-order and e-commerce companies and, ultimately, consumers.

The Post-in-Shop network has replaced a number of post offices with postal service units inside retail outlets. These Post-in-Shops have been predominantly established in grocery stores, kiosks and petrol stations. Through this reorganisation, Posten Norge was able to substantially reduce its costs while increasing the availability of postal services to the public.

However, in so doing, Posten Norge opted for an exclusivity strategy preventing competing suppliers of parcel delivery services from using a number of retail chains and retail outlets as collection points for their parcels. The strategy of Posten Norge consisted of the use of preferential treatment and exclusivity in Posten Norge's agreements with large retail groups and their outlets.

A complaint from one of Posten Norge's competitors alleged that Posten Norge's agreements with retail chains have prevented other suppliers from competing in the market in question. Following the receipt of the complaint, the Authority carried out an extensive investigation of Posten Norge's agreements with retail groups and outlets for the establishment of the Post-in-Shop network. This included an on-the-spot inspection at the premises of Posten Norge.

In 2006, Posten Norge removed or waived all exclusivity provisions in its agreements with retailers which had previously prevented retail chains and outlets from delivering the parcels of other parcel distributors. However, the Authority found it necessary to continue the investigation into whether the market behaviour of Posten Norge had had appreciable anti-competitive effects in the past.

The proceedings will continue into 2009 with the submission of Posten Norge's reply to the Authority's Statement of Objections.

WHAT IS A STATEMENT OF OBJECTIONS?

A Statement of Objections is a formal step in antitrust investigations in which the Authority informs the parties concerned in writing of the objections raised against them.

The addressee of a Statement of Objections can reply in writing to the Authority within a set time-limit. In its reply it may set out all the facts known to it which it considers relevant to its defence against the objections raised by the Authority.

The addressee may also request an oral hearing to present its comments on the case.

The Authority may then take a decision on whether the conduct addressed in the Statement of Objections is compatible or not with the competition rules of the EEA Agreement.

If the Authority decides to adopt a decision finding an infringement of the competition rules, it shall base its decision only on objections on which the parties concerned have been able to comment.

Sending a Statement of Objections does not prejudge the final outcome of the procedure.

Investigations relating to the provision of ferry services to and from Norway

During 2008, the Authority continued its examination of various issues relating to the provision of ferry services to and from Norway.

The Authority is investigating whether Color Line, a major Norwegian ferry operator, may have infringed the EEA competition rules in relation to its provision of ferry services to and from Norway. Following unannounced inspections at Color Line's premises in 2006, the Authority has continued its fact-finding exercise and has examined a substantial body of evidence. The Authority has, in particular, concentrated its efforts on issues relating to the Sandefjord–Strömstad route. At the end of 2008, the conclusion of the Authority's examination was still pending.

In the course of 2008, competition issues also arose on routes to and from Kristiansand in Southern Norway. In October 2008, the Authority learned, through press reports, that the Port Authority requires that all operators of ferry routes from the harbour must offer year-round passenger and cargo transport.

Kristiansand harbour is a major port in the region, from which Color Line and its predecessors have operated ferry routes to Denmark for a long time. Some years ago the company Master Ferries started a competing route from Kristiansand to Northern Jutland. Master Ferries was later taken over by Fjord Line. Fjord Line claims that it is unable to offer the type of year-round services required by the Port Authority, but maintains that the services it offers are in great demand by the public. Thus, according to Fjord Line, the conditions set by the Port Authority will force it to close down its route and thereby eliminate competition to the detriment of consumers.

In light of the facts described in the Norwegian press, the Authority's services decided to look into the case and started gathering information from relevant market actors. At the end of 2008, the fact-finding process was still ongoing.

Sector Inquiry into Financial Services

After an extensive fact-finding exercise, the Authority, made public its final reports on the inquiries into the retail banking and business insurance sectors. The Authority's reports complement the findings of the European Commission's parallel sector inquiries, thus giving an overview of the state of competition in the retail banking and business insurance markets across the whole of the EEA.

Retail banking

In January, the Authority published its final report of the competition inquiry into the markets for retail banking services in the EFTA States. The report concentrated on two main areas, card payment services and core retail banking products. Building on two interim reports published during the course of 2007 and comments received from a public consultation, the final report gives an overview of the state of play in the markets for payment card services and core retail banking products.

The sector inquiry has identified competition concerns relating to fragmented markets along national lines, low customer mobility, and practices of banks to sell several banking services in one package. This may hinder market entry and limit sales opportunities to new entrants.

CARD PAYMENTS

Cashless money transactions using payment cards constitute an increasingly important part of the modern European economy. However, the Authority's inquiry confirms that card payment markets essentially operate on a national level and are often highly concentrated. Consumers in the EEA thus do not benefit from a single, integrated market with regard to card payment services.

There are significant differences in fee levels between countries within the EEA, both as regards cardholder fees and costs that are borne, directly or indirectly, by merchants accepting payment cards.

The inquiry found indications that overall the payment card business enjoys considerable levels of profitability. Card issuing (the issuing of payment cards by a bank to its customers) appears to be more profitable than acquiring (recruiting merchants for card acceptance and transmitting the cardholder's payment back to merchants).

The Authority also examined market characteristics in order to identify actual and potential barriers to competition. In some markets, particularly those for acquiring merchants, there is a high degree of concentration with typically only a handful of market players offering their services in a given country. Moreover, market entry can often be rendered difficult by membership and governance rules determined by a particular card scheme.

CURRENT ACCOUNTS AND CORE RETAIL BANKING

This inquiry found that markets for retail banking services (*i.e.* banking services for individuals, households and small and medium-sized enterprises) remain fragmented along national lines. Factors such as competition barriers and regulatory, legal and cultural differences all contribute to this fragmentation.

The duration of the relationships between customers and banks in Iceland and Norway are long, and customer mobility is low even compared to the rest of the EEA. In both countries, practices such as cross-selling (the selling of additional products and services to existing customers) and tying (requiring the customer to buy one product in order to obtain another) are common in relation to various banking products. Tying can make it more difficult for customers to switch banks, and may thus impede competition by making it more difficult for new market players to attract new clients. The Authority also examined other factors that may reduce customer mobility, such as administrative burdens, information asymmetries and lack of price transparency.

Furthermore, the Authority's findings, together with similar findings by the European Commission, demonstrate that the manner in which customers use their bank accounts varies significantly across the EEA. These differences are influenced not least by high variations in prices for different payment services from country to country. The reason why this high degree of fragmentation remains in place within the EEA is due not least to entry barriers into the different markets.

Business Insurance

In July, the Authority published its final report in the sector inquiry into the business insurance markets. Building on an interim report published during the course of 2007 and comments received from a public consultation, the final report gives an overview of the state of play in the markets for business insurance of Norway and Iceland.

The Authority's inquiry investigated several aspects of the business insurance sector, in particular market structure and financial workings of the industry, use of standard policy conditions, other forms of horizontal co-operation, and distribution arrangements. The inquiry found no strong indications of serious competition problems in this sector.

As regards the market structure and financial aspects of the industry, high concentration levels in most insurance lines were found. For brokers, the concentration level appears to be lower than for insurers. There appears to be considerable variation in profitability between insurance classes. However, the cyclical nature of the industry along with the time lag from premium payments to final settlement of claims makes it difficult to assess profitability based on the survey data available.

Regarding the joint use of standard policy conditions and other forms of horizontal cooperation, no significant issues of concern were identified. The provision for such co-operation under the Insurance Block Exemption Regulation does not seem to be relied upon to any great extent by insurers.

As far as distribution arrangements are concerned, a new code of conduct on remuneration of brokers was introduced in Norway in September 2003. Under the new code of conduct, insurance companies no longer pay commission to brokers for brokerage services but instead only provide net quotes. Brokers in turn charge purchasers of insurance directly for brokerage services ("net-quoting").

Limited data was available on the economic effects of the introduction of net-quoting in Norway, but the data indicate a shift in broker revenues from commissions from insurers to client fees. The practice of net-quoting also seems to have caused a shift in the sources of revenues for brokers from Large Corporate Clients to SMEs.

On-the-spot inspections at the premises of undertakings

During 2008 the EFTA Surveillance Authority carried out unannounced inspections, or "dawn raids" on two occasions.

Ship classification services

The first inspection was undertaken in January when officials from the EFTA Surveillance Authority, accompanied by officials from the European Commission and the Norwegian Competition Authority, carried out an inspection at the Norwegian premises of Veritas, a Norwegian ship classification company providing services for merchant ships. The inspection by the Authority was carried out at the request of the Commission which had reasons to believe that the company had violated the competition rules of the EEA. Other inspections were carried out simultaneously in several EU Member States. Since the Commission is the competent surveillance authority under the EEA Agreement to review the evidence gathered in this case, the information obtained was transmitted to the Commission.

Express bus services

Unannounced inspections were also carried out in June when the premises of providers of express bus services in Norway were raided. The companies concerned were Nor-Way Bussekspress, Nettbuss AS and Tide ASA. Nor-Way Bussekspress is an umbrella organisation under which a large express bus network in Norway is organised. The two other companies are leading express bus operators. The Authority had reasons to believe that the companies concerned might have violated the competition rules of the EEA Agreement through the cooperation that takes place within the Nor-Way Bussekspress network and/or on individual routes. At the end of 2008 the assessment of the information gathered was still ongoing. However, as a direct consequence of the inspections, the Norwegian Ministry of Government Administration and Reform has announced that it put on hold the adoption of a regulation that would exempt cooperation between express bus companies on existing routes from the national competition rules.

WHAT ARE INSPECTIONS?

When necessary to fulfil the duties assigned to it in the field of competition, the Authority may carry out on-the-spot inspections at premises of undertakings in the EFTA States.

During inspections the Authority is empowered to examine and take copies of books and business records, also in electronic form, and to ask representatives and members of staff for explanations.

Surprise inspections are a preliminary step in investigations into suspected anti-competitive practices.

The fact that the Authority carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour; nor does it prejudge the outcome of the investigation itself.

There is no strict deadline within which antitrust inquiries should be completed. Their duration depends on a number of factors, including the complexity of each case, the extent to which the undertakings concerned cooperate and the exercise of the rights of defence.

Cooperation with the European Commission and the competition authorities and courts of the EFTA States

Cooperation with the Commission

There are rules in the EEA Agreement on cooperation between the two surveillance authorities; the European Commission and the Authority. These rules allow the Authority and the competition authorities of the EFTA States to be involved in discussions on competition policy at European level. In addition, this cooperation also covers individual cases which are dealt with by the Commission. Sometimes such cases can have a significant impact on markets in the EFTA States.

MERGER CASES IN 2008

By notifications, the parties to a merger seek clearance from the European Commission before their transaction is implemented. By reasoned submissions, merging parties may ask that a case be transferred from the jurisdiction of national competition authorities to the Commission, or vice versa. In merger cases which qualify for cooperation under the EEA Agreement, the Authority receives notifications and reasoned submissions from the Commission for consideration. This information is passed on to the competition authorities of the EFTA States who have the opportunity to comment.

One of the cases that qualified for co-operation with the Authority in 2008 was **StatoilHydro/Conoco Phillips**. In this case StatoilHydro acquired the petrol station business of ConocoPhilips in Denmark,

Norway and Sweden operating under the brand name "Jet". This transaction raised significant competition problems in Norway since it would reinforce the oligopolistic structure of the market and strengthen StatoilHydro as the largest provider of motor fuels there. Following an in-depth investigation, these concerns were removed when StatoilHydro committed to divest itself of all Jet petrol stations in Norway.

Another case that was notified to the European Commission was **BAT/Skandinavisk Tobakskompagni** in which British American Tobacco acquired a number of subsidiaries of the Danish company Skandinavisk Tobakskompagni. This included J.L. Tiedemanns Tobaksfabrik AS in Norway and raised competition concerns in the markets for cigarettes and roll-your-own tobacco. These concerns were resolved by the offer of BAT to divest itself of certain tobacco brands in Norway such as *Petterøe's* and *Tiedemanns Rød*. An in-depth investigation of the transaction was therefore not deemed necessary.

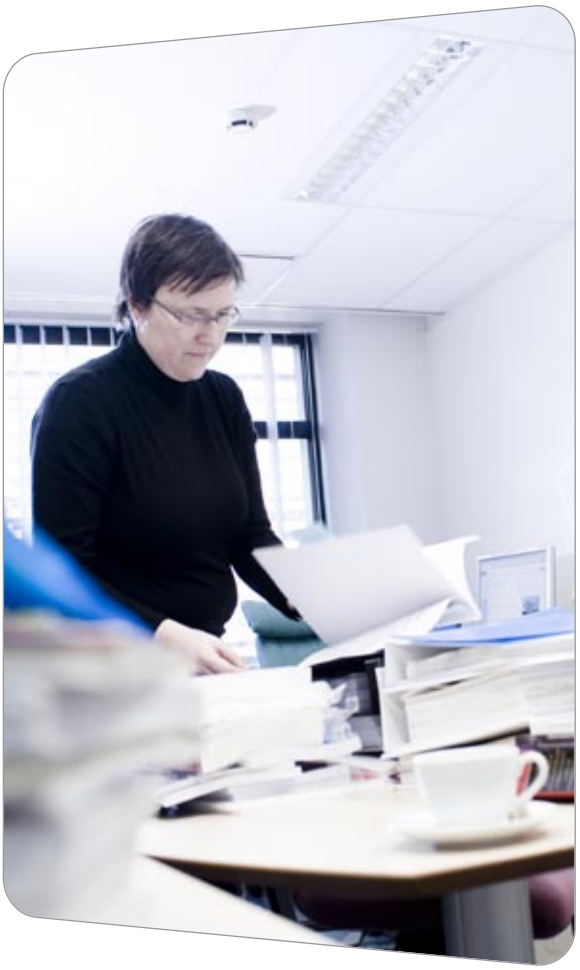
The Authority also received a number of reasoned submissions from the European Commission in 2008. Three of these cases were **Robert Bosch/Hägglunds Drives**, which concerned hydraulic motors and drive systems for industrial applications, **APMM / SWIFT TANKERS POOL**, which concerned maritime transport, and **3M/AEARO**, which concerned personal protective equipment, such as hearing protection and protective eyewear. All these transactions were notifiable in several EU Member States and in Norway. On the initiative of the merging parties, and with the agreement of the competition authorities concerned, these cases were transferred to, and subsequently cleared by, the Commission. As a result of the transfer of jurisdiction, the Commission was also able to clear these cases in so far as they related to the EFTA States.

At the end of 2008, 2 merger cases and more than 20 antitrust cases pending with the European Commission were registered by the Authority as qualifying for co-operation with the Authority under the EEA Agreement.

ANTITRUST CASES IN 2008

The Authority is also involved in cases in which the European Commission applies Article 53 or 54 of the EEA Agreement. Many of these cases concern EEA-wide or worldwide cartels which the Commission has been able to detect and sanction. In 2008, one such case related to the manufacturing of **aluminium fluoride** in which the Norwegian company Boliden Odda received full immunity from fines as it was first to submit evidence of the cartel to the Commission. Another cartel of a different magnitude was found in the **car glass** sector where the Commission imposed fines totalling EUR 1.3 billion on four manufacturers, the highest fines ever imposed on a cartel.

In a case concerning the International Confederation of Societies of Authors and Composers, **CISAC**, and its members, including **TONO** of Norway and **STEF** of Iceland, the European Commission prohibited certain agreements and practices which limited the ability of collecting societies to offer their services to authors and commercial users outside their domestic territory. The removal of these restrictions aimed at allowing authors to choose which collecting society should manage their copyrights. The practical effect of the decision was to make it easier for users to obtain licences for broadcasting music over the internet, by cable and by satellite in several countries from a single collection society of their choice.



Cooperation with the EFTA competition authorities and courts

The Authority also cooperates with the national competition authorities of the EFTA States through the network of EFTA competition authorities. This cooperation relates to the application of the EEA competition rules by the Authority and the national authorities. The Authority is to ensure that the application of the EEA competition rules at the national level in the EFTA States is consistent with the approach taken under the EEA and EU competition rules across the EEA.

Under the cooperation mechanism established between the Authority and the competition authorities of the EFTA States, the Authority is informed of new cases initiated by the national authorities where they envisage that Articles 53 or 54 of the EEA Agreement may be applied. In 2008, 15 such cases were notified to the Authority. A total of 12 cases came from Norway and three from Iceland.[2]

The Authority also reviews the draft decisions of the competition authorities in the EFTA States by which they apply the EEA competition rules. During 2008, the Authority received two draft decisions from the Icelandic Competition Authority and one draft decision from the Norwegian Competition Authority for review.

At the end of 2008, the Authority had 7 pending cases concerning national proceedings in the EFTA States.

During the year the Authority organised a seminar for the EFTA competition authorities addressing issues relevant for the way in which the EEA competition rules are applied at the national level. The seminar was attended by representatives from all the three EFTA States.

During 2008, no courts in the EFTA States asked for transmission of information from the Authority or the opinion of the Authority on questions regarding the application of the EEA competition rules.

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

Chapter 5 Statistics

Case handling by the Authority

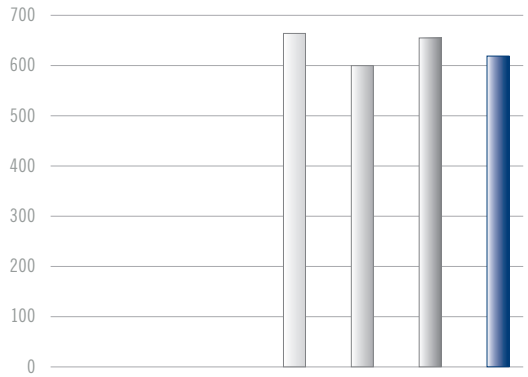
Developments within the Authority's case handling activities in 2008 have been dealt with in the individual chapters of this annual report. In this chapter, we give a brief overview of the more general aspects of those activities, with a focus on pending cases, as well as on the cases that were opened and closed in the previous year.

Pending cases

At the end of 2008, the Authority had 619 pending cases, which is a decrease of 46 compared to the previous year. The number is almost down to the same level as in 2006, where a deliberate attempt to reduce the backlog of old cases brought the number of pending cases down to 600. As mentioned in the previous annual report, the increase from 2006 to 2007 could, to a large extent be explained by the increased efforts made by the Authority to pursue the delays in the incorporation of regulations in Norway and Iceland. This effort continued in 2008 but due to the absence of the need to initiate new cases, the total number dropped.

The following figures show the developments in pending cases in the period 2005-2009.

Table/Figure 1 Pending cases, by category



	2005	2006	2007	2008
Complaints	165	149	145	143
Notifications	85	82	94	113
Obligatory Tasks	103	103	101	91
Own Initiative cases	311	266	325	272
Total	**664**	**600**	**665**	**619**

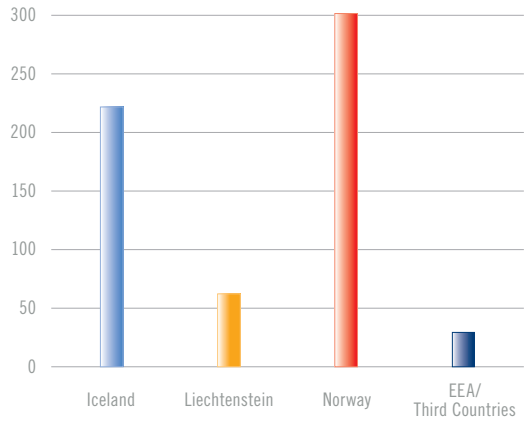
The table shows the development in pending cases between 2005 and 2009. *Complaints* are cases where the Authority examines information received from economic operators or individuals regarding measures or practices in EFTA States which are considered not to be in conformity with EEA rules. *Notifications* cover draft technical regulations, telecommunications markets notifications and state aid measures that are notified to the Authority by the EFTA States. *Obligatory Tasks* are cases which are opened on the basis of the obligations of the Authority which arise from the EEA Agreement directly or from secondary legislation, such as inspections in the area of food safety or transport.

"Case" in this section refers to an assessment of the implementation or application of EEA law, or to relevant tasks registered during the relevant year for the purpose of fulfilling the Authority's obligations under EEA law. Such cases do not necessarily lead to the initiation of infringement proceedings against one or more EFTA State(s) or undertakings.

The figures used in this report for the years 2005-2007 somewhat differ in some cases from those used in previous annual reports. This is due to adjustments in the internal case handling routines and the ways cases are registered within the Authority.

Finally, the Authority opens cases on its *Own Initiative*. Such cases include the non-implementation of directives and non-incorporation of regulations which have been incorporated in the EEA Agreement by Iceland and Norway, and the examination of implementation (*e.g.* the verification of the conformity of national laws with EEA legislation) and application of EEA law. The latter covers, for example, examination of individual award procedures for procurement, state aid or concessions where the Authority, on the basis of different sources, thinks such examination is warranted.

Table/Figure 2 Pending cases, by country of origin



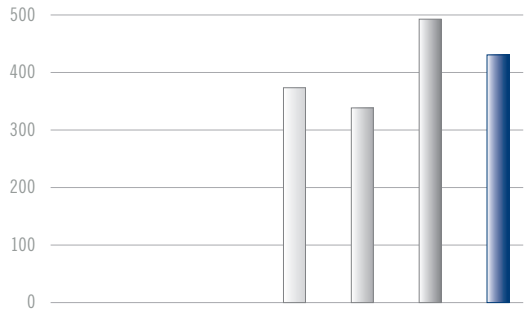
	2005	2006	2007	2008
Iceland	180	156	252	223
Liechtenstein	100	95	72	63
Norway	321	294	294	303
EEA/Third Countries	63	65	47	30
Total	**664**	**600**	**665**	**619**

The table shows the number of cases by country of origin in the period 2005-2009. The section *"EEA/Third countries"* refers to cases where more than one EFTA State is involved, typically two or all three EFTA States, or refers to cases put to the Commission that concern EU Member State(s).

Cases opened and closed by the Authority

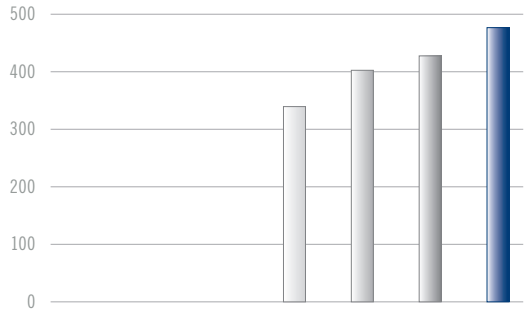
The activities of the Authority can also be illustrated by the number of cases which are opened and closed during the year. A case will be closed when the issue at stake has been solved, or where the Authority finds that no infringement of EEA law has taken place. It has been a priority of the Authority to reduce the backlog of old cases, and both 2007 and 2008 saw a higher number of closures compared to previous years. In both 2006 and 2008, the number of closures was considerably higher than the number of new cases opened by the Authority.

Table/figure 3 Opened (new) cases, by field of work



	2005	2006	2007	2008
Competition	14	16	9	19
Internal market affairs	327	270	421	356
State aid	33	53	63	56
Total	**374**	**339**	**493**	**431**

Table/figure 4 Closed cases, by field of work

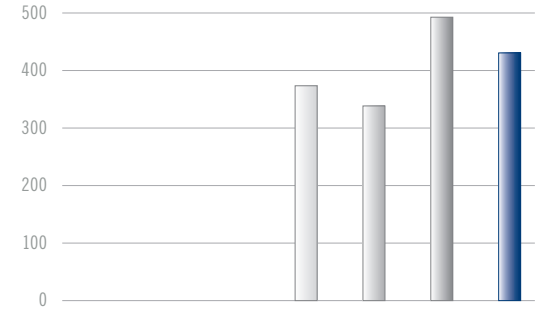


	2005	2006	2007	2008
Competition	14	20	4	36
Internal market affairs	289	338	385	384
State aid	37	45	39	57
Total	**340**	**403**	**428**	**477**

The tables show that the great majority of cases relates to the functioning of the internal market, which among others comprises areas such as the free movement of capital, goods, persons and services, the environment and energy matters as well as public procurement. It can be noted that nearly all cases related to implementation of directives and incorporation of regulations are covered by Internal market affairs, as are most cases relating to security inspections and food and feed safety.

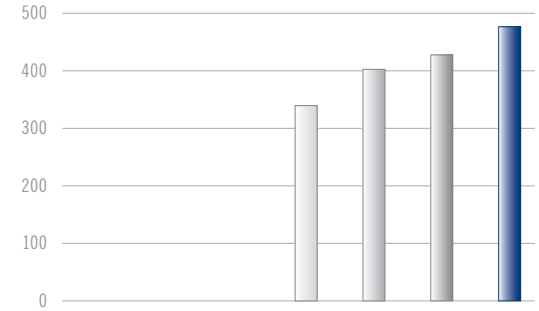
In the areas of state aid and competition the number of cases, and consequently openings and closures, is much smaller. This does, however, not indicate anything particular about the actual work load within these fields of work for the Authority. Many of the cases that the Authority deals with in these areas are very complicated and time consuming.

Table/figure 5 Opened (new) cases, by country of origin



	2005	2006	2007	2008
Iceland	107	95	237	181
Liechtenstein	40	40	21	24
Norway	184	163	203	190
EEA/Third countries	43	41	32	36
Total	**374**	**339**	**493**	**431**

Table/figure 6 Closed cases, by country of origin



	2005	2006	2007	2008
Iceland	77	119	141	210
Liechtenstein	44	45	44	33
Norway	171	190	203	181
EEA/Third countries	48	49	40	53
Total	**340**	**403**	**428**	**477**

The tables show that there was a slight reduction in the number of new cases in 2008 compared to 2007, while a higher number of cases was closed by the Authority than in previous years. More or less the same number of cases was opened in relation to Norway and Iceland, while only a small number relates to Liechtenstein. In 2008, for the first time, most closures concerned Iceland, while again only a relatively small number relates to Liechtenstein.

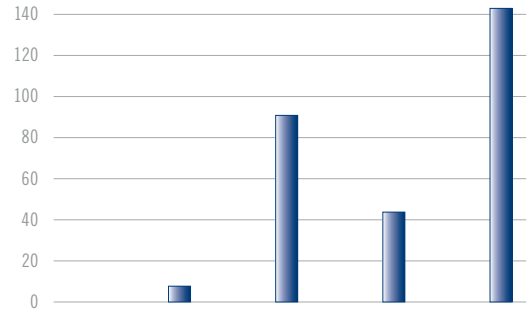
Complaints in 2008

In order to fulfil its surveillance tasks regarding the situation in the EFTA States, and their compliance with EEA law, the Authority is open to receive complaints from interested and concerned parties. Anyone is in principle entitled to lodge a complaint to the Authority, which will then examine it and determine whether there is something to pursue. Following such an examination, the Authority might decide to close the case, or to initiate formal infringement proceedings based on the complaint. It must be underlined that the Authority under such circumstances will pursue the cases on its own initiative and not on behalf of the complainant.

It follows from the statistics of 2008 that the vast majority of the complaints which the Authority receives concern Norway, and that they are within the field of internal market affairs. The number of openings and closures of complaint cases was more or less the same in 2008, leaving the number of complaint cases relatively stable. 143 of the total number of 619 pending cases at the end of 2008 were based on complaints received by the Authority. This amounts to more than 20% of the total case load.

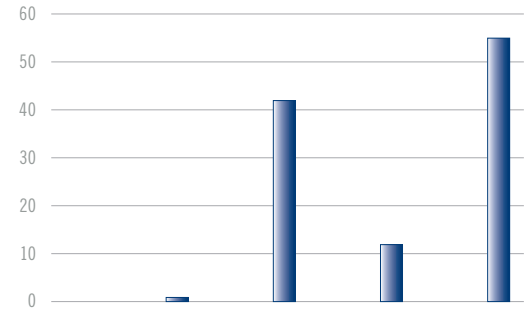
Table/figure 7-9 Number of complaint cases, by country of origin and field of work

Pending complaint cases 2008



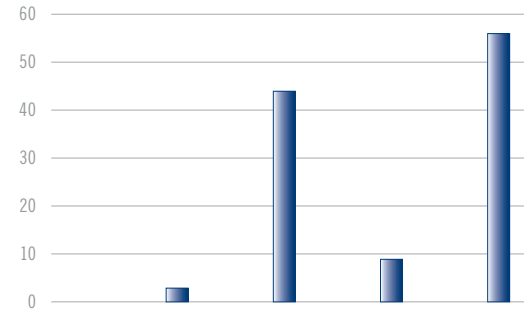
	Competition	Internal market affairs	State aid	Total
Iceland		13	6	**19**
Liechtenstein		5	1	**6**
Norway	8	73	37	**118**
Total	**8**	**91**	**44**	**143**

Opened complaint cases 2008



	Competition	Internal market affairs	State aid	Total
Iceland		7	2	**9**
Liechtenstein		4		**4**
Norway	1	31	10	**42**
Total	**1**	**42**	**12**	**55**

Closed complaint cases 2008



	Competition	Internal market affairs	State aid	Total
Iceland		2	3	**5**
Liechtenstein	2	2		**4**
Norway	1	40	6	**47**
Total	**3**	**44**	**9**	**56**

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