Annual Report 2005

EFTA SURVEILLANCE AUTHORITY

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EFTA Surveillance Authority
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Foreword

2005 was a year marked by change for the EFTA Surveillance Authority. Mr Bernd Hammermann ended his tenure as a College Member in June, after 10 years with the Authority. In August, the Authority lost its President when Mr Hannes Hafstein sadly passed away.

During the second half of the year, a new College with Mr Kurt Jaeger and Mr Kristján Andri Stefánsson started to function. At year's end, Mr Einar M. Bull's term with the Authority came to an end, and Mr Bjørn T. Grydeland took over as the Authority's President.

28 participating States with more than 455 million people make the EEA the world's largest Single Market. For Iceland, Liechtenstein and Norway, the EEA Agreement ensures open and free access to their most important trading partner, the EU. The Authority is one of the cornerstones upon which the EEA Agreement is based.

In 2005, the Authority initiated tasks in several new areas. During the year, it took up its new inspection functions in accordance with the new aviation security package. In the field of electronic communications, it handled its first notification under the eCOM notification procedure.

The Authority maintains its focus on ensuring the timely and correct implementation and application of EEA legislation by the three EFTA States. This emphasis helps to ensure that the EFTA pillar of the EEA reaches and maintains the same level of compliance with Common Market rules as the EU. The Internal Market Scoreboards issued by the Authority and the European Commission bear witness to the EFTA States' progress in this regard. Nevertheless there is room for improvement. The last Scoreboard shows that Iceland's and Liechtenstein's transposition deficits slipped back to 1.9% and 2.1%, respectively. The Authority will work to ensure that these deficits are reduced. A continued success will however require a persistent focus in the EFTA States.

The Authority's work in the field of competition law is centred on potential areas of individual breaches of the EEA Competition rules. The Authority is however increasing its use of sector inquiries to gauge the competitive situation in entire sectors of the economy. During 2005, the Authority completed a sector inquiry into the sale of sports content to new media such as 3G mobile telephones. One new sector inquiry was initiated to examine competition in the electricity markets in the EFTA States. Two other inquiries currently scrutinize the situation with regard to retail banking and business insurance. With respect to state aid the Authority took action to ensure recovery of aid that has been granted unlawfully.

The Authority's role is to ensure that the EEA Agreement is respected. In its work, it is bound to seek a proper balance between the rights and obligations under the Agreement. It is positive, both for the EEA/EFTA States and for the Authority, if disputes about the functioning of the EEA Agreement can be settled in due time and without time-consuming processes. A swift resolution of cases is important to all parties involved. Many cases have in the past year been closed with a positive outcome – also for complainants – in a short time. This has often been possible because of constructive dialogue. It is the Authority's view that these possibilities can be developed further.

Bjørn T. Grydeland, *President*

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CHAPTER 1

Introduction

The European Economic Area and the EEA Agreement

The aim of the EEA Agreement[1] is to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition. It extends the four fundamental freedoms of the Internal Market of the European Community, as well as a wide range of accompanying European Community rules and policies, to Iceland, Liechtenstein and Norway, the EFTA States that are signatories to the Agreement.[2]

As a result of the EEA Agreement, citizens and undertakings in the EFTA States have access to the EU market in generally the same way as persons and undertakings in the EU. The latter have, moreover, gained access to the markets in Iceland, Liechtenstein and Norway.

The basic provisions of the EEA Agreement are drafted in terms closely resembling the corresponding provisions of the EC Treaty governing the free movement of goods, persons, services and capital, and those on competition and other common rules, such as state aid and public procurement. The EEA Agreement also contains provisions on a number of European Community policies relevant to the four freedoms.[3] It further provides for close co-operation between the Contracting Parties to the EEA Agreement[4] in certain fields not related to the four freedoms.

1. The Agreement on the European Economic Area may be found at http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement
2. Switzerland is a member of EFTA, but not a party to the EEA Agreement.
3. Referred to in this Annual Report as horizontal areas, such as labour law, health and safety at work, environment, consumer protection, equal treatment for men and women, and company law.
4. The contracting parties to the EEA Agreement are Iceland, Liechtenstein, Norway, the 25 EU Member States and the European Economic Community.

A dynamic Agreement

Two separate legal systems are employed in parallel within the EEA. On one side, the EEA Agreement applies to relations both between the EFTA and European Community sides and between the EFTA States themselves. On the other side, European Community law applies to relations between the EU Member States. For the EEA to pursue its aim of homogeneity, the two legal systems must develop in parallel and be applied and enforced in a uniform manner. The EEA Agreement thus includes decision-making procedures for the integration into the EEA of new secondary European Community legislation.

The task of ensuring that relevant secondary European Community legislation is extended to the EEA in a timely manner rests, in the first instance, with the EEA Joint Committee. This Committee is composed of representatives of the Contracting Parties to the EEA Agreement. The EEA Agreement also provides a surveillance mechanism to ensure the fulfilment of obligations under the Agreement and uniform interpretation and application of its provisions.

The surveillance mechanism is arranged in the form of a two-pillar structure with two independent bodies. The implementation and application of the EEA Agreement within the EFTA pillar is monitored by the EFTA Surveillance Authority. The European Commission carries out the same task within the European Community pillar. In order to ensure uniform surveillance throughout the EEA, the EEA Agreement provides for co-operation, exchange of information and consultation between the two bodies on surveillance policy issues and individual cases.

Judicial protection

The EEA Agreement also has a two-pillar structure for judicial control within the EEA. The EFTA Court exercises competences in several areas similar to those of the Court of Justice of the European Communities and the Court of First Instance. These include judicial review of the EFTA States' compliance with their obligations arising from the EEA Agreement and appeals against decisions taken by the Authority.

Both the EFTA Court in the *Icelandic passenger tax* case (E-1/03) and the Court of Justice in *Ospelt* (C-452/01) have underlined that one of the main objectives of the EEA Agreement is to create a homogeneous European Economic Area. The two Courts, moreover, emphasised the need to ensure uniform interpretation of those rules of the EEA Agreement and the EC Treaty that are identical in substance. The Court of Justice held in *Ospelt* that one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the Internal Market established within the European Union is extended to the EFTA States. The EFTA Court has also confirmed in *Ásgeirsson* (E-2/03) that the EEA Agreement is to be interpreted in the light of fundamental rights. The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.

What is the EFTA Surveillance Authority?

General surveillance

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

A central role of the Authority is to ensure that the provisions of the EEA Agreement, including its Protocols and the acts referred to in the Annexes to the Agreement, are properly implemented into the national law of the EFTA States and correctly applied by their national authorities.[2] This task is commonly referred to as general surveillance. General surveillance cases are either initiated by the Authority itself or as a result of a complaint.[3]

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

Where appropriate, before concluding the informal phase, and although the Authority itself has not taken a formal position on the subject, the Directorate concerned may make enquiries in the matter. These take the form of a letter to the EFTA State in question inviting it to provide the Authority with supplementary information on the matter under examination. Where necessary, the State may be invited to adopt the measures necessary to comply with EEA law. If formal infringement proceedings are initiated, the Authority will first send the EFTA State Government concerned a **letter of formal notice**. This letter identifies the provision of EEA law that, in the Authority's view, has been infringed. The Government is invited to submit its observations on the matter. If the Authority is not satisfied with the Government's answer to the letter, or if no answer is received, the Authority may deliver a **reasoned opinion**. This document defines the final position of the Authority on the matter, states the reasons on which that position has

1. The Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice may be found at http://secretariat.efta.int/Web/legaldocuments/
2. In addition, the EFTA States have entrusted the Authority with the power to monitor the application of the EEA Agreement by the other Contracting Parties to the Agreement. The Authority can, however, only take formal action against the three EFTA States.
3. Information explaining the proceedings for non-compliance with EEA law may be found on the Authority's website at www.eftasurv.int/procedures/infringement

been based, and requires that the State take the measures necessary to bring the infringement to an end. Should the State fail to comply with the reasoned opinion, the Authority may **bring the matter before the EFTA Court**, whose judgment is binding on the State concerned.

In 2005, the Authority brought eight cases before the EFTA Court, compared to one case in 2004.[1]

Competition

The single market objectives of the EEA Agreement are also upheld through application of the EEA competition rules. The work of the Authority in the field of competition mainly concerns the direct application of the EEA Agreement to individual economic operators. The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty. The competition provisions prohibit, among other things, restrictive practices between businesses and abuses of dominant positions.

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

The EC merger control rules apply to the entire European Economic Area through the application of the EEA Agreement. The Authority provides comments and information on mergers handled by the European Commission in cases where EFTA markets are particularly affected.

The Authority may take action in cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EFTA States. In such cases, action may be taken not only directly against the undertakings, but also against the State if it has taken measures leading to the anticompetitive behaviour.

State aid

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

New state aid measures must be notified to the Authority prior to implementation. They must not be put into effect before the Authority has decided upon the case. The Authority assesses whether a measure constitutes state aid and, if it does, examines whether it is eligible for exemption. The Authority can, after a preliminary examination, decide that a measure does not contain aid, decide not to raise objections to the measure, or decide to open a formal investigation procedure.

A final decision on a state aid measure can be positive (approving the aid), negative (prohibiting the aid), or conditional (approving the aid subject to conditions). If the Authority concludes that aid has been granted without the Authority's approval, and that the aid is incompatible with the EEA Agreement, the Authority will, as a rule, order the EFTA State to reclaim the aid from the recipient.

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

1. Five of the cases concerned non-transposition by Liechtenstein of the electronic communications package (page 24). One case related to the Finnmark supplement (page 20) and another to the Norwegian gaming machines monopoly (page 22). The final case related to the failure by Iceland to recover unlawful state aid (page 50).

COLLEGE 2005
Kurt Jaeger, Einar M. Bull, Kristján A. Stefánsson
Charlotte Schaldemose Isabel Tribler

Organisation

College

The EFTA Surveillance Authority is headed by three College Members (the College). The Members are appointed by common accord of the Governments of the EFTA States for a renewable period of four years. A President is appointed from among the Members, also by common accord of the Governments. The Members are completely independent in the performance of their duties. They must not seek or take instructions from any Government or other body, and must refrain from any action incompatible with their duties. In the course of 2005, the entire College was replaced. The Authority's President, Mr Hannes Hafstein, sadly passed away in August 2005. Mr Bernd Hammermann ended his tenure in June 2005, after ten years with the Authority, while Mr Einar M. Bull finished his term at the end of the year.

During 2005, the composition of the College was:

- Hannes Hafstein, *President* († 07.08.05)
- Einar M. Bull, *College Member* (01.01.05 – 06.09.05) and *President* (07.09.05 – 31.12.05)
- Bernd Hammermann, *College Member* (left office on 30.06.05)
- Kurt Jaeger, *College Member* (took office on 01.07.05)
- Kristján Andri Stefánsson, *College Member* (took office on 01.11.05)

On 14 June 2005 Bjørn T. Grydeland was appointed President of the Authority with effect from 1 January 2006. Hence, from 2006 the composition of the College is:

- Bjørn T. Grydeland, *President*
- Kurt Jaeger, *College Member*
- Kristján Andri Stefánsson, *College Member*

Directorates

The Authority's work is organised through four departments: the Internal Market Affairs Directorate, the Competition & State Aid Directorate, the Legal & Executive Affairs Department and the Administration Department. The distribution of functions between the Departments during 2005 is outlined on the Authority's website.[1] The Authority's organisation chart is found at page 13.

Budget

The activities and operating expenses of the Authority are financed by contributions from Liechtenstein, Iceland and Norway. The three States contribute 2%, 9% and 89%, respectively, to the Authority's net budget. The Authority's budget for 2005 amounted to approximately EUR 10 million.

Personnel

In 2005, the Authority had a staff of 55 people, representing 15 different nationalities. A majority (58%) of the staff members comes from the EFTA States of which staff of Norwegian nationality constitutes the major part (44%). The Authority finds it valuable to also recruit from non-EFTA States as the diversity of cultures, skills and competencies has proven beneficial to the Authority's work. In addition to its core staff, the Authority also recruits a number of temporary officers, national experts and trainees for short time periods. These constitute an important supplement

1. www.eftasurv.int/about/dbaFile3778.html

ADMINISTRATION

From left to right

Claudia Candeago
Jurg Malm Jacobsen
Director Thomas Langeland
Kåre Antonsen
Torbjørn Strand Rødvik
Anne Valkvae

Not present

Anne Günther
Robin Parren
Battista Vailati

to the regular staff. In 2005, the Authority employed two temporary officers, eight national experts and four trainees.

The Authority follows an equal opportunity policy, the main purpose of which is to develop and maintain a balanced professional working environment. Gender equality is recognised as being a basic principle of democracy and respect for the individual. To encourage gender equality among Authority staff, it is the Authority's policy to increase awareness of the importance of an equal opportunity policy within the Authority, in particular, when recruiting new staff members and addressing challenges arising from the need to reconcile family and professional lives. Of the total number of core staff, the gender distribution is 45% women and 55% men.

The Authority enjoys a low rate of sick leave. In 2005, the rate was 1.88%.

The general personnel situation of the Authority remains difficult in terms of number of positions. The primary workload remains high and new tasks are regularly added to the Authority's field of responsibilities, often without an adequate increase of necessary resources. Consequently, the challenges faced by the organisation steadily increase.

Staff turnover in 2005 was moderate with three staff members leaving the organisation and four new staff members being recruited. However, staff turnover remains a challenge due to the Authority's employment practice of awarding employment contracts of three years, renewable once. Historically, the average time of staff employment is less than four years. Despite this turnover rate, the Authority enjoys a high level of staff competence and efficiency.

In order to compensate for limited human resources, the Authority endeavours to give its staff the possibility to develop via training, run an efficient organisation, and utilise modern information management systems. During 2005, the Authority continued the development of its information management system with particular focus and priority on electronic exchange of information with the EFTA States, including eCOM notifications, state aid notifications and general notifications.

Information policy – openness and transparency

The Authority's information policy is based on the principles of openness and transparency. Within the limits imposed by provisions on professional secrecy and the protection of legitimate public and private interests, the Authority aims to inform the public and interested parties as widely as possible about its activities.

In 2005, the EFTA Surveillance Authority maintained a high focus on informing the public of its activities and on the implementation and application of the EEA Agreement. The objective is to stimulate public interest in the EEA Agreement, to improve the awareness and understanding of the function and the work of the Authority and, thus, promote the proper functioning of the Agreement.

As part of its information activities, the Authority:

- publishes press releases, providing news mainly on the decisions taken by the Authority (in 2005, 46 press releases were issued);
- publishes its Annual Report;
- issues twice yearly Internal Market Scoreboards in parallel with the Commission's Scoreboards, providing information on the performance of the EFTA States with regard to the transposition of EEA directives into national legislation;
- maintains a website – www.eftasurv.int - with, *inter alia*:
  - press releases and other news items;
  - general information about the Authority;
  - notifications, decisions, reports; and
  - information about the various fields of application of the EEA Agreement; and
- informs visitors' groups on its activities and the EEA Agreement (in 2005, on average 4 to 5 groups per month).

However, in order to safeguard public and private interests, which impose limits as to what information or documents may be disclosed, the Authority is bound to keep confidential all information covered by rules on professional secrecy contained in the EEA Agreement or the Surveillance and Court Agreement. Furthermore, restrictions apply, *inter alia*, to documents originating outside the Authority and documents and information relating to the Authority's internal deliberations. The Authority's Information Guidelines are available on the website.[1]

1. www.eftasurv.int/information/dbaFile449.html

Organisation chart

1 January 2006

COLLEGE

Kristján A. Stefánsson – Bjørn T. Grydeland – Kurt Jaeger
President

Isabel Tribler A
Charlotte Schaldemose O

COMPETITION & STATE AID

Amund Utne
Director

Diane Tanenbaum A

Competition

Tormod Sverre Johansen
Deputy Director

Dessy Choumelova SO
Cécile Odello SO
Kjersti Bjerkebo O
Justin Menezes O
Hrafnkell Óskarsson O
Hanne Zimmer O
Lars Tore Fredriksen NE
Runa Monstad NE
Per Arne Solend T

State Aid

Rolf-Egil Tønnessen
Deputy Director

Annette Kliemann SO
Marianne Clayton O
Lena Sandberg-Mørch O
Maria J. Segura Catalán O
Espen Bakken NE
Marie Wiersholm NE
Siri Fjeld-Nielsen T

LEGAL & EXECUTIVE AFFAIRS

Niels Fenger
Director

Claire Taylor A

Michael Sanchez Rydelski
Deputy Director

Per Andreas Bjørgan SO
Elisabethann Wright SO
Bjørnar Alterskjær O
Arne Torsten Andersen O
Ane Grimelid T

Library

Matthildur Steinsdóttir

Press & Information

Tor Arne Solberg-Johansen SO
Charlotte Schaldemose O

ADMINISTRATION

Thomas Langeland
Director

Finance & Human Resources

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

Registry

Anne Valkvae A

IT

Jurg Jacobsen
Deputy Director

Torbjørn Strand Rødvik SO
Battista Vailati O

INTERNAL MARKET AFFAIRS

Hallgrímur Ásgeirsson
Director

Adinda Batsleer A
Tuija Ristiluoma A
Inger-Lise Thorkildsen A

Goods & Persons Unit

Erik Jønsson Eidem
Deputy Director

Ólafur J. Einarsson O
Hallvard Gorseth O
Mia S. Hodgson O
Eeva Kolehmainen O
Tuula Nieminen O
Karin Büchel NE
Sigrún Kristjánsdóttir NE

Services & Capital Unit

Ragnhild Behringer
Deputy Director

Erik A. Mathisen SO
Frank Büchel O
Einar Hannesson O
Rúnar Örn Olsen O
Camilla Rise O
Joseph Noel Vasquez NE
Torje Sunde T

Food Safety & Environment Unit

Ketil Rykhus
Deputy Director

Nicola Britta Holsten SO
Patricia González Gálvez O
Claire Koeniguer O
Ólafur Valsson O
Guðriður Kristjánsdóttir NE
Signe Greve-Isdahl T

A: Assistant – SO: Senior Officer – O: Officer – NE: National Expert – T: Trainee

CHAPTER 2

Internal Market

The EFTA States and the Internal Market rules

One of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the Internal Market established within the European Union is extended to the EFTA States. The Internal Market integrates national markets and ensures the free movement of people, goods, services and capital in the whole EEA. This has created new business opportunities, opened up markets and promoted economic growth.

While the principles of free movement are enshrined in the main text of the EEA Agreement, the specific rules are laid down in directives, regulations and decisions, which are incorporated into the Agreement. The EEA States must then implement the rules in a timely and correct manner, so that citizens can enjoy the same benefits and businesses can operate under the same conditions in all EEA States, instead of having to comply with 28 different sets of rules. The EEA States are also required to ensure that the Internal Market rules are correctly interpreted and applied by their national authorities. Furthermore, it shall follow from their internal legal order that EEA rules prevail in cases of conflict between national laws and EEA rules.

Under the EEA Agreement, it is the responsibility of the EFTA Surveillance Authority to ensure that the Internal Market rules are promptly and properly implemented and applied by the EFTA States. The Authority is vested with the necessary powers, comparable with the powers of the European Commission, to perform these duties and to take action in response to a possible infringement of Internal Market rules.

The Internal Market rules are constantly developing and becoming more elaborate. The smooth functioning of the Internal Market, as regards the EFTA States, requires mutual understanding and good co-operation between the Authority and the EFTA States. The Authority carries out different administrative tasks as provided for in the Internal Market rules. If problems are discovered, they are often resolved through informal exchanges of information and discussions between the Authority's staff and representatives of the EFTA States.

If the Authority considers that an issue warrants formal infringement proceedings, it issues a letter of formal notice to the EFTA State concerned, requesting it to submit its observations by a specified date. In light of the reply, or absence of a reply, from the EFTA State concerned, the Authority may decide to deliver a reasoned opinion to that State. The reasoned opinion definitively sets out the reasons why the Authority considers there to be an infringement of EEA law and calls on the EFTA State to comply with EEA law within a specified time period, normally two months. If the EFTA State fails to comply with the reasoned opinion, the Authority may decide to bring the case before the EFTA Court.

Types of cases handled by the Internal Market Affairs Directorate

Own-initiative cases

Any case (other than complaints) where the Authority, *either at a pre-litigation stage or through infringement proceedings*, has formally expressed concerns that EEA law has not been complied with by one or more of the EFTA States. Such cases affect all areas of EEA law, including failure to notify, or make part of their internal legal order, EEA acts, as well as wrongful application of those acts.

Complaints

Written communications to the Authority from economic operators or individuals reporting measures or practices alleged not to be in conformity with EEA rules. Anyone may submit a complaint against any of the EFTA States. The Authority examines all complaints falling within its competence and passes on to the European Commission complaints which fall within the competence of that body.

Preliminary examinations

Cases opened by the Authority to examine *e.g.* whether national laws intended to implement directives actually conform to the wording and substance of the directive in question. Such a case may well become an "own-initiative" case, as referred to above, if, following an initial examination, the Authority considers that it has sufficient reason to question the legality of national laws or the application of those laws.

Management tasks and reports

Management tasks and reports include examinations relating to the telecommunications sector, or the adoption and publication of guidelines relating to product safety, summary reports of national reports on *e.g.* health and safety, or the calculation and publication of thresholds applicable in the field of public procurement.

Draft Technical Regulations (DTR)

The Authority examines draft notifications from the EFTA States of technical regulations concerning products and provisions relating to *e.g.* Information Society services.

Inspections

The Authority performs on-the-spot inspections to verify that the EFTA States comply with their obligations, especially relating to food safety and aviation security.

Case handling 2005

The task of the Authority's Internal Market Affairs Directorate (IMA) is general surveillance of 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 rules concern the "four freedoms" – free movement of goods, persons, services and capital – supplemented by a number of so-called horizontal provisions covering matters such as health and safety at work, labour law, equal treatment for men and women, consumer protection, environment, and company law.

In 2005, a total of 315 Internal Market cases[1] were opened and 230 cases were closed. At the end of 2005, the Authority was examining 609 cases, of which 120 were complaints. The remaining 489 cases have been opened by the Authority either to carry out management tasks entrusted to it by EEA legislation (*e.g.* reporting tasks, general conformity assessment of certain legislative sectors, examination of draft technical regulations, and food safety inspections), or on the Authority's own initiative to examine whether the EFTA States comply with their EEA obligations.

A listing of open Internal Market cases at the end of 2005 and closures during that year can be consulted at the Authority's website.[2]

Figures 1 and 2 show how the completion and initiation of new cases during 2005 are spread by type.

Figure 1

New cases in 2005 by type and country

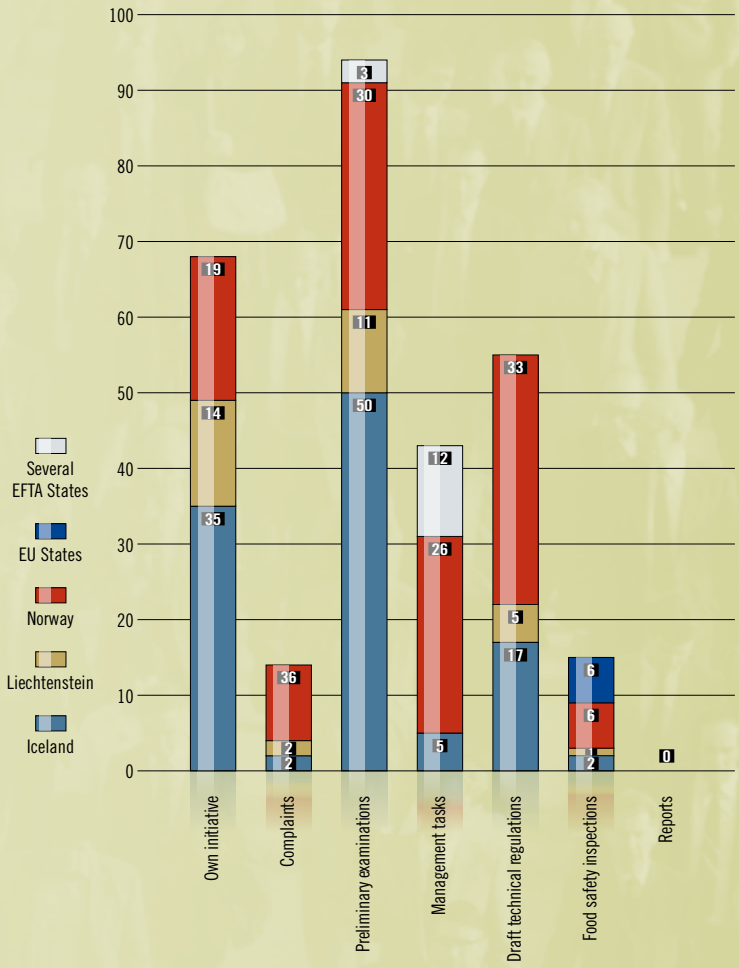
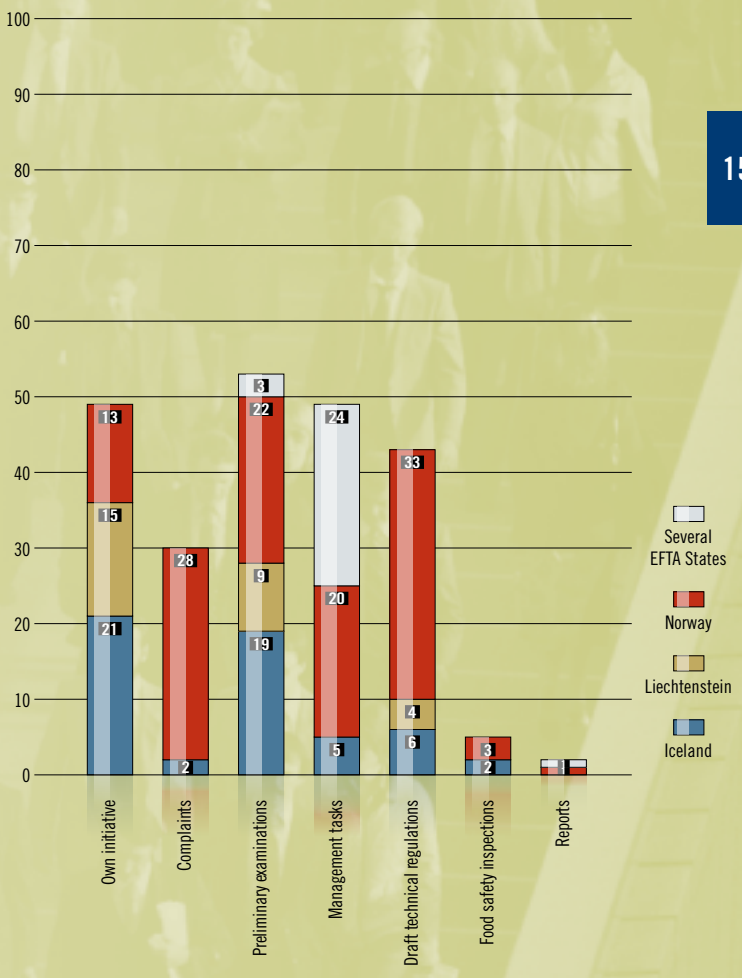


Figure 2

Closures in 2005 by type and country



1. "Case" is defined as an assessment relating to the implementation or application of EEA law, as well as all other relevant tasks registered during the year for the purpose of fulfilling the Authority's Internal Market Affairs Directorate's objectives. A case need not be related to an infringement of EEA rules, but can also relate to an administrative managerial task performed by the Authority.
2. www.eftasurv.int/information/annualreports/dbaFile8507.html

Own-initiative cases and preliminary examinations

In 2005, 68 "own-initiative" cases were opened, compared to 100 in 2004 and 41 in 2003. Such cases reflect a suspicion by the Authority that EEA law may have been infringed. However, they do not necessarily lead the Authority to initiate formal infringement proceedings, as the cases might be solved informally or proven unfounded (see next page for infringement statistics).

Of the 68 new own-initiative cases, 35 (51%) concerned Iceland and mostly related to an apparent failure by Iceland to timely notify the Authority and implement new directives and regulations. 19 (28%) cases concerned Norway and 14 (21%) Liechtenstein.

In addition, in 2005, the Authority registered 94 "preliminary examinations", mostly to check whether national laws were in conformity with the Agreement. Such cases are opened either as a result of new EEA acts entering into force, or the EFTA States adopting new laws in areas that are already regulated by EEA law. A majority of these examinations concerned Iceland (56%), followed by Norway (35%) and Liechtenstein (12%).

Complaints

As in previous years, the majority of new complaints, 36 or 90%, were directed against Norway. Two complaints were received against Iceland and two against Liechtenstein. Compared to 2004, the number of complaints received is down by 7.5%.

At the end of 2005, 120 complaints cases remained open of which 85% concerned Norway, 11% Iceland, and 4% Liechtenstein. The 2005 number for Iceland is relatively low compared to previous years.

Most complaints are received concerning free movement of persons, 19 in total, which is, furthermore, more than twice as many as two years ago.

Figure 3

Complaints received 2001-2005 by country

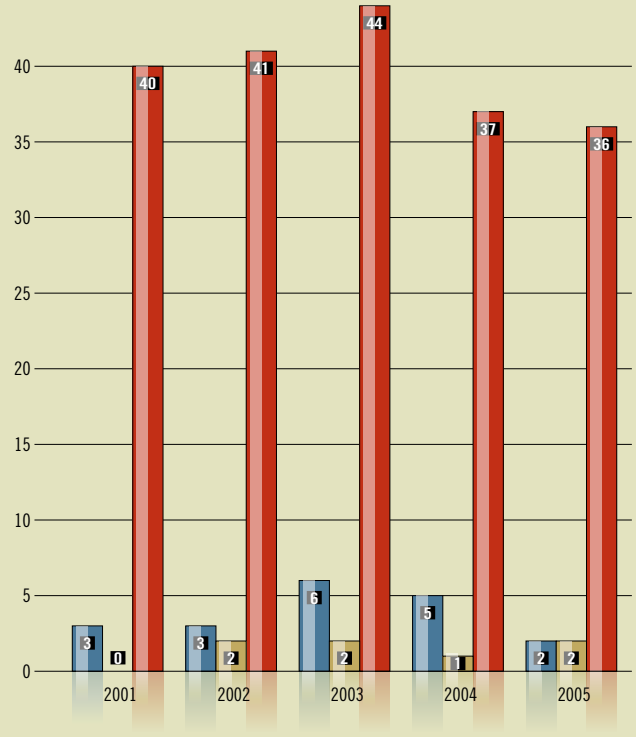
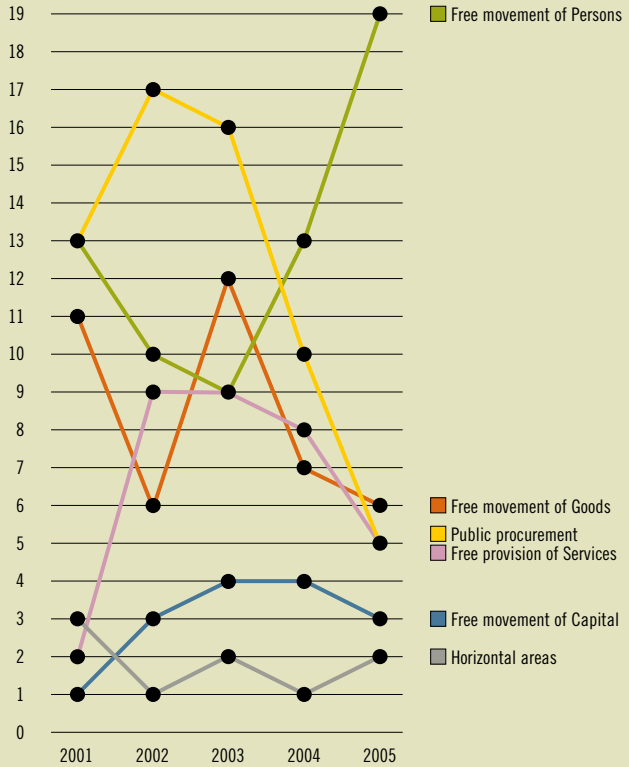


Figure 4

Complaints received 2001-2005 by sector



Formal infringement proceedings

In 2005, the Authority initiated infringement procedures (sent a letter of formal notice) in 73 cases, bringing the total number of pending infringement cases against the EFTA States to 123 at the end of the year.

Of the new infringement cases, 31 (42%) were directed against Iceland, 26 (36%) against Norway and 16 (22%) against Liechtenstein.

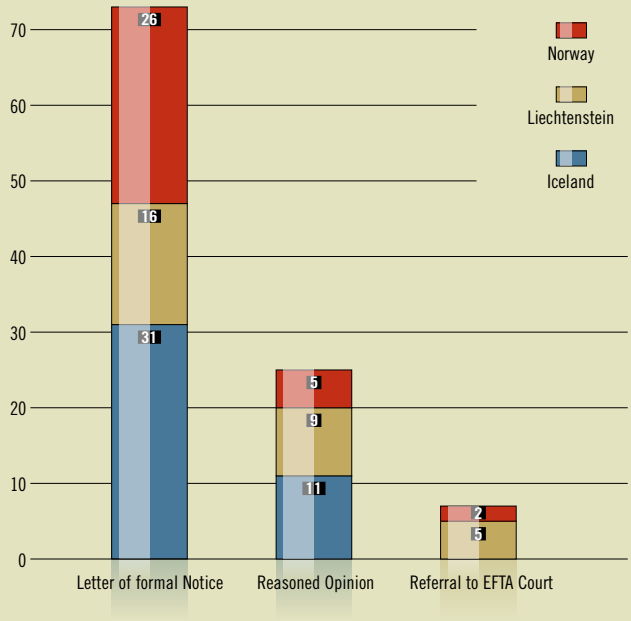
Failure to implement EEA Acts into national laws was the thorniest issue for the EFTA States, accounting for 98%, 81%, and 53% of new infringement proceedings launched by the Authority against Iceland, Liechtenstein, and Norway, respectively.

The Authority issued 25 reasoned opinions and brought 7 cases relating to the areas of law handled by the Internal Market Affairs Directorate before the EFTA Court.

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

Figure 5

Formal action 2005 by stage of infringement proceedings and by country



Implementation statistics

Twice a year, the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard showing how well the EFTA States perform with regard to implementation of directives. No equivalent information is published for regulations and decisions.

By the end of 2005, the total number of directives incorporated into the EEA Agreement was 1,604. Iceland was required to implement 1,391 of these into their national legal order. The corresponding figures for Liechtenstein and Norway were 1,372 and 1,545. At year's end, Iceland had notified full transposition of 98.2% of the directives applicable to them. For Liechtenstein and Norway, the figures were 97.6% and 99.2% respectively.

The implementation figures do not reflect the quality of the implementing measures notified by the EFTA States, or the application of these. 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 about one third of the notified acts has been fully checked. At the end of 2005, the Authority, based on such conformity assessment, estimated that 29.4% of the legislation notified by the EFTA States conformed to the EEA Acts (31.8% in 2004) that they were intended to implement.

The implementation status database on the Authority's website[1] allows for searching information concerning implementation of directives as notified to the Authority by the EFTA States. The database provides the titles of national measures adopted by those States in order to comply with EEA directives.

Latest Scoreboard findings
as per 30 November 2005 [2]

With an average transposition deficit of 1.6%, the EFTA States together fail to meet the interim target of a deficit of less than 1.5%.

- Liechtenstein 2.1%
- Iceland 1.9%
- Norway 0.8%

1. Implementation status database for EEA directives: www.eftasurv.int/?showWithHandler=node/web/database
2. The latest EFTA Scoreboard was published in February 2006, showing figures from November 2005.
The EFTA Scoreboard can be found at:
http://www.eftasurv.int/information/internalmarket
The EU Scoreboard is available at:
http://europa.eu.int/comm/internal_market/score/index_en.htm

Problems with implementation of labour law directives

Directives in the field of labour law establish minimum requirements for protection of workers while maintaining the right of the EEA States to provide for a higher level of working conditions. Delayed or incorrect implementation entails that workers may be deprived of rights they derive from EEA law.

The *Directive on Parental leave* (96/34/EC) implements the framework agreement on parental leave. It grants men and women workers an individual right to a parental leave for at least three months to enable them to take care of a child. Liechtenstein notified the national measures implementing the Directive in January 2004. According to Liechtenstein law, a three month parental leave could be claimed until the end of the year when the child turns three years. However, only parents whose children were born after 31 December 2003 had a right to parental leave. Such a *"cut-off"* provision is not in compliance with the Directive. Consequently, a letter of formal notice was sent to Liechtenstein in February 2005. Liechtenstein has informed the Authority that it intends to abolish the cut-off provision.

The *Directive on part-time work* (97/81/EC) implements the framework agreement on part-time work concluded between the general cross-industry organisations (UNICE, CEEP and the ETUC). The purpose of the framework agreement is to provide for the removal of discrimination against part-time workers and to facilitate the development and improve the quality of part-time work.

The *Directive on involvement of employees in SE* (2001/86/EC) governs the involvement of employees in the affairs of European public limited-liability companies *(Societas Europaea, SE)*.

During the first half of 2005, reasoned opinions were delivered to Liechtenstein for failure to fully implement both of these Directives.

The *Working Time Directive* (93/104/EC, replaced by Directive 2003/88/EC), lays down the minimum safety and health requirements for the organisation of working time and includes, for instance, provisions concerning daily rest, weekly rest periods and maximum weekly working time.

Solution to a professional qualifications case through SOLVIT

In 2005, the Authority, for the first time, made use of the SOLVIT network in order to seek a solution to a complaint regarding the misapplication of EEA law by an EFTA State. SOLVIT is an on-line problem solving network in the EEA with the aim to solve problems that arise for individuals and businesses from the incorrect application of Internal Market legislation.[1] The system began operating in July 2002. The EFTA States are full participants in the network and there is a SOLVIT centre in every EEA State.

The SOLVIT centres co-operate directly via a database. The home centre, *i.e.* the SOLVIT centre in the EEA State in which a problem is raised, enters the case in the database. The lead centre, *i.e.* the SOLVIT centre in the EEA State in which the problem occurred, takes responsibility for seeking to resolve the case.

An overview of the cases submitted to the SOLVIT database from July 2004 until October 2005 shows that Norway received five cases from other EEA States as lead centre and submitted three cases against other EEA States as home centre. Iceland received no cases, but submitted five cases. Although the number of cases with regard to Norway and Iceland is still below the EEA average, this is a steady increase compared to the previous period. Liechtenstein neither received nor submitted any cases in SOLVIT during the period.

The Authority will refer complaints to SOLVIT if the problem is relatively simple and stands a good chance of being solved within the ten weeks deadline.

The complaint referred to SOLVIT by the Authority in 2005 concerned the recognition in Norway of professional qualifications from other EEA States. A Dutch specialist nurse had been refused authorisation to work as a general care nurse in Norway and complained to the Authority. Following the referral to SOLVIT, the Norwegian authorities accepted his Dutch qualifications on the condition that he completed an adaptation period to make up for differences in the matters covered by his Dutch qualifications and the Norwegian requirement. The Authority assessed the solution to be in conformity with EEA law and closed the complaint case.

1. The SOLVIT website is found at http://europa.eu.int/solvit/site/index_en.htm In addition to the EU languages, the website also exists in Norwegian and Icelandic.

The *Directive on working time in excluded sectors* (2000/34/EC) extends the scope of the Working Time Directive to cover certain sectors of activity. It also contains specific provisions, *inter alia*, on doctors in training. The latter Directive should have been implemented with regard to doctors in training no later than 1 August 2004. In April 2005, the Authority delivered a reasoned opinion to Iceland for failure to implement the provisions in that Directive on working time for doctors in training.

The *Directive on Information and consultation of employees* (2002/14/EC) establishes a general framework setting out minimum requirements for the right of employees to information and consultation. In June 2005, the Authority sent a letter of formal notice to all EFTA States for failing to implement the Directive. Norway subsequently notified the national measures intended to implement the Act. The cases against Iceland and Liechtenstein were followed up with reasoned opinions in November 2005.

The Liechtenstein helplessness allowance

In April 2005, the EFTA Surveillance Authority sent a letter of formal notice to Liechtenstein regarding a requirement of residence in Liechtenstein for entitlement to helplessness allowance (*Hilflosenentschädigung*). By applying the residence requirement in cross-border EEA situations, Liechtenstein fails to fulfil its obligations under the *Social Security Regulation* (1408/71/EEC).

All residents in Liechtenstein who permanently require a considerable degree of surveillance or help to carry out daily tasks are entitled to a helplessness allowance. In 2004, the Authority received a complaint from a former worker in Liechtenstein residing in Austria who was in receipt of an old-age pension from Liechtenstein. He permanently required help to carry out most of his daily tasks, but Liechtenstein had rejected his application for helplessness allowance because he did not reside in Liechtenstein.

Liechtenstein claims that the helplessness allowance is a special non-contributory social security benefit that, pursuant to its listing in an Annex to the Social Security Regulation, should be granted only to residents in Liechtenstein.

The European Court of Justice has held that benefits aimed at improving the state of health and quality of life of persons reliant on care are essentially intended to supplement sickness benefits. Such benefits are regular sickness benefits in cash under the Social Security Regulation even if they are included in the Annex to the Regulation listing special non-contributory benefits. Consequently, they shall be paid to persons covered by the social security legislation of an EEA State even if they do not reside in that State.

The Authority concluded in its letter of formal notice that the allowance cannot be considered as a special non-contributory benefit that can be confined to residents, because it is not based on the personal financial need of the recipient. It also concluded that the allowance's features make it appear as a regular sickness benefit in cash under the Social Security Regulation. Therefore the benefit should be paid to employed and self-employed persons in Liechtenstein, unemployed persons who receive unemployment benefit from Liechtenstein and pensioners who draw pension from Liechtenstein, as well as members of their families, irrespective of where they reside.

Discriminatory rules on calculation of survivor's pension

The Norwegian Public Service Pension Act provides that widows, whose deceased spouses became members of the Public Service Pension Fund before 1 October 1976, receive a survivor's pension without curtailment regardless of whether they receive an own pension or have other income. By contrast, a survivor's pension for widowers is, in identical situations, subject to a reduction if the widower has an own pension or other income. Consequently, widowers are treated less favourably than widows.

The Authority considers that the Norwegian rules are contrary to Article 69(1) EEA which provides that men and women should receive equal pay for equal work, and the *Equal Treatment in Occupational Social Security Schemes Directive*.[1] Equal treatment must be ensured insofar as a pension accrued on the basis of the spouse's periods of employment after 1 January 1994 is concerned. Thus, in October 2005, the Authority sent a reasoned opinion to Norway. Norway has to take the measures necessary to comply with the reasoned opinion before the end of February 2006. The Authority will then assess whether any possible future amendments fulfil the requirements of EEA law.

1. Directive 86/378/EEC, as amended by Directive 96/97/EC.

The Finnmark supplement and migrant workers

In April 2005, the EFTA Surveillance Authority referred a case to the EFTA Court regarding the Finnmark supplement to family allowances. The Authority's submission concluded that, according to the *Social Security Regulation* (1408/71/EEC), Norway may not restrict the entitlement of a migrant worker who is covered by Norwegian social security legislation to family allowances, including the regional supplement, due to the fact that her child resides in another EEA State. The Authority also held that the regional residence requirement constituted indirect discrimination contrary to the *Freedom of Movement of Workers Regulation* (1612/68/EEC).

Norway grants a regional family allowance supplement to families residing in the northernmost county of Finnmark or in parts of the neighbouring county of Troms. In 1999, the Authority received a complaint from a frontier worker employed in Finnmark, but residing with her child across the border in Finland. She had been granted family allowances in accordance with the *Social Security Regulation*. The Norwegian authorities, however, rejected her application for the regional supplement because her child did not reside in Finnmark.

The Authority's submission was registered with the EFTA Court as Case E-3/05. The written procedure before the Court was finalized during 2005 and an oral hearing was subsequently held on 14 February 2006.

Liechtenstein residence requirements not in line with EEA law

In July 2005, the EFTA Court rendered its decision in a direct action by the Authority concerning the compatibility of a Liechtenstein provision which requires that at least one member of the management board and the executive management of a bank be resident in Liechtenstein.

The EFTA Court recalled its two previous decisions concerning the compatibility of Liechtenstein residence requirements with the right of establishment.[1] It concluded that, as in the two previous cases, the effect of the residence requirement at issue was to place nationals of other EEA States at a disadvantage compared to Liechtenstein nationals. The Court thus concluded that the Liechtenstein provision constituted covert discrimination and a restriction within the meaning of Article 31 EEA.

The EFTA Court considered that neither the fact that the residence requirement constituted a minimum requirement, nor the fact that the Liechtenstein provision did not require practice of a particular profession, changed this conclusion. It also rejected the claim by the Liechtenstein Government that, since the provision affects only 35 people it did not have an appreciable effect on the right of establishment. The Court repeated its previous position that any restriction, however minor, is prohibited.

1. Case E-3/98 - *Rainford-Towning* and Case E-2/01- *Dr Franz Martin Pucher.*

Liechtenstein rules on securities for procedural costs reviewed by the EFTA Court

In response to a request for an advisory opinion, the EFTA Court ruled on Liechtenstein provisions on securities for costs

Section 56 of the Liechtenstein Zivilprozessordnung (ZPO) concerns the nature of the security that may be deposited for the coverage of costs in civil actions before the Liechtenstein courts. It provides that, in the absence of an agreement by the parties, cash, or, at the court's discretion, various types of securities of domestic origin (*e.g.* deposits in a savings account in a Liechtenstein bank) must be provided. In July 2005, the EFTA Court rendered its opinion on whether this provision of Liechtenstein law was compatible with EEA law.

The EFTA Court held that the provision of foreign security, such as those relevant to the present case, constituted capital movements within the meaning of Article 40 EEA. The difference in treatment, to which Section 56 ZPO gave rise, impeded claimants in court proceedings in Liechtenstein from posting security that originated in an EEA State other than Liechtenstein.

The Court considered that rules on security for costs could influence the possibilities for the parties in a legal dispute to protect their legitimate interests by recourse to the judicial system. It recognised that enforcement of claims on foreign security deposits in Liechtenstein might be difficult since Liechtenstein is not a member of the Lugano Convention. However, some means of security originating in another EEA State did not raise difficulties additional to those related to domestic securities. Thus, an outright exclusion of any security originating in other EEA States could not satisfy the conditions of proportionality. Similarly, a decision by a national court that excluded security on the sole ground that it was not of domestic origin would be disproportionate. The decisive question, therefore, would be whether procedural costs could be recovered without additional difficulties caused by, *inter alia*, litigation proceedings or other cumbersome recovery procedures abroad. This is a question for the national court to resolve.

The Authority brings the Norwegian gaming machine monopoly before the EFTA Court

In summer 2003, the Norwegian Parliament adopted new legislation providing for a monopoly for Norsk Tipping AS on the operation of gaming machines offering money prizes. Norsk Tipping is a state-owned company which already enjoys a monopoly on popular forms of gambling such as lotto and football betting. The Authority received complaints from several private operators who had so far been allowed to operate gaming machines and who alleged that the legislation infringed their freedom to provide services and their right of establishment, provided for in Articles 31 and 36 EEA.

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

The Authority does not dispute that a wish to combat gaming addiction is a laudable aim capable, in principle, of justifying a restriction. However, it considers that Norway has not shown that its gaming policy is consistent enough to justify such an extensive monopoly. Moreover, the Authority regards the legislation to be contrary to the principle of proportionality, as the objectives pursued by the legislation can been reached by less restrictive means, *e.g.* imposing more stringent conditions on the private operators running gaming machines today.

In parallel with the Authority's proceedings, the issue of the legality of the monopoly has been pending before the Norwegian Courts. Concurring with the Authority's reasoned opinion, Oslo City Court *(Oslo Tingrett)* concluded in October 2004 that Norwegian law was contrary to the EEA Agreement. On 26 August 2005, the Court of Appeal *(Borgarting Lagmannsrett)* reversed that judgment. That decision was appealed to the Norwegian Supreme Court who decided to hear the case in a plenary session in January 2006. On 17 October 2005, the Supreme Court decided not to request an advisory opinion from the EFTA Court.

As the case raised important questions of EEA law that ought to be assessed on a European level by the EFTA Court, the Authority decided on 17 November 2005 to bring the case before the EFTA Court. Subsequently, on 5 December 2005, the Norwegian Supreme Court decided to postpone its further proceedings and await the EFTA Court's decision.

The EFTA Court rules in the field of life assurance

The EFTA Court ruled in November 2005 on the compatibility of a requirement in Norwegian insurance law that costs which accrue when life assurance contracts are entered into have to be charged and paid no later than the date when the first premium payment is due.[1]

The Authority argued that such a requirement limited consumer choice by preventing consumers in Norway from entering into contracts with life assurance providers in the EEA that distribute the payment of contract completion costs over a period of time. Furthermore, the requirement limited the possibility for assurance undertakings authorised in other EEA States to market such products in Norway.

The Norwegian Government submitted, *inter alia*, that the contested requirement was both suitable and necessary to provide consumer protection through increased awareness of the price for concluding life assurance contracts.

The Court held that the rules at issue may be suitable for achieving the goal of consumer protection. However, it was considered that the rules were disproportionate. The Court held that consumers can be provided with necessary information about the essential elements of the life assurance contract in order to enable them to make an informed choice by less restrictive means, for example by requesting that life assurance providers supply more specific information.

Conformity assessment of national legislation notified under Financial Services Action Plan measures

On 30 November 2005, 23 directives adopted under the Financial Services Action Plan (FSAP)[2] were in force in the EU. In the EEA, 18 of these were in force, out of which 12 were fully implemented by all of the three EFTA States.

In December 2005, the Internal Market Affairs Directorate launched a project aimed at examining the conformity of notified national measures under the relevant EEA Acts. It is foreseen that the major part of this project will be carried out during 2006.

1. Case E-1/05 *EFTA Surveillance Authority* v. *The Kingdom of Norway.*
2. For further information on the FSAP see: http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

A case on the Icelandic Act on Lotteries is closed

In late 2004, the EFTA Surveillance Authority delivered a reasoned opinion to Iceland concluding that an Act on Lotteries and Prize Draws infringed the EEA Agreement. The Act prohibited all Icelandic residents from trading in or selling tickets for foreign lotteries or other equivalent prize draws, and from undertaking any work related thereto.

The Authority considered the Article to be contrary to Article 36 EEA. This was because it inevitably placed foreign lottery providers at a disadvantage when they tried to market their services in Iceland. It also restricted the right of establishment provided by Article 31 EEA by excluding a company originating in another EEA State from offering its services through an agent or representative office in Iceland.

Following receipt by Iceland of the reasoned opinion, the Icelandic Parliament enacted a new Act on Lotteries repealing previous legislation as per 1 July 2005. As a result, the restrictions giving rise to this action were abolished. The Authority, therefore, decided to close the case.

Liechtenstein fails to transpose the eCOM regulatory framework

Liechtenstein taken to the EFTA Court for failure to transpose regulatory framework for electronic communications

On 22 November 2005, the EFTA Surveillance Authority decided to bring the failure by Liechtenstein to implement the 2002 regulatory framework for electronic communications before the EFTA Court in Luxembourg. With this step, the Authority followed a similar action launched by the European Commission against a number of EU Member States in 2004.

The decision to bring the matter before the EFTA Court concerned the non-transposition of the following EEA legislation into national law:

- the *Access Directive* (2002/19/EC), which sets out rules for a multi-carrier marketplace, ensuring access to networks & services, interoperability, etc.;
- the *Authorisation Directive* (2002/20/EC), which replaces individual licences by general authorisations to provide communications services;
- the *Framework Directive* (2002/21/EC), which outlines the general principles, objectives and procedures;
- the *Universal Service Directive* (2002/22/EC), which guarantees basic rights for consumers and minimum levels of availability and affordability; and
- the *Directive on Competition* (2002/77/EC), which consolidates previous liberalisation directives.

The *Directive on privacy and electronic communications* (2002/58/EC), which concerns the protection of privacy and personal data communicated over public networks and also forms part of the new regulatory framework, is the object of separate infringement proceedings initiated by the Authority against Liechtenstein.

The 2002 regulatory framework is characterised by four main policy objectives: flexibility, legal certainty, technological neutrality, and harmonisation of application. It aims at further liberalising and harmonising the market for electronic communications networks and services in Europe.

The regulatory package entered into force in the European Communities in mid 2003. Its incorporation into the EEA Agreement had, however, been delayed. Liechtenstein was required to transpose the Directives into national law before 1 November 2004. The Authority initiated infringement proceedings against Liechtenstein in December 2004. At the time of referral to the EFTA Court, Liechtenstein had implemented none of the said Directives into national law.

INTERNAL MARKET AFFAIRS DIRECTORATE

In front from left to right

Adinda Batsleer, Claire Koeniguer, Ólafur J. Einarsson, Director Hallgrímur Ásgeirsson, Helen Pope, Camilla Rise

At the back from left to right

Nicola Britta Holsten, Torje Sunde, Ragnhild Behringer, Hallvard Gorseth, Mia Salborn Hodgson, Eeva Kolehmainen, Patricia González Gálvez, Sigrún Kristjánsdottir, Rúnar Örn Olsen, Ólafur Valsson, Joseph Noel Vasquez, Karin Büchel, Erik J. Eidem, Tor Bjørdal, Ketil Rykhus

Not present

Frank Büchel, Signe Greve-Isdahl, Einar Hannesson, Guðriður Kristjánsdóttir, Erik A. Mathisen, Tuula Nieminen, Tuija Ristiluoma, Inger-Lise Thorkildsen

eCOM: The Authority scrutinises first notifications of draft national regulatory measures

The EFTA Surveillance Authority has been preparing for its new tasks pursuant to the 2002 regulatory framework for electronic communications since the framework's entry into force in the European Communities in 2003.

The new regulatory framework, which entered into force in the EEA in November 2004, provides that national regulatory authorities (NRAs) 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 has the right and duty to scrutinize draft measures before their adoption in order to ensure their compatibility with EEA law. Moreover, the Authority has the power to veto notified measures if it finds that the definition of a relevant market or the assessment of market power proposed by the NRAs to be incompatible with EEA competition law. By virtue of a review procedure pursuant to Article 7 of the *Framework Directive* (2002/21/EC), the Authority is now closely associated with the day-to-day application of the provisions of the EEA Agreement in the electronic communications sector on a national EFTA State level. This is a closer involvement of the Authority than in many other areas of EEA law.

In order to facilitate the good functioning of the notification system, the Authority has adopted several recommendations and guidelines and established an eCOM Task Force, a joint effort between the Authority's Internal Market Affairs Directorate and its Competition & State Aid Directorate. In order to ensure homogeneity throughout the EEA, the eCOM Task Force also co-operates with the European Commission and participates in the work of the Communications Committee and the European Regulators Group (ERG).

Throughout 2005, the Task Force has continued its active co-operation with the NRAs in the EFTA States. It has conducted a number of pre-notification meetings with the NRAs in Norway and Iceland and remained at the disposal of the NRAs to discuss matters in connection with notifications informally.

In August 2005, the Authority received the first notification of a draft regulatory measure for regulatory clearance pursuant to the Article 7 procedure. A second notification was submitted in December and more are expected. The first notification was closed with a comments letter by the Authority.

The Authority has established an eCOM Online Notification Registry to facilitate the administration of the notification procedure under the *Framework Directive* and to help ensure transparency and the exchange of information. The Registry is maintained by the Authority's eCOM Task Force and is accessible to the public at large through the Authority's website.[1]

Further, the Authority and the European Commission have linked their respective registries and put in place an e-mail alert system. This has been done to comply with the obligation to ensure the exchange of information regarding notifications originating from both the EFTA States' NRAs as well as from the NRAs in the EU Member States. In this way, full cross-pillar access to notifications by NRAs in both pillars is ensured.

1. The eCOM Online Notification Registry is accessible at https://eea.eftasurv.int/portal/

The Authority commences aviation security inspections

Since the events of 11 September 2001, major aviation security measures have been introduced in the European Union. The aim is to safeguard civil aviation against acts of unlawful interference and protect citizens against terrorism in air transport. The measures introduced oblige each State to lay down a National Civil Aviation Security Programme to ensure the application of the common aviation security standards. Each State shall also develop and implement a National Civil Aviation Security Quality Control Programme to ensure that its National Civil Aviation Security Programme is also effective in practice. The civil aviation security legislation does not apply to Liechtenstein, where there is no airport with commercial operations.

The *Aviation Security Framework Regulation* (2320/2002/EC) lays down the main framework on aviation security. It is supplemented by several Commission implementing regulations. The Regulation on *Common Basic Standards on Aviation Security* (622/2003/EC) is the most important one. Both Regulations were incorporated into the EEA Agreement in April 2004. Two new implementing regulations (781/2005/EC and 857/2005/EC) amending 622/2003/EC were adopted in 2005 and incorporated into the EEA Agreement the same year.

The Authority's main responsibility is to monitor the EFTA States' application of the civil aviation security measures, and to conduct inspections of national administrations and airports in the EFTA States to ensure that EEA rules on aviation security are being complied with. The legal basis for these inspections is laid down in the *Civil Aviation Security Inspection Regulation* (1486/2003/EC).

In 2005, the Authority recruited civil aviation security inspectors to perform inspections in Iceland and Norway. These inspectors may also participate as observers in inspections under the Commission's authority in the EU Member States, in the same way as observers from the Commission may participate as observers in inspections carried out on behalf of the Authority. This exchange of observers between the Authority and the Commission is particularly important in order to ensure that the aviation security inspections are carried out in a homogeneous manner in the entire EEA Area. In addition, the Authority may request the assistance of national auditors from all EEA States to participate in their inspections.

In 2005, much of the Authority's work in this field was dedicated to technical and administrative preparatory work in order to make it possible to begin inspections in 2006. Nevertheless, the Authority was already able to start some inspection activities in 2005 by inspecting an airport in one of the EFTA States. In addition, the Authority inspectors were invited to participate as observers in inspections carried out by the Commission in some EU Member States.

The Authority inspections are carried out according to an inspection programme established by the Authority. This programme is in many ways similar to the Commission's inspection programme, but is adjusted to the specific requirements following from the legal framework governing the Authority's activities. The programme establishes that the Authority shall take all necessary action to seek rectification by the Member States of any deficiencies which might be identified at either national level or at the airports. In cases where the authorities concerned do not react appropriately, the programme provides that infringement proceedings shall be initiated.

It is expected that the findings of the Authority inspection programme will yield a solid overview of the compliance level of the civil aviation security requirements under the EEA Agreement.

Maritime security

In a similar way to aviation, shipping is also exposed to the threat of terrorism. Therefore, the EU has seen a need to enhance the security of the maritime transport chain. The Regulation on *Ship and Port Facility* (725/2004/EC) introduces measures aimed at improving the security on board ships in international and domestic trade and associated port facilities. The Regulation was incorporated into the EEA Agreement in February 2005, with entry into force pending the fulfilment of constitutional requirements by Iceland.

In the field of maritime security the Authority will carry out inspections in Norway and Iceland, to check and verify security measures on board ships and at sea ports. The framework for these maritime security inspections on behalf of the Authority will be put in place once the Regulation on Maritime Security Inspections (884/2005/EC) becomes applicable under the EEA Agreement.

Free movement of goods

In 2005, the Authority closed two cases against Iceland relating to the free movement of goods after Iceland changed its legislation.

Iceland amends rules on export of eider down

In late 2004, the Authority had sent a letter of formal notice to Iceland where it was concluded that the Icelandic legislation on export of eider down constituted an infringement of Article 12 EEA. The rules in question imposed more stringent requirements on eider down intended for export than eider down for the Icelandic market. Iceland passed a new law in May 2005, according to which the same conditions are imposed on all eider down whether for export or the domestic market. As the discrimination had been removed the Authority closed the case.

The Authority closes "Buy Icelandic" case

In the autumn 2004, the campaign "Buy Icelandic and Everyone Wins" was initiated. The campaign was aimed at increasing the awareness of the importance of domestic production in Iceland. The Federation of Icelandic Industries *(Samtök iðnaðarins)* and the Farmer's Association *(Bændasamtök Íslands)* were among the organisations behind the campaign.

Article 11 EEA provides that quantitative restrictions on import and all measures having equivalent effect shall be prohibited. Advertising which encourages consumers to buy domestic products solely on the basis of their origin has been held to fall within the scope of the provision. However, Article 11 EEA only applies to measures taken by public authorities. As both the Federation of Icelandic Industries and the Farmer's Association receive funding from the Icelandic Government, the Authority considered the campaign attributable to the State. Furthermore, the Icelandic Government had also contributed directly to the campaign. Accordingly, on 10 November 2004, the Authority sent a letter of formal notice to Iceland concluding that the campaign was in breach of Article 11 EEA.

To comply with the letter of formal notice, the direct contribution of the Icelandic Government was repaid by the organisers of the campaign. Both the Federation of Icelandic Industries and the Farmer's Association took appropriate steps to ensure that no revenues coming from State resources were used. Furthermore, the campaign, which had been temporarily suspended, was later re-launched in a different format without any involvement of the Icelandic Government. Since the Government thus had disengaged from its involvement in the campaign the Authority decided to close the case in 2005.

The trade terms of an Icelandic monopoly supplier before the EFTA Court

In 2005, the Authority intervened before the EFTA Court in a request for an advisory opinion concerning questions regarding the trade terms of the Icelandic State monopoly on alcohol.

The monopoly provider requires its suppliers to deliver their goods to it on a certain type of pallet. Moreover, the price of the pallets must be included in the total price of the deliverance. One supplier argued that these requirements were contrary to the EEA rules on free movement as well as the EEA competition rules.

In its ruling of January 2006, the EFTA Court found, in accordance with the Authority's view, that the disputed trade terms had to be assessed under Article 16 EEA regarding state monopolies, as the rules were part of the existence and operation of the monopoly. There was no breach of Article 16, given that the trade terms applied to all suppliers to the monopoly, irrespective of whether the goods supplied were of domestic or foreign origin. Neither did the Court find a violation of the competition rules as the imposition of the trade terms did not constitute an abuse of the dominant position held by the monopoly.

Norwegian rules on advertising on alcohol reviewed by the EFTA Court

In February 2005, the EFTA Court rendered its advisory opinion in a case concerning Norway's ban on alcohol advertising. The case concerned the question of whether the Norwegian ban is compatible with the rules on free movement of goods and services in the EEA Agreement. The Court found that, when assessing the ban, it had to have regard only to advertising for products covered by the EEA Agreement. Thereby, the ban on advertising for wine, a product that, in contrast to beer and spirits, is not subject to the free movement of goods in the EEA, was not relevant for the case. This was so, irrespective of the fact that advertising services, in general, fall within the ambit of the Agreement as advertising for wine forms an integral part of, and is inseparable from, the trade in wine.

As for the effect of the advertising ban on the trade in beer and spirits, the EFTA Court ruled that the prohibition constituted an obstacle to trade covered by Article 11 EEA. Account had to be taken of the link between consumption of alcoholic beverages and traditional social practices as well as local habits and customs. According to the Court, however, a prohibition on alcohol advertising is potentially affecting market access for products from other EEA States more heavily than for domestic products.

The EFTA Court, nevertheless, held that the advertising ban could be justified out of public health grounds under Article 13 EEA, but stated that the question of whether a total ban was proportional to the aims it sought to pursue should be investigated. This called for an analysis of circumstances of law and of fact which characterize the situation in Norway, something the EFTA Court found the national courts were in the better position to undertake. The last question was therefore sent back to the referring Court, *Markedsrådet*, in Norway.

The case is still pending before the Norwegian Courts.

Public procurement

The EEA public procurement rules aim to secure equal treatment of all potential bidders in award procedures initiated by public authorities, bodies governed by public law, and contracting entities operating in the utilities sectors (energy, transport and water). As a general rule, contracting authorities must publish a call for tender prior to the award of supply, service or works contracts of a value exceeding certain threshold values. During the award procedure, contracting authorities and entities must, *inter alia*, apply objective and non-discriminatory criteria, and evaluate all candidates and bids in accordance with the principles of proportionality and equal treatment.

In co-operation with the European Commission, the EFTA Surveillance Authority has determined and calculated new threshold values, applicable from 1 January 2006.[1]

Fewer complaints in 2005

At the end of 2005, the Authority had 31 open cases concerning public procurement. Of these, 16 concerned complaints, 12 conformity assessments, and three were other cases opened at the Authority's own initiative to examine the application of EEA public procurement law in general. All the complaints concern Norway, while the conformity assessments relate to implementing measures in Iceland and Liechtenstein. Two of the own-initiative cases relate to Iceland and one to Norway.

For the second consecutive year, the number of new complaints fell significantly in 2005 (see figure 4 on page 16), with only five new complaints registered during the year, compared to 10 in 2004 and 16 in 2003.

One complaint alleged that a hospital trust had infringed the EEA public procurement rules by omitting required information in the invitation to tender. Another claimed that a municipality had deliberately split its purchases into small lots in order to avoid having to apply the EEA procurement rules to their tender procedure. Both these cases were in the Authority's view unfounded and consequently closed.

A third complaint contended that the Norwegian Food Authority had not published a call for tender as required by the EEA public procurement rules. Since the Food Authority had, in fact, cancelled the disputed award procedure and initiated a new procedure with prior publication of an invitation to tender, the Authority closed the case.

In the fourth complaint case, the Authority addressed an allegation that a municipality had unlawfully awarded a contract for refuse collection services to an inter-municipal undertaking of which it was part-owner rather than applying EEA tender rules. The Authority will continue its examination of the case in 2006.

Finally, a complaint asserted that a tender initiated by a university college had unlawfully required that microprocessors to be fitted in PCs by reference to a particular brand name rather than general specifications. The Authority did not complete its examination of the case during the reporting period.

Infringement procedures

During 2005, the Authority initiated formal infringement procedures in three cases. One reasoned opinion was delivered to Iceland, and two letters of formal notice were sent to Norway. One of the letters concerned 11 different, but similar, award procedures where brand names had been used in the tender documents.

Suðurnes Regional Heating

In December 2005, the Authority delivered a reasoned opinion to Iceland. This opinion arose from a failure by Iceland to comply with the EEA public procurement rules applicable to the utilities sector in the conclusion of several contracts by the public undertaking (Hitaveita Suðurnesja). There were apparently no prior calls for tender related to these contracts.

Public undertakings falling within the scope of the *Utilities Directive* (93/38/EEC) are required to follow a tender procedure when awarding contracts, unless they can demonstrate that the conditions for applying one of the exemptions for which this Act provides are fulfilled. The Authority considered that the Icelandic Government had not demonstrated that the conditions for applying the exemptions were fulfilled with regard to the contracts concluded by Suðurnes Regional Heating.

The Icelandic Government responded to the reasoned opinion in December 2005. In this response it acknowledged that, by concluding the contracts at issue without a prior call for competition, it had failed to fulfil its obligations arising from the EEA Agreement. The Icelandic Government and Suðurnes Regional Heating have undertaken to apply the relevant EEA provisions correctly, and without any exemptions, in the future.

Reference to brand names in tender documents

In April 2005, the EFTA Surveillance Authority sent a letter of formal notice to Norway. This letter concluded that, by allowing contracting authorities to use references

such as "Intel or equivalent", "AMD or equivalent" or references solely to a clock rate technical specifications in its tender documents, Norway had infringed Article 11 of the EEA Agreement and the provisions of the *Supply Directive* (93/36/EEC) and the *Utilities Directive* (93/38/EEC). Article 11 prohibits quantitative restrictions on imports and all measures having equivalent effect. This issue was still being examined at the end of 2005.

Preferential treatment bidders

In March 2005, the Authority sent Norway a letter of formal notice concluding that, by allowing a local authority to accept incomplete bids and to extend the time limits for submitting additional information necessary for the evaluation of the bids that had previously been requested in the tender documents, Norway had breached the principle of equal treatment and the EEA public procurements rules.

Following a reply from the Norwegian Government, in which it was acknowledged that the EEA rules on public procurement had been infringed and corrective action would be taken, the Authority closed the case in the course of the year.

1. www.eftasurv.int/fieldsofwork/fieldpublicproc/dbaFile8523.html

Preventing new technical barriers to trade

The *Draft Technical Regulations Directive* (98/34/EC) establishes a notification procedure on draft technical regulations. The procedure aims at providing transparency and preventing the creation of new, unjustified barriers to trade which can arise from the adoption of diverging and restrictive national technical regulations. According to the Directive, the EFTA States shall notify technical regulations concerning products in draft form to the EFTA Surveillance Authority. This notification procedure has also been extended to provisions relating to the Information Society services, such as regulations relating to safety in electronic communications networks. Following a notification, there is a three months standstill period during which the notifying EFTA State is obliged to postpone the adoption of the regulation. This period gives the Authority, the European Commission and other EEA States, time to examine the regulation. Where the draft regulation contains provisions which are considered contrary to the EEA Agreement or secondary EEA legislation, comments will be sent to the notifying EFTA State.

Statistics

In 2005, the Authority received 55 notifications of draft technical regulations from the EFTA States. Of these, 33 came from Norway, 17 from Iceland and 5 from Liechtenstein. 17 notifications regarded foodstuffs and 9 maritime transport, which, consequently, were the two most prominent sectors where draft technical regulations were notified. Three notifications were received regarding information society regulations on safety in electronic communications networks, certification services for electronic signatures and archival provisions.

11 of the notifications prompted the Authority to send comments. The European Commission commented upon 23 of the notifications.

The Authority received 733 notifications from the EU Member States, which were forwarded by the Commission. None of these led the EFTA States to send comments through the Authority for the purpose of making a single coordinated communication.

Draft Technical Regulations

Year	EFTA notifications	Comments from the Authority	EC 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

Infringement cases

During 2003, the Authority initiated infringement procedures against Norway and Liechtenstein for incorrect implementation of the *Draft Technical Regulations Directive*, as amended. In December 2004, Norway adopted a new Act which entered into force in January 2005. In Liechtenstein, a new law was passed in May 2005 which entered into force in September 2005. The Authority has consequently closed both these infringement cases.

Reasoned opinion delivered to Iceland

On 16 February 2005, the Authority delivered a reasoned opinion to Iceland due to a failure to notify several draft technical regulations. An examination of Icelandic legislation had revealed that Iceland had enacted several draft technical regulations without proper notification to the Authority. Following the reasoned opinion, Iceland notified the relevant measures to the Authority, and the case was subsequently closed.

Food safety and animal health

The EFTA Surveillance Authority monitors the EFTA States' compliance with EEA rules related to food and feed safety and to animal health and welfare. This is mainly done by verifying, through inspections, the effectiveness of the national control systems. In 2005, the Authority maintained its focus on inspections related to food safety and increased its focus on animal health issues. In anticipation of the incorporation into the EEA Agreement of the new Community regulations on hygiene and official controls, the Authority has been following the European Commission's preparation of implementing measures related to official control.

Inspections in the EFTA States

In 2005, the Authority carried out nine inspections in the EFTA States. Apart from one postponement due to lack of inspectors, the Authority followed the defined inspection programme for 2005. The Authority's inspection reports, including the EFTA States' comments, are published on the Authority's website.[1]

Five inspections were related to food safety issues and three to animal health issues. One inspection to Liechtenstein covered the official control of both food and feed.

The three EFTA States have put much effort into optimising their respective systems for official control throughout the food chain. Through its inspections the Authority nevertheless observed a number of deficiencies in their official control systems.

Food Safety inspections

Approval of food processing establishments that do not fully comply with legal requirements and inadequate enforcement by national competent authorities of relevant EEA legislation can increase the risk of products for human consumption which are not of a satisfactory hygienic quality being placed on the market.

In 2005, the Authority carried out one inspection in Iceland relating to the application of the *Directive on Fishery Products* (91/493/EEC) and the *Directive on Fish Diseases* (Directive 93/53/EEC). The main purpose was to assess the action taken by the Icelandic Competent Authorities following the conclusions of a similar inspection carried out in 2004.

In 2004, the Authority had concluded that some establishments had been approved although they did not fully comply with the requirements of Directive 91/493/EEC. Furthermore, the Authority had concluded that the necessary corrective measures were not always taken when establishments failed to comply with the legal requirements. Both the representatives of the establishments visited during the inspection in 2004 and the Icelandic Competent Authority had put effort into adressing the observations and conclusions from that inspection. However, following the inspection in 2005, the Authority maintained its conclusions with regard to the approval of establishments and actions to be taken in cases where establishments were not complying with the requirements of Directive 91/493/EEC.

The Authority also performed an inspection to verify the application of Directive 91/493/EEC in Norway. In its Report, the Authority concluded that the necessary measures were not always taken when establishments failed to comply with the legal requirements. Furthermore, the list of fishing vessels was not complete and official sampling was insufficient or could not be documented.

In an inspection in Iceland regarding application of the *Directives on official control of foodstuffs* (89/397/EEC and 93/99/EEC), and the *Directive on hygiene of foodstuffs* (93/43/EEC), particular emphasis was put on import control of foodstuffs. The Authority found that there was no difference in the way products imported from third countries via other EEA States and products imported directly from third countries were controlled. Furthermore, samples of products imported directly from third countries were not taken at the point of entry. The Authority also found that, because of legal uncertainty regarding the official control responsibilities, some fish establishments could potentially be controlled by two different Competent Authorities and that some food production undertakings could potentially not be controlled in some regions.

In 2005, the Authority also carried out an inspection in Norway relating to the application of the *Directive on Fresh Meat* (64/433/EEC), the *Directive on Meat Products* (77/99/EEC), the *Directive on Minced Meat and Meat Preparations* (94/65/EC). In its Report, the Authority concluded that the procedures for official controls and the control of establishments were not fully in compliance with the Directives. Deficiencies were also observed with regard to the identification of cattle and the registration of information in the cattle database.

In all its Reports from inspections carried out in Iceland and Norway during 2005, the Authority has included conclusions related to the internal procedures of establishments, to facilities and equipment, and to the handling of products. In some of the establishments visited only minor deficiencies

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

were found, while in others, a number of deficiencies, some serious, were observed.

The Authority also carried out one inspection in Norway regarding the application of the *Directive on Veterinary Border Control* (97/78/EC). This was the last inspection in a series of inspections to all veterinary border inspection posts in Iceland and Norway that was initiated in 2004. Many of the observations made in 2004 were also made during the inspection in 2005.

Finally, one inspection was carried out in Liechtenstein in 2005. During that inspection, the Authority assessed the application of the *Directives on Official Food Control* (89/397/EEC and 93/99/EEC) and the *Directive on Food Hygiene* (93/43/EEC), which relate to the official control of food, and the application of the *Directive on Official Inspections in Animal Nutrition* (95/53/EC) and the *Directive on Establishments and Intermediaries in the Animal Feed Sector* (95/69/EC), which relate to the official control of feed. In its Report of this inspection the Authority concluded that the frequency of official inspections was not sufficient, and that it could not be confirmed that certain products had been checked for aflatoxins (toxin in nuts produced by fungi).

Animal health inspections

Animal health inspections are important, not only in order to protect consumers from zoonotic diseases (diseases that are transmissible from animals to humans), but also for the protection of animals from diseases which also might have serious economic effects.

Fully operational contingency plans, sufficient available laboratory services and competent staff are crucial factors in combating animal diseases.

In 2005, the Authority carried out one inspection in Norway related to the application of the *Directive on Aquaculture Animals* (91/67/EEC) and the *Directive on Fish Diseases* (93/53/EEC). During the inspection, a particular focus was put on the Norwegian Competent Authority's handling of outbreaks of infectious salmon anaemia (ISA) (see box on page 36). The Authority found that the Norwegian contingency plan was not complete and that the Competent Authority did not take all the actions necessary to handle outbreaks of ISA, as foreseen in Directive 93/53/EEC. However, the laboratories involved in carrying out ISA analyses were mostly complying with the requirements of Directive 93/53/EEC.

In its Report of the combined fishery products and fish disease inspection in Iceland in 2004, the Authority had concluded that the national reference laboratory and the Icelandic contingency plan for certain fish diseases were not in full compliance with the requirements of Directive 93/53/EEC. Only minor improvements were observed during the inspection carried out in 2005.

In 2005, the Authority inspected the application of the *Directive on Control of Foot and Mouth Disease* (FMD)

(2003/85/EC) and the *Directive on Control of Classical Swine Fever* (CSF) (2001/89/EC) in Norway. In combating an outbreak of an animal disease, such as FMD, the tracing of animal movements is crucial. In its Report of the inspection, the Authority concluded that registration of information in the cattle database was insufficient. The Authority also concluded that the Norwegian contingency plans for the two diseases FMD and CSF did not always describe in detail, and in a comprehensive and practical way, all the actions, procedures, instructions and control measures to be employed in order to handle an outbreak of the two diseases.

Late 2005, the Authority also carried out an inspection in Norway related to the application of the *Directive on Bovine Semen* (88/407/EEC) and the *Directive on Bovine Embryos* (89/556/EEC). Some minor deficiencies related to the handling of semen were observed during this mission.

Co-operation with the European Commission

In order to ensure that EEA legislation is applied in a uniform manner throughout the EEA, the Authority co-operates closely with the European Commission. In addition to discussions on individual cases, exchange of information and consultations, the Authority carries out inspections together with the Food and Veterinary Office (FVO) of the European Commission in both EFTA States and EU Member States.

The Authority and the FVO also exchange information on their inspection programmes for the forthcoming year. The inspection programme for 2005 was approved in November 2004 and, thereafter, sent to the EFTA States and the FVO, and published on the Authority's website.[1]

In 2005, the Authority's inspectors participated in five FVO inspections in EU Member States related to meat processing, animal health and contingency plans. Inspectors from the FVO participated in inspections related to fish diseases and to fresh meat and meat products in Norway.

The Authority was assisted by national experts in the inspections related to fish diseases and contingency plans in Norway and in the inspection related to fish diseases and fishery products in Iceland.

The national experts assisting the Authority and the FVO normally work at laboratories in the EU Member States. Because of their scientific competence and in-depth knowledge of laboratory work, the experts' contribution is important in the more technical inspections.

Implementation of new EEA legislation

The Authority has registered a continued trend of late implementation of EEA legislation in the veterinary field.

Animal disease notification system (ADNS)

The EU Member States and the European Commission have a system for notification of outbreaks of contagious animal diseases. The animal disease notification system (ADNS) is important for notifying the European Commission and other EU Member States of outbreaks of a number of contagious animal diseases such as avian influenza, foot and mouth disease and classical swine fever. Both the Authority and Norway are linked to the system and it is one of several sources of information that the Authority utilises regularly in its surveillance.

1. The food safety inspection programme is accessible via: www.eftasurv.int/fieldsofwork/fieldgoods/foodvet/#_Toc62549051

In 2005, the Authority monitored more closely the adopted national measures corresponding to EEA regulations. Neither Iceland nor Norway have always respected the compliance dates for such acts, hence the Authority issued 14 letters of formal notice, regarding both feedstuffs and veterinary issues.

Annex I to the EEA Agreement contains details on safeguards and protective measures related to veterinary and phytosanitary matters. The measures should be applied in cases of risk to animal or human health. In these situations, the EFTA States are obliged to adopt corresponding measures simultaneously with the EU Member States. The EFTA States must immediately notify the Authority of the measures adopted. During 2005, the EFTA States have improved their ability to adopt national measures closer in time to the measures adopted by the European Commission.

Packaging gas as additive for meat products

Carbon monoxide (CO) has been used as a packaging gas for meat products in Norway for many years. However, such use of CO is not in compliance with the EEA rules on food additives. Following a letter of formal notice issued by the Authority in 2003, Norway decided to terminate the use of CO as a packaging gas from mid 2004.

As agreed with the Authority, Norway sent a report regarding the results of the national inspections carried out. According to this Report, the use of CO had terminated and no such substance was stored in Norwegian meat packaging facilities. The inspection regarding fresh meat etc., carried out by the Authority in Norway during 2005, confirmed the conclusions of the Report provided earlier by Norway. The case against Norway was therefore closed in October 2005.

Contingency plans in the field of animal nutrition

The *Directive on Official Feed Control* (93/53/EC) provides that the EEA States must draw up contingency plans that set out the national measures to be immediately implemented where a product for animal nutrition has been found to pose a serious risk to human health, animal health, or to the environment.

In 2005, the Authority examined the EFTA States' contingency plans and suggested some amendments which would contribute to the plans' efficiency. Risk assessment criteria that would trigger the activation of the contingency plans and the implementation of the plans at local level were important points raised in discussions with the EFTA States. On the basis of the Authority's comments and suggestions, amendments have been made to the national plans.

Technical regulations in the field of food safety

The Authority also monitors the compliance of national technical regulations in the field of food safety with the EEA Agreement. This assessment is mainly done on draft technical regulations notified by EFTA States (see page 31).

In 2005, the Authority received an increased number of notifications of draft technical regulations in the field of food safety and animal health. Most of the notifications received in the field of Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) of

foodstuffs and agricultural products were considered to be compatible with the relevant EEA legislation. However, some notifications, in particular from Norway and Iceland, relating to salmonella health certificates, additives for use in feedingstuffs, food contact materials and genetically modified food and feed, prompted the Authority to issue comments with regard to a possible breach of the relevant EEA legislation.

Recommendations and decisions on food safety and animal health

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

In 2005, the Authority issued five recommendations to the EFTA States. Since the recommended programmes do not have a binding character, the Authority was informed by the EFTA States of the extent to which the programmes were followed up at national level.

Infectious salmon anaemia

Infectious Salmon Anaemia (ISA) is a viral disease known to develop only in Atlantic salmon (Salmo salar). It is the only serious contagious fish disease currently listed in EEA legislation. Consequently, an outbreak of the disease should be handled so that it is eradicated. ISA was first diagnosed in Norway in 1984 and has since been diagnosed in Canada (1996), Scotland (1998), Chile (1999), the Faroe Islands (2000), USA (2001), and Ireland (2002).

The recommendations adopted related to a coordinated programme for the official control of foodstuffs, monitoring to ensure compliance with maximum levels of pesticide residues in and on cereals and certain other products of plant origin, further investigation into levels of polycyclic aromatic hydrocarbons in certain foods, a coordinated inspection programme in the field of animal nutrition and the monitoring of background levels of dioxin and dioxin-like PCBs in feedingstuffs.

In 2005, the Authority continued its work on updating the list of veterinary border inspection posts in the EFTA States. The Decision amending the list was adopted early 2006.

The Authority has the legal competence to adopt decisions regarding the status of animal health in the EFTA States. In 2005, the Authority continued its work on updating the Decisions regarding, *inter alia*, the enzootic bovine leucosis status in Norway. However, due to its workload, the Authority has not been able to adopt the Decision as planned within the reporting period.

Reports on food safety and animal health

A number of EEA Acts on feedingstuffs, organic production, veterinary issues and foodstuffs oblige the EFTA States to send, periodically, to the Authority monitoring plans, results of official controls, and results of analyses carried out. Reports from the EFTA States often constitute parts of more comprehensive Reports issued by the European Commission.

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

Complaint

In 1997, the Authority received a complaint related to the import of frozen fishery products from third countries. The complainant alleged that Norway had allowed the import of frozen fishery products from establishments, factory vessels, cold stores, etc. that were not approved by the competent authorities of the third countries. The Authority initiated an investigation with the aim of establishing whether Norway had failed to fulfil its obligations under the *Directive on Fishery Products* (91/493/EEC). In order to ensure a harmonised approach throughout the EEA, the Authority also initiated an investigation into how Iceland applied Directive 91/493/EEC for similar products. These investigations were carried out in close co-operation with the European Commission and coordinated with similar investigations initiated by the European Commission relating to some of the EU Member States. The Authority found that, indeed, both Iceland and Norway had allowed the import of frozen fish in breach of the principles laid down in the Directive. In July 2005, the Authority therefore delivered reasoned opinions to both Iceland and Norway. Following the Authority's reasoned opinions, both EFTA States informed the Authority, late 2005, that this activity would be terminated. Further evidence from the EFTA States of the actions taken to that effect will be sought in 2006.

Seeds, the first link in the food chain

The main objective of EEA plant health legislation is to protect the safety of food derived from plants while ensuring quality conditions for the sale of seeds and propagating material. The Authority plays an important role in the implementation of controls in the field of seeds, which, due to the integrated food safety approach, are considered to be the first link in the food chain. In 2005, after having completed the conformity assessments of the Norwegian national measures implementing relevant EEA legislation in the field of seeds, the Authority initiated similar conformity assessments in this field regarding Iceland.

CHAPTER 3

Competition

Overview 2005

In 2005, a major reform of the antitrust enforcement regime entered into effect in the EEA. The EFTA Surveillance Authority took a pro-active approach in the field of competition by the launch of several sector inquiries. The in-depth examination of several complex cases continued in 2005, while the investigation concerning a complaint from Conoco Phillips Jet came to an end.

At the beginning of 2005, there were 19 competition cases in the field of antitrust pending with the Authority. Four new cases were opened during the year, all relating to the launch of sector inquiries. Five cases were closed. At the end of the reporting period, there were 18 antitrust cases open.

The reform of the antitrust enforcement regime resulted in a new co-operation mechanism being established between the Authority and the competition authorities of Iceland and Norway in which also Liechtenstein participates.[1] Under this mechanism, the Authority received five notifications of new cases from the Norwegian Competition Authority in which the application of Articles 53 or 54 EEA was foreseen. At the end of the reporting period, the Authority had not yet received any such notifications from the Icelandic competition authority. The Authority did not receive any envisaged decisions from either of the two authorities where Article 53 and 54 EEA would be applied.

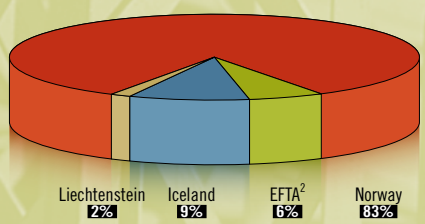
There were four cases pending at the start of the reporting period concerning State measures possibly in conflict with the EEA competition rules. Two of these cases were closed during the year, while the other two remained open. No new cases were registered.

At the end of 2005, there were 7 merger cases and more than 30 antitrust cases registered by the Authority as pending with the European Commission which qualified for co-operation with the Authority under the EEA Agreement.

Further, the Authority scrutinised notifications from the EFTA States in the field of electronic communications under the new, EEA competition law based, regulatory framework (see the article on the eCOM notification procedure on page 25).

Figure

The Authority's cases in the field of antitrust 1994-2005



1. Liechtenstein does not yet have a competition authority.
2. Cases which concern all three EFTA States.

The modernisation reform enters into force in the EEA Agreement

A new regime for the enforcement of the competition rules in the EEA Agreement entered into force in 2005. Notably, the new rules establish how Articles 53 and 54 of the EEA Agreement shall be applied by the EFTA Surveillance Authority and the competition authorities of the EFTA States and how co-operation shall take place between these authorities.

The new regime results from the incorporation into the EEA framework of a similar reform in the EU. The EU reform entered into effect in May 2004 and represented a major modernisation of the EC antitrust enforcement regime. The central element of the reform was *EC Council Regulation 1/2003* on the implementation of Articles 81 and 82 of the EC Treaty. The reform also included *Commission Regulation 773/2004* (the implementing regulation) and six explanatory notices.

Two decisions of the EEA Joint Committee (*Decisions 130/2004 and 178/2004*), and corresponding amendments to Protocol 4 to the Surveillance and Court Agreement, extend the modernisation reform in the EU to the EEA, and the EFTA pillar in particular. The central part of these amendments to the EEA framework entered into force on 19 May 2005 and the remainder on 1 July 2005. With the entry into force of the reform in the EEA, the enforcement regime on the EFTA side reflects, to a large extent, the regime in the EU.

The Authority allocated a significant amount of its resources in 2005 to drafting explanatory notices similar to those adopted by the European Commission, clarifying various aspects of the new antitrust enforcement regime. Some of the Commission's notices needed to be substantially adapted to reflect the specificities of the EFTA pillar.

The following notices were adopted by the Authority:

- informal guidance relating to novel questions concerning the application of Articles 53 and 54 EEA;
- the effect on trade concept contained in Articles 53 and 54 EEA;
- the application of Article 53(3) EEA;
- the handling of complaints by the Authority under Articles 53 and 54 EEA;
- co-operation within the EFTA network of competition authorities; and
- co-operation between the Authority and the national courts of the EFTA States regarding the application of Articles 53 and 54 EEA.

The main characteristics of the new competition regime are:

- The abolition of the previous notification system, under which undertakings could request a declaration by the EFTA Surveillance Authority (or by the European Commission) as to whether their behaviour infringed Articles 53 or 54 EEA. Under the new regime, economic operators have to assess themselves whether or not their market behaviour infringes the competition rules of the EEA Agreement. This includes Article 53(3) EEA, which is an exception to the prohibition of anti-competitive agreements in Article 53(1) EEA.
- Decentralised application of Articles 53 and 54 EEA in the EFTA States. According to Protocol 4 to the Surveillance and Court Agreement, the national competition authorities of the EFTA States shall have the power to apply Articles 53 and 54 EEA. When applying national competition law in cases where Articles 53 and/or 54 EEA are applicable, both national competition authorities and courts are obliged to apply Articles 53 and/or 54 EEA at the same time.
- Closer co-operation between the EFTA Surveillance Authority and the national competition authorities in order to provide homogenous application and coordinated enforcement of EEA competition rules in the EFTA States. This includes the establishment of an EFTA Network of competition authorities consisting of the competition authorities of Iceland and Norway and the EFTA Surveillance Authority.[1]
- New principles and rules for co-operation between the EFTA Surveillance Authority and the national courts of the EFTA States when the latter apply Articles 53 or 54 EEA, always taking account of the independence of national courts;
- A strengthening of the investigatory and decision-making powers of the EFTA Surveillance Authority.

A high level of co-operation between the Authority and the European Commission is maintained, ensuring homogenous application of Articles 53 and 54 EEA in the entire EEA.

1. Liechtenstein also participates in the network, but does not yet have a competition authority.

Under its new enforcement powers, the Authority may:

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

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 of the EEA Agreement are virtually the same as those of the EC Treaty and can be summarised as follows:

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

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

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

The Authority enjoys the same 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 EEA Agreement is a "dynamic" agreement. Its Annexes and Protocols, in particular, are adapted over time to incorporate the Community competition acquis. The Surveillance and Court Agreement is, likewise, amended to incorporate new procedural rules.

Non-binding competition acts, such as guidelines and notices, are adopted by decision of the Authority for application to the EFTA pillar.

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

COMPETITION & STATE AID DIRECTORATE

In front from left to right
Marie Wiersholm
Per Arne Solend
Hanne Zimmer
Esben Bakken
Tormod Sverre Johansen
Director Amund Utne
Rolf-Egil Tønnessen
Annette Kliemann
Runa Monstad
Justin Menezes

At the back from left to right
Hrafnkell Óskarsson
Diane Tanenbaum
Siri Fjeld-Nielsen
Lena Sandberg-Mørch

Not present
Kjersti Bjerkebo
Dessy Choumelova
Marianne Clayton
Lars Tore Fredriksen
Cécile Odello
Maria J. Segura Catalán

Conoco Jet investigation finalised

In 2005, the EFTA Surveillance Authority finalised its in-depth investigation of a complaint from ConocoPhillips Jet AS (Conoco Jet) requesting access to distribution facilities for petrol in Norway.

In Norway, motor fuels are transported by vessels from refineries to so-called intermediate storage facilities (or storage depots). Motor fuels are lifted by truck from these facilities and transported to petrol stations from which retail sales take place. In its complaint, lodged in 2002, Conoco Jet had claimed that it was denied access to the intermediate storage facilities for petrol belonging to the four incumbent oil companies in Norway and that this constituted an infringement of the EEA competition rules.

The Authority's investigation confirmed the existence of bilateral agreements between the incumbents under which one incumbent was allowed to lift motor fuel from the other's intermediate storage facilities. This had, over the years, made it possible to significantly reduce the number of such facilities and thereby made distribution of motor fuels more efficient. The Authority carefully scrutinised these agreements. However, no anti-competitive objects or effects which appreciably restricted competition were revealed. Nor did the Authority's investigation bring to light any other agreement or concerted practice among the incumbents aiming at preventing Conoco Jet access to the market. Therefore, the Authority considered that there was insufficient evidence to establish an infringement of Article 53 EEA.

The Authority also examined whether the behaviour of the incumbent oil companies *vis-à-vis* Conoco Jet could amount to an abuse of a dominant position within the meaning of Article 54 EEA.

The Authority assessed whether any of the incumbents could be regarded as holding a dominant position, individually or jointly. The information in the Authority's possession was, however, considered insufficient to establish such a position on the part of the incumbents.

In the course of the investigation, the supply situation of Conoco Jet appeared to improve and the Authority considered that Conoco Jet, given the turn of events, had sufficient supply possibilities in the area where it had established its petrol stations. Conoco Jet seemed thus able to compete with the incumbents in this part of the country. This area represented a large part of the demand for petrol in Norway. In the remaining areas of Norway there were already four players on the market and no evidence of anti-competitive practices between them.

Given this factual background, the Authority could not see that the reluctance of each of the incumbents to grant Conoco Jet access to their intermediate storage facilities would have such negative effects on competition as required by the case law of the European Court of Justice for there to be an abuse.

Consequently, the Authority's preliminary findings were that neither an infringement of Article 53 nor Article 54 EEA could be established.

After having communicated these preliminary findings to Conoco Jet, in accordance with the established procedural rules in competition cases, Conoco Jet informed the Authority that it withdrew its complaint. On this basis the case was closed.

Exclusivity arrangements in TV channel distribution

The Authority examined new transactions related to the continued exclusive distribution of TV2 on the satellite TV platform of Canal Digital in light of their compatibility with the EEA competition rules.

Prompted by a complaint lodged in 2001 by the Norwegian satellite television platform Viasat, the Authority examined the competitive effects of an agreement between the satellite television platform Canal Digital and the general interest television channel TV2.

As a result of competitive concerns expressed by the Authority in 2003, Canal Digital and TV2 abandoned a long-running exclusivity arrangement whereby only Canal Digital could supply TV2 direct-to-home via satellite to customers in Norway. In October 2003, TV2 concluded a second two-year exclusive distribution contract with Canal Digital, following a tender. Viasat challenged the fairness of the tender.

In June 2005, TV2 announced a new tender for the satellite distribution rights of TV2, as well as three more channels – TV2 Xtra, TV2 Sport, and TV2 Film. While that tender was open, TV2 and Telenor bought the media rights for all major Norwegian football competitions. The Authority has looked at any actual or potential link between the TV2 tender and the acquisition of football media rights jointly with Telenor, the parent company of Canal Digital. In September 2005, TV2 announced that it would conclude a new two-year exclusive distribution agreement with Canal Digital. Further, in November 2005, Canal Digital introduced price changes, as of January 2006, for its different subscriptions.

At the end of 2005, the Authority was examining the competitive effects of these transactions. The assessment will continue in 2006.

Norway Post

In 2005, the Authority closed one case concerning allegations of anti-competitive practices by Norway Post in relation to cross-border mail entering Norway from elsewhere in the EEA. The case was closed after the complainant had informed the Authority that it no longer intended to pursue its complaint and the information in the Authority's possession did not give sufficient reasons for continuing the investigation.

Two other cases concerning Norway Post's provision of services in the market for parcels sent by business operators to consumers (also referred to as the B-to-C parcel market), in relation to which the Authority carried out an on-the-spot inspection in 2004 at the premises of Norway Post, remained pending.

In the first case, the Authority is assessing whether the rebates granted by Norway Post to mail-order and e-commerce companies on the purchase of B-to-C parcel services is compatible with Article 54 of the EEA Agreement.

In the second case, the Authority is investigating whether agreements entered into by Norway Post for the establishment of Post in Shops *(Post i Butikk)* in retail outlets such as grocery stores, kiosks and petrol stations may infringe Article 54 of the EEA Agreement by limiting the possibilities for competing suppliers of B-to-C parcel services to develop their own delivery networks.

Sector inquiry on the sale of sport content to new media

The sector inquiry of the EFTA Surveillance Authority scrutinising the competitive sale of sport content to new media, such as third generation (3G) mobile phones, was completed in 2005.

When the Authority launched this sector inquiry in 2004, it wanted to ensure that access to key sport content via 3G mobile phones was not unduly restricted, or made prohibitively expensive, to the detriment of the consumers in Iceland, Liechtenstein and Norway. The inquiry was conducted in parallel with a similar investigation by the European Commission.

Early in 2005, the Authority analysed replies to extensive questionnaires sent out in 2004 to four groups of respondents: broadcasters/TV operators, content owners/rights holders, mobile operators, and content aggregators. Altogether, replies were received from 31 companies in the EFTA States.

In May 2005, the Authority, jointly with the European Commission, published an Issues Paper on the preliminary findings of the sector inquiry for the 28 EEA States. The Issues Paper put forward two major questions on possible market definitions: (1) whether sport content services provided via 3G mobile phones are in the same relevant market as sport content services provided over other media platforms and/or alternative technologies; (2) whether non-sport content services and sport content services provided over mobile networks are regarded as substitutes at retail level. Further, some areas of potential competition concerns were identified and put forward for discussion: (1) lack of access to sport content for mobile operators; (2) exclusivity; (3) cross-platform bundling of rights; (4) competition effects of collective selling; (5) pricing concerns, and (6) coverage restrictions.

The Issues Paper served as a basis for a public presentation of the preliminary results in the sector inquiry which took place in Brussels on 27 May 2005. The public presentation was attended by market players involved in 3G sport content markets – companies such as content owners/providers, mobile network operators and service providers, as well as broadcasters and TV operators competing in closely related markets.

The sector inquiry led to a better understanding of the commercial practices related to selling and buying of sport rights. On the basis of this increased market knowledge, the Authority and the European Commission will monitor further developments of 3G sport content services in the EEA with a view to:

1. ensuring a homogeneous approach to the definition of relevant markets and the assessment of market power; and
2. promoting a maximum exploitation of 3G sport rights by scrutinising restrictions which may have anti-competitive effects.

The joint Concluding Report published by the Authority and the European Commission in September 2005 can be found on the Authority's website.[1]

Sector inquiries in the EEA

The modernised EEA competition rules require the competition enforcement agencies, such as the Authority, to adopt a pro-active stance. Sector inquiries serve as a tool to initiate market investigations into particular sectors of the economy where the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the territory covered by the EEA Agreement.

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

The Authority normally carries out sector inquiries concurrently and in close co-operation with the European Commission. This enables comparative information to be gathered across industry sectors not only in the EU, but for the entire EEA.

It is envisaged that information gathered in the context of sector inquiries may give rise to actions on the basis of Article 53 and/or 54 EEA if agreements or practices in breach of these provisions are detected, or actions against the EFTA States on the basis of any of these provisions in conjunction with Article 59 EEA.

The Authority's website provides further information on the sector inquiries conducted by the Authority at
www.eftasurv.int/fieldsofwork/fieldcompetition/activities/dbaFile7269.html

1. www.eftasurv.int/information/reportsdocuments/otherreports/concludingreportnewmedia3gsectorinquiry.pdf

Sector inquiry into the EFTA States' electricity markets

In June 2005, the EFTA Surveillance Authority launched an inquiry into competition in the electricity markets of the EFTA States.[1]

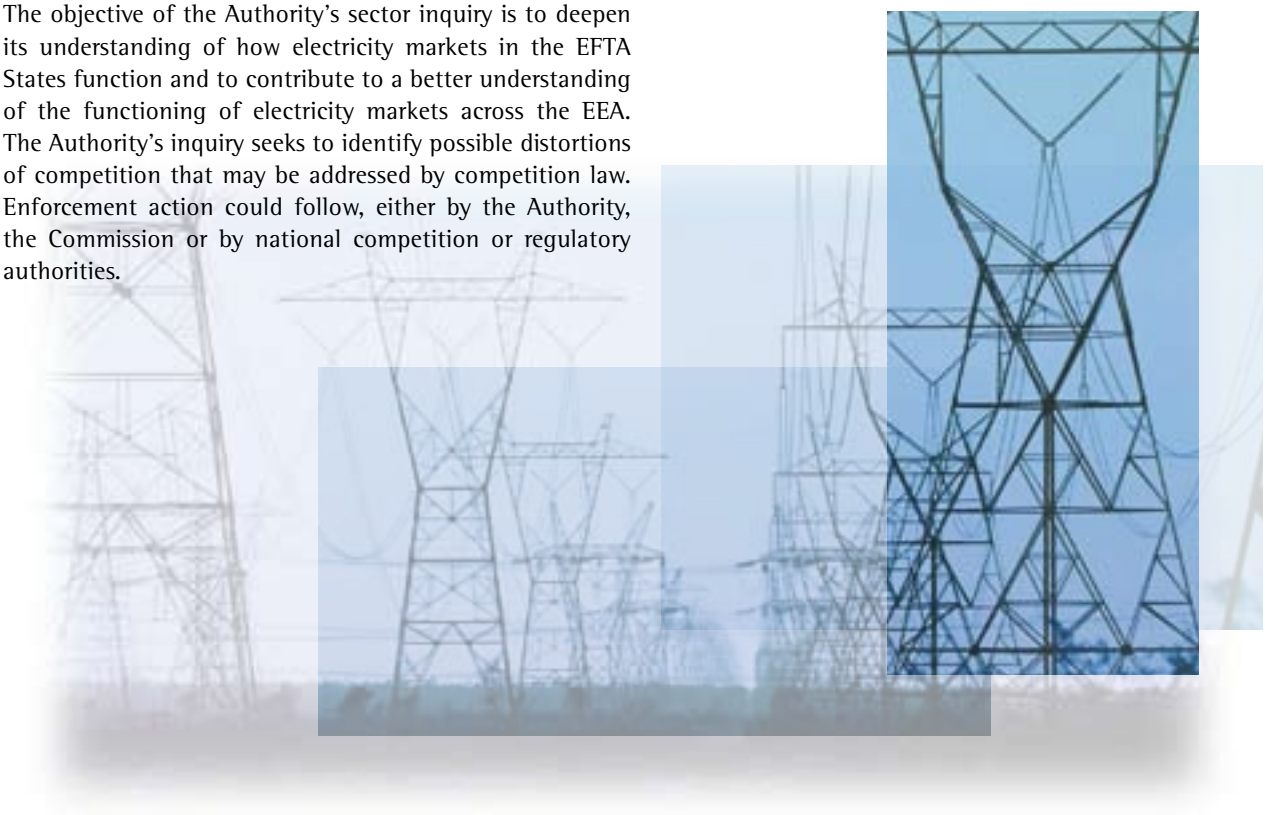
The Authority decided to launch a sector inquiry into the electricity sector for a number of reasons. Electricity prices had risen in several EEA States during 2005 and forward prices pointed to further price rises in the future. The incumbent suppliers attributed the price increases to increased costs and technical factors. However, price rises were of particular concern since complainants expressed little trust in existing mechanisms of price formation. Liquidity was low on the majority of electricity exchanges in the EEA. This led to price volatility and possible scope for manipulation.

With respect to the EFTA States in particular, there were concerns relating to bottlenecks, the position of electricity generators, market concentration and cross-ownership between companies involved in generation. There were also issues relating to vertical integration of distribution system operators with suppliers of electricity or with generators.

The objective of the Authority's sector inquiry is to deepen its understanding of how electricity markets in the EFTA States function and to contribute to a better understanding of the functioning of electricity markets across the EEA. The Authority's inquiry seeks to identify possible distortions of competition that may be addressed by competition law. Enforcement action could follow, either by the Authority, the Commission or by national competition or regulatory authorities.

During the course of its inquiry in 2005, the Authority required a variety of undertakings operating in generation, supply and distribution to provide information. The Authority also contacted the Nordic power exchange, "Nord Pool", a number of industrial customers, national regulators and trade associations. In total, the Authority sent questionnaires to 94 respondents. The Authority observed that the market participants in the electricity sector generally adopted a positive attitude toward its inquiry.

The Authority's inquiry is conducted in parallel with the European Commission's sector inquiry into the energy sector in the EU Member States. A public presentation of the preliminary findings of the electricity inquiry was scheduled for February 2006 and was to be held jointly with the European Commission in Brussels. A preliminary report was also to be published opening a two-month consultation period for interested parties to comment. There were plans to publish the main results of the inquiry in the second half of 2006.



1. See PR(05)19: The EFTA Surveillance Authority opens a sector inquiry into the electricity sector at www.eftasurv.int/information/pressreleases/2005pr/dbaFile7270.html

Sector inquiries scrutinise the banking and insurance sectors

In June 2005, the EFTA Surveillance Authority launched two inquiries into the financial sector. The areas examined are retail banking and business insurance.

Well functioning, integrated and competitive financial markets are essential for the efficient and dynamic development of the European Economic Area. In recent years, various legislative measures have been taken to promote the integration of financial markets within the EEA, *inter alia*, by ensuring freedom of establishment and freedom to provide services across the EEA. While these measures have, to some extent, resulted in more integrated markets, other markets have continued to show lack of integration. This is particularly evident in the retail financial markets which provide services to consumers and smaller enterprises.

For this reason, the Authority decided to launch sector inquiries into the fields of retail banking and business insurance, in order to gain understanding of how these sectors function, and also to enhance transparency in price-setting and general practices in the sectors, where consumers tend to lack information and variety of choice. The sector inquiries are being conducted in close co-operation with the European Commission's parallel inquiries into the same sectors.

The Authority expects to complete both inquiries by the end of 2006 with the publication of reports.

Retail banking

The first phase of the Authority's inquiry into the retail banking sector concentrated on payment cards (debit/credit). During summer and autumn 2005, questionnaires were sent out to payment card issuers and acquirers, as well as to operators of payment card networks. In total, questionnaires were sent out to approximately 50 market players operating in the three EFTA States.

The second phase of the inquiry was launched in December 2005, with questionnaires concerning certain core retail banking products being sent out to a sample of banks. The focus of this part of the inquiry is the supply of certain core products (such as current accounts and non-secured loans) to consumers and small and medium-sized enterprises (SMEs). In total 24 banks in the EFTA States were approached by the Authority in this phase of the inquiry. It is possible that further requests for information will be sent out during 2006.

The Authority hopes that the inquiry will provide a clear picture of the functioning of the retail banking markets in the EFTA States. In particular, the Authority hopes to shed light on issues such as market structure, entry conditions and possible barriers to entry, and the behaviour of existing market players.

Business insurance

The inquiry into business insurance examines the provision of insurance products and services to businesses.

During 2005, information requests were sent to national associations of insurers and brokers in the three EFTA States. It is envisaged to send further enquiries to, *inter alia*, individual insurance companies, during the course of 2006.

Possible subjects for further investigation include conditions for market entry (in particular cross border entry), the possible existence of vertical agreements between actors on the insurance market, the sharing of data between insurers, the use of standard policy clauses and the use of pool agreements and co-insurance agreements.

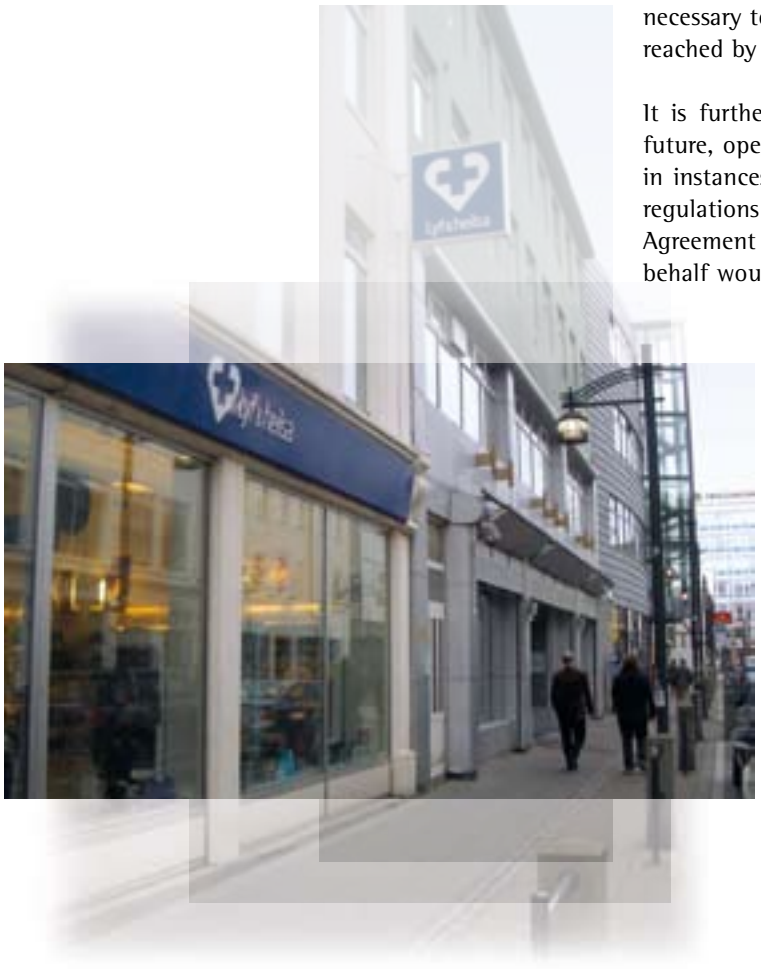
It is hoped that the inquiry will give an overview of the competitive conditions in the insurance markets in the EFTA States and allow for comparison with the EU Member States on the basis of the European Commission's parallel inquiry.

Report on competition in the liberal professions published

In 2005, the EFTA Surveillance Authority published the findings of its stocktaking exercise concerning the competitive conditions of the liberal professions in the EFTA States. The professions investigated were lawyers, auditors, accountants, pharmacists, architects and engineers.

The Authority initiated a review of the level of regulation of professional services in the EFTA States in 2004, following a similar exercise undertaken by the European Commission. The Authority published a Report with its findings in July 2005.

The Report examines in detail the regulatory environment of each profession in the three EFTA States with special regard to issues such as conditions for entry into the profession, exclusive rights enjoyed by members of the profession, applicable restrictions on advertising, pricing, organisation of the professional's business, and restrictions on inter-professional co-operation. Also, using the same methodology as the European Commission, the Authority compiled special regulation indices to facilitate comparison with prevailing regulation levels in the 25 EU Member States.



In most cases, the level of regulation of professional services in the EFTA States was found to be low or medium, especially compared to the 15 "old" EU Member States. Nevertheless, there are examples of more liberal regulation of all the professions examined elsewhere in the EEA. The Report also identified several categories of restrictions. For example, there are numerous activities that may only be performed by the members of certain professions. Pricing of some services is not entirely free due to price regulation in the form of maximum or reference prices. Advertising, in particular comparative price advertising, is not allowed for all professional services. Finally, not all the professions are free in their choice of business structure.

Some, but not all, such restrictions on the exercise of professional services may constitute infringements of the competition provisions of the EEA Agreement. For this reason, the Authority has encouraged the authorities and professional bodies in the EFTA States to undertake a voluntary review of existing restrictions and their compatibility with the EEA competition rules as well as assessing, in general, whether competition may be promoted by making the regulatory framework less restrictive. In such a review, particular attention should be given to whether a restriction serves a public interest goal, whether it is necessary to attain that goal, and whether the goal may be reached by less restrictive measures.

It is furthermore possible that the Authority may, in the future, open investigations based on the Report's findings, in instances where it has a reason to believe that rules or regulations contravene the competition rules of the EEA Agreement and where it believes that intervention on its behalf would be appropriate.

Co-operation cases with the European Commission

Co-operation cases

The Authority and the European Commission co-operate in the handling of individual cases which affect both EFTA States and EU Member States, the so-called mixed cases, as well as on general policy issues. There is also co-operation between the two authorities with regard to sector inquiries.

The detailed rules on co-operation are set out in Protocols 23 and 24 to the EEA Agreement and entail an extensive exchange of information in individual cases, giving rights to the authority not handling the case to comment and to take part in hearings and Advisory Committee meetings. The Authority also takes part in multilateral expert meetings on competition at EU level.

Mixed merger cases in 2005

In 2005, the Authority was involved in the following merger cases handled by the European Commission to which public reference had been made:

- Total/Sasol / JV
- Honeywell / Novar
- Orkla / Chips
- Siemens / VA Tech
- Blackstone / Acetex
- Orkla / Elkem
- EQT/ISS / Healthcare / Carepartner / JV
- Johnson & Johnson / Guidant
- Gluma Holding / Glud & Marstrand
- AVID / Pinnacle
- TETRA LAVAL / SIG
- PERMIRA-KKR / SBS BROADCASTING
- Telenor / Vodafone Sweden
- Goldman Sachs / Cinven / Ahlsell
- AMI / Eurotecnica
- Microsoft / Time Warner / Contentguard / JV
- Pernod Ricard / Allied Domecq

Mixed antitrust cases in 2005

The Authority was involved in the following cases under the EEA antitrust rules in 2005 which were dealt with by the European Commission and to which public reference was made:

- PO / Thread
- MCAA
- Deutscher Fussball-Bund (DFB)
- Rubber Chemicals
- Microsoft Windows 2000
- Austrian Airlines Oesterreichische Luftverkehrs AG and Scandinavian Airlines
- Coca Cola
- AstraZeneca (Losec)

In one of the co-operation cases that the Authority was involved in during the reporting period, the Commission adopted a decision[1] holding that AstraZeneca had abused a dominant position and imposed a fine of 60 million EUR.[2] The Commission found that AstraZeneca had misused the patent system and other regulatory procedures for the marketing of pharmaceutical products by AstraZeneca to block or delay market entry for generic competitors to its ulcer drug Losec. Firstly, it had given misleading information to several national patent offices to obtain extended patent protection for Losec. Secondly, it had misused rules and procedures applied by the national medicines agencies when selectively deregistering the market authorisations for Losec capsules in some countries. Norway was one of the countries in which AstraZeneca had committed these two abuses. On this basis, the Commission found infringements of Article 54 EEA in Norway. Similar behaviour in some of the EU Member States was also condemned as abusive.

The EFTA Surveillance Authority supported the Commission's position both when it issued its statement of objections against AstraZeneca in 2003[3] and when it adopted its final decision with fines in 2005. In particular, the Authority welcomed the parallel enforcement of Article 54 EEA and Article 82 of the EC Treaty in this case contributing to a level playing field in the EEA.

Reform of merger control rules in the EEA

The main part of the revised Merger Regulation (Council Regulation (EC) No 139/2004) entered into force in the EEA in 2004. In July 2005, the incorporation of the remaining elements of the Merger Regulation, (inspections and post notification referrals) entered into force in the EFTA States.

Work on the incorporation of the Implementing Regulation (European Commission Regulation (EC) No 802/2004) was still ongoing at the end of the reporting period.

An EEA-specific Form RS was adopted to facilitate pre-notification referrals by the notifying parties under the Merger Regulation in cases which affect both EFTA States and EU Member States. For practical purposes, the introduction of an EEA-specific Form RS helps ensure that the referral mechanisms under the Merger Regulation function effectively in the whole of the EEA.

1. AstraZeneca has brought an action against the decision before the European Court of First Instance (OJ C271/24, 29.10.2005).
2. See Commission press release IP/05/737.
3. See Commission press release IP/03/1136.

CHAPTER 4

State aid

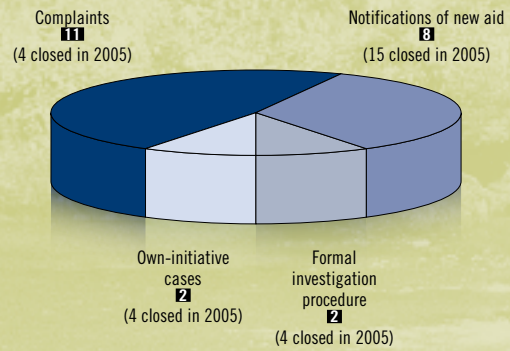
One of the roles of the EFTA Surveillance Authority is to verify whether state aid measures envisaged or taken by the EFTA States are in compliance with the EEA Agreement. This role is similar to the role that the European Commission plays in relation to the EU Member States.

Continued high workload in 2005

In 2005, 23 new cases were opened and 31 cases were closed. However, of the 31 cases closed, eight were very old own-initiative cases which the Authority decided to close without further procedure. Of the 23 new cases opened, eight were notifications of new aid, 11 were complaints, two were own-initiative cases and two were opening of the formal investigation procedure. Of the 31 cases closed, 15 were notifications of new aid, four were complaints, nine were own-initiative cases and three were closures of the formal investigation procedure. These figures do not include the adoption of new State Aid Guidelines. 46 cases were pending at the end of the year. An increasing number of the pending cases are complaints (34 by the end of 2005). As the Authority is under an obligation to deal with notifications within two months of receipt of a complete notification, such cases are given priority. Hence, several old complaints remain pending. Copies of the College Decisions described below (as well as other decisions) can be found on the Authority's website.[2]

Figure

State aid new cases 2005 by type



2. EFTA Surveillance Authority State Aid Register: www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry

State aid provisions

Article 61(1) EEA lays down the general principle that state aid is prohibited, save as otherwise provided in the EEA Agreement. Public support measures are caught by the general prohibition of state aid only if the conditions laid down in Article 61(1) EEA are fulfilled. The conditions are that:

- the support must be granted by the State or through State resources in any form whatsoever;
- it must favour certain undertakings or the production of certain goods (the so-called "selectivity" criterion);
- it must distort or threaten to distort competition; and
- it must affect trade between the Contracting Parties to the Agreement.

The EEA Agreement contains several possibilities for exemption from the general prohibition on state aid, in particular in Article 61(2) and (3). The provision which plays the greatest role in the Authority's state aid practice is Article 61 (3) (c) of the EEA Agreement. This Article concerns "aid to facilitate the development of certain economic activities or of certain economic areas". This Article covers not only sectoral and regional aid measures, but also measures which follow horizontal objectives (*i.e.*, research and development, environment, etc.). The EEA Agreement contains further exemption possibilities concerning compensation for the discharge of a public service obligation where these concern undertakings entrusted with operation of the services of general economic interest referred to in Article 59 (2) EEA and, specifically in the field of transport, pursuant to Article 49 EEA.

The rules on state aid procedures are laid down in Protocol 3 to the Surveillance and Court Agreement. EFTA States are under an obligation to notify any plans to grant new aid to the Authority. The EFTA State concerned must not put the aid into effect until the Authority has approved it. Incompatible aid that has been paid out in breach of the notification obligation shall be recovered from the aid beneficiary.

According to Article 62 EEA, the task of ensuring compliance with Article 61 EEA is divided between the Authority and the European Commission. The Authority is competent when aid is granted by an EFTA State. The Commission is competent if aid is granted by an EU Member State. In fulfilling its tasks, the Authority is entrusted with powers and functions similar to those of the Commission.

The relevant provisions of the EEA Agreement and the Surveillance and Court Agreement governing state aid can be found in the state aid section of the Authority's website.[1]

State Aid Guidelines

In January 1994, the Authority adopted a consolidated document on Procedural and Substantive Rules in the field of state aid, also called the State Aid Guidelines.[2] The purpose of these Guidelines is to provide national administrations and enterprises with information on how the Authority interprets and applies the provisions of the EEA Agreement governing state aid. They also ensure uniform implementation, application and interpretation of Articles 61 and 62 EEA.

The Guidelines have since been amended or supplemented 54 times to accord with the framework and guidelines issued by the European Commission in the field of state aid. The Guidelines contain, *inter alia*, rules concerning horizontal aid (*e.g.* aid for research and development and aid for environmental protection), rules dealing with certain forms of aid (state guarantees), rules on aid to public enterprises, rules on sectoral aid and rules on regional aid.

In 2005, the Guidelines were amended five times. The Authority introduced a new Chapter 18C to its Guidelines, which deals with state aid in the form of public service compensation, following the adoption of the Commission's framework. A new Chapter 30A regarding the financing of airports and start-up aid to airlines departing from regional airports was also introduced into the Guidelines. Following a prolongation of the Commission's Communication on short-term export-credit insurance, the corresponding Chapter 17A of the Guidelines was first re-enacted and later prolonged until 30 June 2006 at the latest. The Authority further prolonged Chapter 14 of the State Aid Guidelines on aid for research and development, until 31 December 2006.

1. www.eftasurv.int/fieldsofwork/fieldstateaid
2. The State Aid Guidelines are accessible on the Authority's website: www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/

Recovery of aid to Icelandic Trading Companies before the EFTA Court

The EFTA Court declared that Iceland failed to abolish and recover aid from international trading companies.

The Authority brought Iceland before the EFTA Court for not complying with a Decision by the Authority in relation to a tax scheme for International Trading Companies (ITCs) in Iceland. The Court concurred that Iceland was in breach of its obligations under the Authority's Decision.

In February 2004, the Authority adopted a negative Decision regarding a tax scheme in favour of International Trading Companies existing in Iceland since March 1999. The Authority requested the Icelandic authorities to terminate the tax scheme and to recover any aid granted under this scheme which constituted incompatible state aid.

One year after its adoption, the Icelandic authorities had not complied with the Decision. No legislative steps had been taken to eliminate the tax scheme nor had any aid amount paid under the said scheme been recovered. For this reason, in February 2005, the Authority brought an action to the EFTA Court for a declaration that Iceland had failed to fulfil its obligations under the Authority's Decision.

In November 2005, the EFTA Court declared that Iceland had failed to fulfil its obligations under the state aid Decision.

Following this judgment, the Authority has requested the Icelandic authorities to immediately terminate the ITC scheme and to inform it of the legislative measures adopted to this effect. Furthermore, the Icelandic authorities have been requested to effectively recover any outstanding amounts of unlawfully paid state aid and inform the Authority accordingly.

LEGAL & EXECUTIVE AFFAIRS DIRECTORATE

From left to right

Ane Grimelid
Claire Taylor
Bjørnar Alterskjær
Matthildur Steinsdóttir
Charlotte Schaldemose
Director Niels Fenger
Tor Arne Solberg-Johansen
Per Andreas Bjørgan
Michael Sánchez Rydelski
Lorna Young
Arne Torsten Andersen

Sale of rental apartments in Oslo did not involve state aid

In March 2005, the Authority decided that the conditions of the sale of 1,744 rental apartments from the Municipality of Oslo to Fredensborg Boligutleie ANS did not involve state aid.

The sale of the apartments was concluded in May 2001 and the sales price was NOK 715 million (approximately EUR 89 million). Chapter 18B of the Authority's State Aid Guidelines describes two alternative procedures for selling public land and buildings. The Guidelines presume that if one of these two methods is followed, a sale does not contain state aid. After a preliminary examination, the Authority had doubts whether the Municipality of Oslo followed a sales procedure that would have automatically excluded the existence of state aid. In addition, several largely diverging value assessments were prepared by Norwegian authorities as well as private interests. These factors led the Authority to open the formal investigation procedure in 2003.

Having assessed in detail how the sales process evolved, having looked into the various appraisals made and also having commissioned a new separate study, the Authority concluded that the sales procedure did not exclude involvement of state aid. However, the Authority could not establish that the sales price was below market value and thus involved state aid within the meaning of Article 61(1) EEA.

Norwegian seed capital schemes approved

In July 2005, the Authority approved two new Norwegian seed capital schemes, one nationwide and one targeted at specific regional areas.

The primary objectives of the nationwide scheme are to increase the supply of seed capital and to stimulate commercialisation of research-based projects from universities. The State will finance up to 50% of the total capital of the four funds in the form of subordinated loans carrying an interest of 12 month NIBOR plus 2 percentage points. NOK 667 million (some EUR 81 million) has been granted for this purpose. In addition, the State has granted NOK 167 million (some EUR 20 million) to cover potential losses. Equity (minimum 50%) is to be provided by private investors.

The primary objective of the regional scheme is to increase the supply of seed capital and to promote the development of specific regions. At the outset, the regional scheme will consist of one fund, but three more may be added at a later stage. The State will finance up to 70% of the funds' total capital in the form of subordinated loans carrying an interest of 12 month NIBOR plus 0.5 percentage points and partly cover administrative costs. NOK 700 million (some EUR 85 million) has been granted for the loans and NOK 50 million (some EUR 6.1 million) for administrative costs. In addition, the State has granted NOK 175 million (some EUR 21 million) to cover potential losses on the subordinated loans. Equity (minimum 30%) is to be provided by private investors.

In November 2005, the Norwegian authorities notified an amendment to the two schemes. The amendments concern the conditions for follow-up investments. The Authority has requested additional information, and a decision will be taken in 2006.

Entra's exemption from excise duties unlawful state aid

In December 2005, the Authority decided that the exemption from excise duties provided for in the establishment of the Norwegian real estate company Entra Eiendom AS constitutes unlawful state aid.

During the period 1999-2000, the Norwegian authorities re-organised the Directorate of Public Construction and Property *("Statsbygg")*. Part of the property stock administered by Statsbygg was transferred to the newly established company Entra. While Statsbygg continued to own and manage various special purpose buildings, Entra took over properties and buildings which corresponded more to premises operated in the commercial market. Entra was set up as a limited liability company, 100% owned by the Norwegian State.

According to Norwegian law, the registration of transfer of ownership of real estate creates an obligation to pay document duties and registration fees. The document duty is 2.5% of the sales value of the property. In addition, registration of transfer of title in the real estate registry was, at the time, subject to a registration fee of NOK 1,480 per document registered.

When Entra was established, the Norwegian Parliament passed a special Act whereby Entra was relieved of paying the charges. Technically this was done by a provision in the said Act stating that re-registration in the real estate registry was to be done as a change of name of the property holder. A change of name does not trigger an obligation to pay excise duties. According to information submitted by the Norwegian authorities, payable excise duties for the transfer of titles to the real estate received by Entra would have amounted to NOK 80.6 million (some EUR 10 million).

In June 2004, the Authority decided to open the formal investigation procedure, as the Authority had doubts as to the compatibility of the exemptions with the functioning of the EEA Agreement.

In its final decision, the Authority concluded that the exemption for Entra from paying the excise duties amounted to unlawful state aid which was incompatible with the functioning of the EEA Agreement, and that the aid, with accrued interest, must be recovered from Entra.

The EFTA Court rules on exemptions from environmental taxes in Norway

Exemptions from Norwegian environmental taxes was unlawful state aid

In July 2005, the EFTA Court upheld the Authority's decision, taken in 2004, concerning certain environmental taxes in Norway.[1] This Decision concerned, in particular, the Norwegian electricity tax legislation for the budget years 2001, 2002 and 2003. The legislation provided for an exemption for the mining and manufacturing sectors from the general electricity tax. In its Decision, the Authority took the view that this tax relief constituted state aid incompatible with the EEA Agreement, and ordered Norway to recover a "significant proportion" of the tax benefit received by the companies concerned. Norway, the Association of the Norwegian Manufacturing Industry and a number of private operators appealed the Decision before the EFTA Court.

The EFTA Court confirmed that relief of expenses in the form of tax exemptions constituted State aid, which, in the case at hand, fulfilled the condition of selectivity in Article 61(1) EEA by benefiting only certain economic sectors. It concurred with the view of the Authority that this selective advantage was not justified by the inherent logic of the Norwegian tax scheme whose overall objective of environment protection was not fulfilled by exempting two significant energy consuming sectors. Moreover, other sectors such as services or construction did not get the same advantages. The EFTA Court further held that the aid granted was liable to distort competition and affected trade between the Contracting Parties to the EEA Agreement in the meaning of Article 61(1) EEA.

As to the recovery, the essential question was whether there was a legal basis for such an order. In its Decision, the Authority had referred to its Guidelines "on the application of the EEA State aid provisions to aid for environmental protection" issued in May 2001. Based on these Guidelines, it had proposed to Norway appropriate measures to bring its existing environmental aid schemes into line with these new Guidelines before 1 January 2002. The Norwegian Government signified its unconditional agreement to this proposal. Norway did however not bring its electricity tax legislation in line with the new Guidelines within the agreed time-limit. The Authority was therefore of the opinion that, in such a situation, a recovery order should be based on this agreement. The recovery order was disputed by the applicants who pointed out, *inter alia*, that the agreement did not specify which legislation was affected, and maintained that the Guidelines were too general and vague. Therefore, the agreement could not entail such severe consequences as recovery.

The EFTA Court held that the issuance of general Guidelines constitutes one element of the obligation of regular, periodic co-operation between the Authority and the EFTA States in the field of State aid. While the Authority does not necessarily have to carry out an individual assessment of specific aid schemes, it is under an obligation to co-operate sincerely with the national administration. In the case at hand there existed only two other relevant aid schemes in Norway, and there had been extensive exchanges of view between the Authority and Norwegian authorities before and after drafting the Guidelines. In these circumstances, the agreement entered into between Norway and the Authority was held to constitute a legal basis for a recovery order in case of non-compliance.

1. See Annual Report 2004, page 56 (PDF)

Electricity tax exemptions for energy-intensive companies in Norway authorised

In June 2005, the Authority authorised a Norwegian aid scheme, by which certain energy-intensive industries are exempted from electricity tax, provided that they participate in a programme for energy efficiency.

In November 2004, the Norwegian authorities notified the above tax exemption to the Authority. According to Norwegian taxation rules, companies in the Norwegian manufacturing and mining industry as a rule have to pay a reduced electricity tax of NOK 0.0045/kWh, which corresponds to the minimum tax level provided for by the *Energy Taxation Directive* 2003/96/EC in the European Community. In turn, for their participation in an energy efficiency programme which should bring about the same positive environmental effects as paying a tax, the notified scheme now provides for a total exemption (zero rate) from this tax for certain energy-intensive undertakings. The companies must, in order to profit from the scheme, enter into agreements with the Norwegian Water Resources and Energy Directorate (*NVE*). The tax exemption constitutes state aid within the meaning of the EEA state aid provisions.

In June 2005, the Authority declared the aid scheme compatible with state aid rules, based on the Authority's State Aid Guidelines on environmental aid. The Authority was satisfied that the scheme and the agreements thereunder contain several conditions which should ensure that certain energy-efficiency goals, equal to what the payment of the tax would have achieved, are met. The companies concerned must, for instance, implement an energy management system, which is certified by an accredited certification body and which establishes individual energy targets and concrete action plans for each company. The companies are further called upon to assess and describe their energy use and identify more energy-efficient measures which can be implemented in the manufacturing process. The companies must report to the *NVE* after two years and at the end of a five year period. If a company does not fulfil its obligations under the agreement, the company has to pay the energy tax retroactively, however, with default interest. The Norwegian authorities estimate that the energy-efficiency programme leads to a reduction in energy consumption of 2%, which is higher than what would have been obtained by paying the tax.

On this background and given the strict supervision and sanctioning system in case a company does not fulfil its commitments, the Authority authorised the scheme, which has a duration of 10 years.

Gassnova aid scheme compatible with EEA rules

The Authority accepted a Norwegian aid scheme aimed at strengthening research and development concerning gas-fired power stations.

In November 2005, the Authority concluded that an aid scheme, notified in June the same year by the Norwegian authorities and managed by a newly created administrative body, Gassnova, complied with the Authority's Guidelines on state aid for research and development. The Authority therefore decided not to raise objections to the aid scheme.

The principal objective of the aid scheme was to strengthen the intensity of research and development concerning gas-fired power stations with carbon dioxide capture and storage, in order to reduce CO_2 emissions from such power-stations. Carbon free gas-fired power stations are facilities in which carbon dioxide is separated and captured before, during or after the electricity generating process. The scheme should promote the development of more cost-efficient solutions for carbon dioxide separation.

The Norwegian Energy Fund under scrutiny

The Authority opened the formal investigation of the Norwegian funding of renewable energy and energy-saving projects via the Norwegian Energy Fund.

In January 2002, Norway established the Norwegian Energy Fund, a finance mechanism for the support of, *inter alia*, renewable energy projects, energy saving measures and information and education in the field of energy efficiency. The Fund is managed by Enova, an administrative body owned by the Norwegian State and funded by state budgetary allocations and a levy on the electricity distribution tariffs paid by the end user. The aim of the Energy Fund is to achieve more energy efficiency, reduce energy consumption and reach Norway's goal to achieve, by 2010, a minimum of 12 TWh of energy saved or produced in a more environmentally friendly manner. To this end, Enova grants lump sum payments to project owners, after having established that state support is necessary to realise the project.

The Energy Fund scheme was notified to the Authority in June 2003. In May 2005, the Authority opened the formal investigation procedure. The Authority considers that the support granted by the Fund gives the recipients an advantage over their competitors with the EEA, thereby constituting state aid within the meaning of the state aid provisions. The Authority has doubts whether the system as notified can be declared to be compatible with the state aid provisions and, in particular, with the Authority's State Aid Guidelines on aid for environmental protection. The Authority in particular questions whether the conditions of the scheme are such that the support for renewable energy production and energy saving measures result in any overcompensation. According to the Authority's State Aid Guidelines, the support must be limited to investment costs, with the exception of biomass for which operating costs might also be financed.

The Norwegian authorities offered to amend the system to bring the scheme in line with the State Aid Guidelines. In the formal investigation procedure the Authority will have to investigate further whether these changes are sufficient to dispel the Authority's doubts.

Aid to the Norðurál hf. aluminium smelter in Iceland accepted

The Authority adopted two Decisions in 2005 concerning state aid in favour of the aluminium smelter Norðurál hf.

The first Decision was adopted in June 2005. In this Decision, the Authority proposed appropriate measures to the Icelandic authorities in respect of state aid granted to Norðurál hf. on the basis of a number of tax and fee concessions which had previously been approved by the Authority in 1998. The Authority proposed that the aid resulting from recurrent tax and fee provisions should be subject to a ceiling expressed as a percentage of total investment costs. The ceiling was fixed according to the Authority's guidelines on regional aid as the smelter is located in an eligible region. In setting the ceiling, the Authority took into account the amount of investment costs incurred in 1998 and 2000-2001 as well as those relating to an expansion which is still under construction and to be terminated in 2008.

The Authority also requested the abolishment of a provision for the granting of aid to Norðurál hf. and its shareholders by means of an exemption from dividends withholding tax. The Authority found that the provision involved operating aid in favour of the shareholders, and could therefore not qualify as investment aid.

The appropriate measures were accepted by the Icelandic authorities on 15 July 2005.

The second Decision was adopted by the Authority on 20 July. It addresses a number of amendments to the aid scheme, which had been notified by the Icelandic authorities, as well as a number of non-notified aid measures, all forming part of the same scheme. The Decision provides that the grant of aid resulting from the amendments to the scheme and the non-notified aid measures must be subject to the ceiling fixed in the appropriate measures Decision of June 2005. The Authority moreover decided that the fact that the state owned power utilities built new facilities for purposes of supplying the expanded Norðurál hf. smelter with power does not result in the grant of state aid to the smelter. This finding followed an examination involving the application of the private market investor principle in the context of assessing the profitability of the new projects.

On this basis the Authority took a favourable view and adopted a Decision raising no objections.

The FARICE submarine cable project

The Authority will look more closely into the support measures granted by the Icelandic State in favour of the Farice submarine cable project. While the measures may be classified as state aid, the ongoing investigation will establish whether the measures may be considered compatible with the EEA Agreement.

On 26 May 2005 the Authority opened the formal investigation procedure regarding support measures which the Icelandic State granted in favour of the Farice project. The Farice project concerns the construction and management of a submarine cable which connects Iceland and the Faeroe Islands with Scotland. Since 1994, Iceland has been internationally connected through the undersea cable CANTAT-3. However, given the technical limitations of that system and the fact that Iceland has no other international fibre network link, there was a perceived need to find alternative solutions to ensure a reliable connectivity for Iceland.

The Farice project, which results from an initiative by the former state owned Icelandic telecom operator Landsími Íslands hf. (Síminn) and the incumbent telecom operator in the Faeroe Islands, Føroya Tele, should provide such an alternative. However, it already became visible at an early stage that without the financial participation of the Icelandic State, the project might not succeed. The Icelandic State, which became a shareholder in Farice hf., raised its share capital in the company at a later stage and also assumed a state guarantee for a loan given to Farice hf.

These two measures are the subject of the Authority's formal investigation procedure. The measures may constitute state aid, as they seem to grant an advantage to Farice hf. over its competitors within the EEA. Regarding the share capital increase, the Authority has taken the preliminary view that this increase would not have been undertaken in similar conditions by a private market investor. A state guarantee may constitute state aid unless a premium is paid to offset

Norwegian system for differentiated social security taxes

On 22 November, the EFTA Surveillance Authority adopted a negative Decision declaring the Norwegian proposal for regionally differentiated rates of social security contributions incompatible with the state aid rules in the EEA Agreement.

In April 2004, the Norwegian authorities notified the Authority of their intention to apply reduced rates of contributions to the national social insurance scheme paid by undertakings active in certain sectors and located in certain geographical areas (*"differensiert arbeidsgiveravgif"*). With the Decision adopted in November, the Authority closed the formal investigation started in October 2004 and concluded that the proposal could not be considered compatible with the state aid rules of the EEA Agreement.

For a measure to be state aid in the meaning of the EEA Agreement, one condition is that trade between EEA States is affected. The Norwegian authorities argued that the sectors covered by the notification were not exposed to intra-EEA trade and that therefore the notified scheme would not involve state aid within the meaning of Article 61(1) EEA. The Authority did not agree with this approach. The notified proposal covered around 200 specified economic sectors like banking, telecommunications and construction. Many of the notified sectors were clearly open to trade and competition within the EEA. Therefore, the Authority considered that the notified scheme was liable to affect trade between EEA States.

On the basis of a ruling by the EFTA Court and on the current Guidelines for Regional Aid, and in line with previous decisions, the Authority found the scheme to be incompatible with the EEA Agreement.

This Decision affected neither the Authority's Decision from 2003, which approved a gradual phasing out of the geographical differentiation until 1 January 2007, nor the EFTA State's Decision that continuation of a zero rate contribution in the very northernmost part of Norway (Northern Troms and Finnmark) was compatible with the EEA Agreement due to the exceptional circumstances in that area.

the advantage of the guarantee. The Authority is currently not convinced that an adequate premium has been paid for Farice's guarantee to be excluded.

If the Authority concludes that state aid is involved, it will have to assess whether the aid is compatible with the EEA Agreement. In that context, the Authority will take into consideration that the support might be necessary for guaranteeing a reliable connection for Iceland. It will, however, also be necessary to ascertain that the competition rules of the EEA Agreement are not infringed. Here the Authority will have to assess whether the project ensures that the access to all connectivity to Iceland is given on an open, transparent and non-discriminatory basis.

State guarantee in favour of Liechtensteinische Landesbank altered to comply with EEA state aid provisions

Due to an intervention of the Authority, the Principality of Liechtenstein altered a state guarantee which it grants to Liechtensteinische Landesbank ("LLB") and now requires LLB to pay an adequate premium to the State.

On 29 July 2005 the Authority closed its investigation of the state guarantee in favour of LLB. LLB has enjoyed a State guarantee on savings deposits and medium term notes since 1993. The guarantee was unlimited in time and in amount and LLB did not pay any premium for it. While LLB was not in financial difficulties and would, in principle, be able to get a loan on market conditions from the financial market, the Authority considered the fact that the guarantee was unlimited and not being remunerated to give LLB an advantage over its competitors, which do not profit from a State guarantee. The State guarantee could not be justified under the EEA state aid provisions, in particular not according to the criteria established by the Authority's State aid Guidelines for state aid in the form of State guarantees.

The Liechtenstein authorities suggested altering the State guarantee and limiting it to a period of 15 years. The guarantee will further be subject to a premium for the guaranteed savings deposits and medium term notes. The Authority needed to ascertain that this premium would be paid on market terms. An expert study in financial mathematics assessed – for a guarantee similar to the state guarantee under consideration – how much an insurer would charge in annual premiums. This rate so established will be paid by LLB, as a percentage of the annually established guaranteed amount of saving deposits and medium term notes, each year for the previous year. Each year, the Liechtenstein authorities will report on the calculation of the premium and its payment to the Authority.

Given these alterations, the Authority was satisfied that the guarantee would no longer result in an advantage for LLB.

State aid in the fisheries sector

In a Decision adopted in July 2005, the Authority considers that it is not within its competence to assess state aid to the fisheries sector on the basis of the EEA Agreement.

In September 2003, the Authority received a complaint from various Norwegian companies which requested it to investigate the use of public funds by local authorities to companies within the fisheries sector. The complainants alleged that aid was granted by municipalities and counties, in particular, by buying bankrupt undertakings and leasing them to interested companies on terms more favourable than those available in the market. According to the complainants, the municipalities granted operating aid to these companies contrary to the state aid rules of the EEA Agreement.

The Authority closed the case without further action. The provisions of the EEA Agreement and of the Surveillance and Court Agreement, which define the scope of the Authority's competences in the field of state aid, do not confer upon it the powers to assess state aid to the fisheries sector. Protocol 9 and the appertaining Joint Declaration of the EEA Agreement have introduced a separate surveillance and dispute settlement system regarding state aid to the fisheries sector. Under these provisions, it is up to the Contracting Parties to the EEA Agreement to deal with any possible state aid measures to this sector. The Authority has no role to play in this context, and therefore decided to close the case.

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The electronic version of the EFTA Surveillance Authority Annual Report may be found at:
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The electronic version includes two annexes. Both annexes concern cases handled by the Internal Market Affairs Directorate. The first annex lists all open cases at 31 December 2005. The second annex lists all cases closed in the course of 2005.

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