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P.O. Box 3984 Sandviken  
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**By registered mail**

**Subject: Complaint regarding levies imposed on fish exporters and exported fish products**

Dear Mr. Foss,

Reference is made to your complaint on behalf of Marine Harvest ASA and Marine Harvest (Scotland) Ltd., dated 2 May 2016 concerning alleged state aid in relation to levies imposed on fish exporters and exported fish products. By letter dated 13 May 2016 the EFTA Surveillance Authority ("the Authority") acknowledged the complaint.

The Authority further refers to the meeting between the complainants and representatives of the Authority on 10 June 2016, held at the request of the complainants. At the meeting the complaint was discussed and a further exchange of views took place, including on the Authority's competence to assess state aid to the fisheries sector.

In the present letter the Authority sets out why the relevant provisions of the EEA Agreement and of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA" or "the Surveillance and Court Agreement") cannot be held to confer upon the Authority the power to assess state aid to the fisheries sector pursuant to Article 4(1) of Protocol 9 EEA.

The present letter does not affect any other case pending with the Authority, including your Case No 79122, handled by the Authority's Internal Market Affairs Directorate.

## **1 The complaint**

In the complaint you describe an alleged aid measure emanating from levies on fish exporters and exported fish products. The levies are imposed on the basis of the Act relating to the Regulation of Exports of Fish and Fish Products, which enables the relevant Ministry to impose levies on fish exporters and exported fish products.<sup>1</sup> You explain that the levies

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<sup>1</sup> Lov om regulering av eksporten av fisk og fiskevarer; LOV-1990-04-27-9.

are in force on the basis of the Regulation on the Regulation of exports of Fish and Fish Products (“the Regulation”).<sup>2</sup>

Section 4 of the Regulation introduces two separate levies:

- An annual levy imposed on registered exporters; and
- A market levy on the fob-value of exported fish and fish products, with certain exemptions.

A portion of the proceeds from these levies is used to finance the activities of the Norwegian Seafood Council (“the Seafood Council”). The Authority understands that this allocation of financial resources is the object of the complaint.

According to the complaint the Seafood Council’s activities cover the dissemination of information. The Seafood Council may engage in marketing and export promoting activities, abroad and domestically. According to your complaint, a considerable part of the proceeds from the levies are targeted at certain sectors making it selective aid. The Seafood Council has discretionary power to formulate specific projects targeted at aiding individual exporters’ marketing efforts and thus relieving individual enterprises of marketing expenses which otherwise would have been borne by their budgets. Finally, you conclude that the alleged aid infringes Article 4(1) of Protocol 9 EEA.

In the complaint you also refer to Decision No 195/96/COL of 30 October 1996, in which the Authority concluded that it does not have the competence to assess state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA.

## **2 Comments by the Norwegian authorities**

By letter dated 13 May 2016, the Authority forwarded the complaint to the Norwegian authorities and invited them to submit observations by 13 June 2016. By letter dated 13 June 2016, the Norwegian authorities submitted their observations in relation to the complaint.

The Norwegian authorities refer to the Authority’s previous decisions concerning its competence to control state aid in the fisheries sector, and state that they share the interpretation of the EEA Agreement expressed in the statements and conclusions of the Authority in the three decisions.<sup>3</sup> The Norwegian authorities further state that they cannot see that the present case is to be distinguished from the previous cases assessed by the Authority. Thus, in the view of the Norwegian Government, the complaint is without merit.

## **3 Assessment**

### **3.1 State aid to the fisheries sector is excluded from the Authority’s competence**

Protocol 26 EEA on the functions and powers of the EFTA Surveillance Authority in the field of State aid outlines the state aid rules for which the Authority shall have surveillance powers. These include the general state aid provisions in Articles 61 to 63 EEA, as well as the sector-specific provisions of Article 49 EEA on transport and of Protocol 14 EEA on trade in coal and steel products. The state aid provisions in Protocol 9 EEA, however, are not included. Article 1 of Protocol 26 EEA reads:

*“The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC*

<sup>2</sup> Forskrift om regulering av eksporten av fisk og fiskevarer; FOR-1991-03-22-157.

<sup>3</sup> Decision No 195/96/COL of 30 October 1996; Decision No 176/05/COL of 15 July 2005; and Decision No 729/08/COL of 26 November 2008.



*Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to state aid of the Treaty establishing the European Economic Community, enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2)(e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14.”*

The competences of the Authority in the field of state aid are further specified in the Surveillance and Court agreement. Article 24 SCA enumerates the provisions, in accordance with which the Authority shall exercise its surveillance powers in the field of state aid:

*“The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning state aid as well as ensure that those provisions are applied by the EFTA States. In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I.”*

The state aid provisions in Protocol 9 EEA are not included, and Annex I SCA did not include any acts on state aid in the fisheries sector. Nor are any acts on state aid in the fisheries sector included in Annex XV EEA.

There is no indication that Protocol 26 EEA together with Article 24 SCA were not intended to exhaustively list the basic provisions, according to which the Authority can exercise surveillance powers in the field of state aid.

Moreover, the exclusion of the state aid rules in Protocol 9 EEA from the surveillance powers of the Authority is also apparent from Article 64 EEA. This Article foresees a procedure to deal with cases where one of the surveillance authorities considers that the other surveillance authority’s implementation of state aid rules is not in conformity with the maintenance of equal conditions of competition within the territory covered by the EEA Agreement. Article 64(1) EEA reads:

*“If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).  
...”*

Indeed, only the state aid rules in Articles 61 and 62, as well as Article 5 of Protocol 14 EEA are mentioned, to the exclusion of the state aid rules in Article 4(1) of Protocol 9 EEA.

Accordingly, 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 carry out surveillance of state aid to the fisheries sector under Article 4(1) of Protocol 9 EEA.

### 3.2 State aid to the fisheries sector is to be assessed by the Contracting Parties

Chapter 2 of Part II of the EEA Agreement concerns specific rules for agricultural and fisheries products. Article 20 of that Chapter states that “*provisions and arrangements that apply to fish and other marine products are set out in Protocol 9*”.

Protocol 9 EEA on trade in fish and other maritime products contains rules relating to custom duties and charges having equivalent effect, rules on quantitative restrictions on imports, rules of origin, as well as rules on state aid and competition. Article 4 of Protocol 9 EEA reads:

*“1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.*

*2. Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition.*

*3. The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties.”*

Article 4(1) must be read in the context of (2) and (3), indicating that aid granted to the fisheries sector is for the Contracting Parties to assess. This understanding is confirmed by the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9, annexed to the Final Act of the EEA Agreement (emphasis added):

*“1. While the EFTA States will not take over the “acquis communautaire” concerning the fishery policy, it is understood that, where reference is made to aid granted through state resources, any distortion of competition is to be assessed by the Contracting Parties in the context of Articles 92 and 93 of the EEC Treaty and in relation to relevant provisions of the “acquis communautaire” concerning the fishery policy and the content of the Joint Declaration regarding Article 61(3)(c) of the Agreement. ...”*

That the Contracting Parties have thus reserved the enforcement of Article 4(1) of Protocol 9 EEA for themselves is also entirely consistent with how the Authority’s competence to assess state aid is circumscribed elsewhere in the EEA Agreement and the Surveillance and Court Agreement (see section 3.1 above).

## 4 Conclusion

On the basis of the foregoing, and in line with the Authority’s previous decisions on its competence to control state aid in the fisheries sector,<sup>4</sup> the Authority finds that it lacks the competence to carry out surveillance of state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

Accordingly, the case is closed.

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<sup>4</sup> Decision No 195/96/COL of 30 October 1996; Decision No 176/05/COL of 15 July 2005; and Decision No 729/08/COL of 26 November 2008.

The present letter is a challengeable act. Any appeal must be brought before the EFTA Court within two months, in accordance with Article 36(3) SCA.

Yours sincerely,



Gjermund Mathisen

Director

Competition and State Aid Directorate