EFTA SURVEILLANCE AUTHORITY

Annual Report 2009

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Foreword

2009 witnessed the 15th anniversary of the entry into force of the EEA Agreement. The modest marking of the event occurred in a year of worldwide economic turmoil. 2009 was also notable as it saw the Lisbon Treaty enter into force and Iceland apply for membership of the EU.

The financial crisis has had major consequences for the economies of the EFTA States. Iceland has suffered an unprecedented collapse in its financial sector, and has been forced to take far-reaching measures to address the crisis. More than 40 European banks, as well as Dutch deposit holders, have launched complaints against the Icelandic State's actions. Refinancing of the banks and other state interventions raise many state aid issues, not only in Iceland but also in Norway where there have been several major cases. Liechtenstein has not notified any financial crisis measures.

It is important that all businesses across the EEA enjoy the same level of protection against possible anti-competitive practices. The Authority has recently issued two statements of objections addressed to Norwegian companies in the field of competition.

In recent years, the Authority has made a targeted effort to speed up its case handling and, as a consequence, reduced the number of pending cases. The number of open cases was reduced to 510 at the end of the year from 619 in 2008. The aim is to bring this number down even further. Twice a year, in parallel with the European Commission, the Authority publishes an Internal Market Scoreboard. The Scoreboard indicates how well the EFTA States perform in implementing directives. The average transposition deficit of the EFTA States has dropped to an excellent 0.7 %, which is the best rate since the EEA was created. Hopefully, this positive development will continue in 2010. It is important that the governments of the EFTA States devote sufficient resources to honour their EEA obligations even in times of many other competing priorities.

Last July, Iceland applied for membership of the EU. The application will not, however, have a bearing on the work of the Authority, and it will be "business as usual" when it comes to the surveillance of Iceland's obligations.

It may well be that the EEA Agreement was originally conceived by some as a provisional arrangement, but it was constructed to last. The Agreement is static in scope but dynamic in nature, as it provides for a regular addition of EU legislation to it. Last year alone, 284 new legal acts were incorporated into the Agreement. Without a vigilant EFTA Surveillance Authority ensuring compliance with a continuously adapted set of EEA rules, confidence in the Agreement would ultimately erode.

Per Sanderud
President

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Chapter 1

Introduction

The EFTA Surveillance Authority monitors compliance with European Economic Area rules in Iceland, Liechtenstein and Norway, enabling them to participate in the European internal market

The European Economic Area

The European Economic Area (EEA) consists of the 27 Member States of the European Union (EU) and three European Free Trade Association (EFTA) States: Iceland, Liechtenstein and Norway. It was established by the EEA Agreement, an international agreement which enables the three EFTA States to participate fully in the European internal (or single) market.

The purpose of the EEA Agreement is to guarantee, in all 30 EEA States, the free movement of goods, people, services and capital – "the four freedoms". As a result of the agreement, EC law on the four freedoms, state aid, and competition rules for undertakings, is incorporated into the domestic law of the participating EFTA States. All new relevant Community legislation is also introduced through the EEA Agreement so that it applies throughout the EEA, ensuring a uniform application of laws relating to the internal market.

The Agreement seeks to guarantee equal conditions of competition, and equal rights to participate in the internal market for citizens and economic operators in the EEA. It also provides for cooperation across the EEA in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture. By removing barriers to trade and by opening new opportunities for some 500 million Europeans, the creation of the EEA stimulates economic growth and adds to the international competitiveness of the EEA States.

The successful operation of the EEA Agreement depends upon uniform implementation and application of the common rules in each of the 30 EEA States. A two-pillar system of supervision has been devised: EU Member States are supervised by the European Commission; while the participating EFTA States are supervised by the EFTA Surveillance Authority.

The role of the EFTA Surveillance Authority – an overview

The EFTA Surveillance Authority ensures that the participating EFTA States of Iceland, Liechtenstein, and Norway respect their obligations under the EEA Agreement.

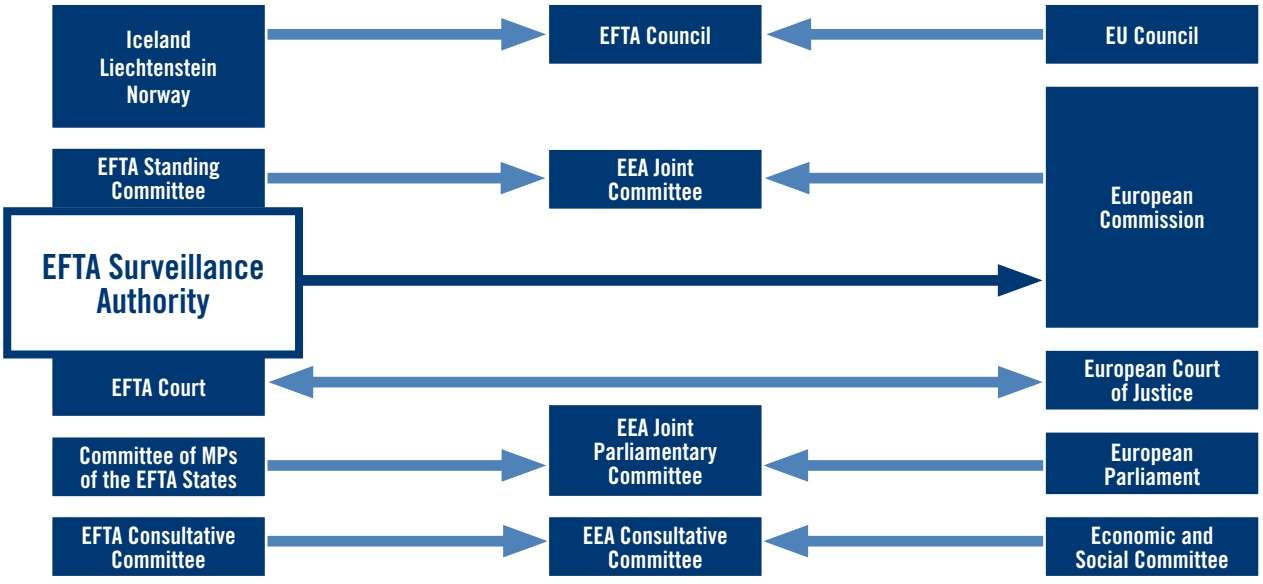
The Authority seeks to protect the rights of individuals and market participants who find their rights violated by rules or practices of the EFTA States or companies within those states. Such rules or practices may, for example, be discriminatory, impose unnecessary burdens on commercial activity, or constitute unlawful State aid. The Authority may in such cases initiate proceedings against the relevant EFTA State at the EFTA Court, seeking a change in the relevant rules or practices.

The Authority also enforces restrictions on State aid, assessing its compatibility with the functioning of the internal market, and has the power to order repayment of unlawful State aid.

The Authority also ensures that companies operating in the EFTA States abide by the rules relating to competition. The Authority can investigate possible infringements of EEA provisions, either on its own initiative, or on the basis of complaints, and can impose fines on individual undertakings and assess mergers between undertakings where certain thresholds are met.

In monitoring and enforcing the Agreement, the Authority has powers that correspond to those of the European Commission and there is close contact and cooperation between the Commission and the Authority. The two institutions oversee the application of the same laws in different parts of the EEA.

THE TWO-PILLAR STRUCTURE UNDER THE EEA AGREEMENT



Organisation of the Authority

College

The Authority operates independently of the EFTA States and is based in Brussels. The Authority is led by a College which consists of three members, each appointed for a period of four years by the three participating EFTA States. Although College members are appointed by the Member States, they undertake their functions independently and free of political direction. All decisions which formally bind the Authority are taken by the College, which usually meets once a week.

During 2009, the composition of the College was:

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

In 2009, the EFTA States appointed a new College for the period 2010–13:

- **Per Sanderud** President (Norway, 2010–11)
- **Kurt Jaeger** (Liechtenstein)
- **Sverrir Haukur Gunnlaugsson** (Iceland)

The College is served by four departments that form the staff of the Authority: the Internal Market Directorate, the Competition and State Aid Directorate, the Legal and Executive Affairs Department and the Administration.

Budget and accounts

The activities and operating expenses of the Authority are financed by contributions from Iceland (9%), Liechtenstein (2%) and Norway (89%). The Authority's annual budget was almost EUR 12.2 million in 2009, 3.38% higher than in 2008. The budget for 2010, adopted in December 2009, is marginally less than in 2009.

On 23 July 2009, the Authority submitted its Financial Statement for the preceding financial year (2008), and the accompanying Audit Report by the EFTA Board of Auditors (EBOA), to the EFTA States. The audit certificate stated that:

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

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

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

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

On 8 December 2009, the Authority's Financial Statement for the preceding year (2008) was approved by the EFTA States, and the Authority was discharged of its accounting responsibilities for that period.

The Authority's budgets for the reporting period, 2009, and 2010, adopted in 2009, is shown below.

Personnel

In 2009, the Authority consisted of 66 personnel, made up of College Members, staff employed on fixed-term contracts, temporary staff, national experts seconded from the EFTA States' public administrations, and trainees. In 2009, 16 nationalities were represented amongst the staff, but approximately half come from the EFTA States. In accordance with the Authority's staff regulations established by the EFTA States, staff are employed for a three-year period, normally renewable only once.

Total budget (EUR)		Budget 2009	Budget 2010
Chapter 1	Salaries & benefits, allowances	9 311 645	9 311 646
	Salaries	6 349 311	6 137 876
	Benefits, allowances & turnover costs	2 962 334	3 173 770
Chapter 2	Travel, training, representation	710 300	710 300
Chapter 3	Office accommodation	1 055 000	1 107 000
Chapter 4	Supplies and services	1 116 907	1 064 905
Total expenditures		**12 193 851**	**12 193 851**
Chapter 5	Financial income and expenditures	– 13 478	– 25 000
Chapter 6	Other income	– 27 052	– 19 818
Contributions from the EFTA States		**12,153,321**	**12 149,033**

Access to information

In June 2008, the Authority adopted new Rules on Public Access to Documents, and has since published a document register containing correspondence and decisions emanating from the Authority weekly on its website (http://www.eftasurv.int). The aim of the new rules, and the document register, is to increase transparency and improve access to information. 2009 was the first full year in which these rules were applicable. The Authority received approximately 50 requests under the rules and granted access to the requested documents in the majority of cases. In six cases access to some or all documents was refused. Those instances primarily concerned cases in which an investigation was still pending at the Authority or where documents requested concerned internal evaluations of the Authority or correspondence with EFTA States.

In 2009, the Authority also launched a newly improved and revised website (http://www.eftasurv.int).

KEY TERMS

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

EEA
The European Economic Area, an area of economic cooperation that consists of the 27 EU Member States and three of the EFTA States: Iceland, Liechtenstein, Norway. Switzerland is not part of the EEA. Inside the EEA, the rights and obligations established by the Internal Market of the European Union are expanded to include the participating EFTA States.

EEA Joint Committee
A Committee of representatives of EU and EFTA States competent to incorporate legislation into the EEA Agreement.

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

EEA Agreement
The Agreement which creates the European Economic Area.

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

EFTA Court
The judicial body of the EFTA pillar with jurisdiction with regard to the obligations of the EFTA States and the Authority pursuant to the EEA Agreement. The main functions of the Court consist of judgments in direct actions, in particular infringement cases brought by the Authority against the EFTA States, and advisory opinions in cases referred to it by the national courts of the EFTA States.

Chapter 2

Internal Market

Tasks and activities in the field of Internal Market

The role of the Authority's Internal Market Affairs Directorate (IMA) is to monitor the EFTA States in order to ensure that they effectively implement the Internal Market rules into their national legal orders and that they apply those rules correctly. In this context, the Authority performs broadly the same role as the European Commission, and the two bodies work closely together.

The Internal Market is based on the rules concerning the four freedoms – the free movement of goods, persons, services and capital – which have been at the centre of European integration ever since the signing of the Treaty of Rome in 1957. Those rules are further supplemented by a number of "horizontal provisions", covering areas such as health and safety at work, labour law, equal treatment of men and women, consumer protection, environment and company law. The Internal Market rules cover most areas relevant to commercial activities in the EEA.

The EFTA States are required to notify the Authority of the measures they adopt to implement directives and, if requested by the Authority, to inform the Authority of the incorporation of regulations into national law. If an EFTA State does not implement the EEA rules, the Authority will intervene and may initiate infringement proceedings against the EFTA State concerned which may ultimately be adjudicated by the EFTA Court.

Where the Authority has information about national legislation or practices that may not comply with EEA rules, it may decide to initiate an investigation. This may be based on incorrect implementation of EEA rules or where national rules or practices are incompatible with the rules. Such investigations can be initiated on the basis of the Authority's own surveillance of the EFTA States, or on the basis of a complaint. Anyone may submit a complaint to the Authority against any EFTA State that has failed to comply with its obligations under the EEA Agreement.

However, problems can often be resolved through informal exchange of information and discussions between the Authority and the EFTA State concerned.

TYPES OF CASES[1] HANDLED BY IMA

COMPLAINTS (COM)

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

NON-NOTIFICATION OF IMPLEMENTATION OF DIRECTIVES (NON)

Non-notification cases are opened when an EFTA State has failed to adopt national measures to implement directives by the relevant compliance date.

NON-INCORPORATION OF REGULATIONS (REG)

Non-incorporation cases are opened when an EFTA State has failed to adopt national measures to incorporate regulations into its internal legal order by the relevant compliance date.

CONFORMITY ASSESSMENTS (CON)

Conformity assessment cases are opened on the Authority's own initiative in order to assess the conformity of national measures notified by an EFTA State with an EEA measure.

INCORRECT IMPLEMENTATION OR APPLICATION OF EEA RULES (INC)

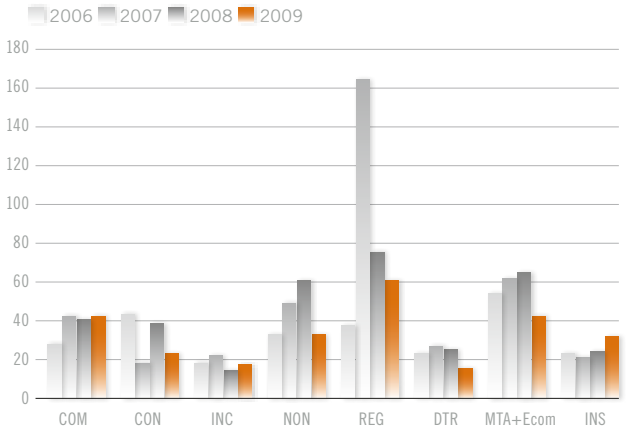
Where the Authority has information that national legislation or practice may not be in compliance with EEA rules and decides to examine the issue further, a case is opened at the Authority's own initiative.

Overview of activities in 2009

New cases in 2009

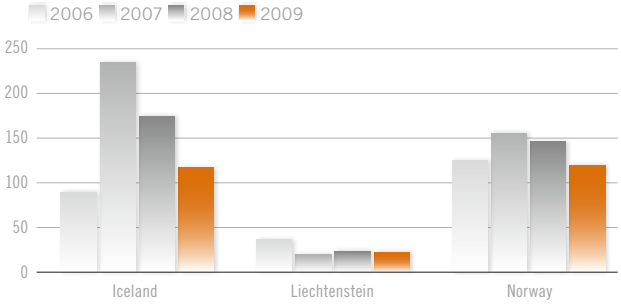
A total of 276 new cases were opened by IMA during 2009. This amounts to a 22% decrease compared to cases opened in 2008.

Figure 1 New cases/Case types



The majority of new cases opened in 2009 concerned Norway (118) and Iceland (115). The corresponding figure for Liechtenstein was 22[2].

Figure 2 New cases/States



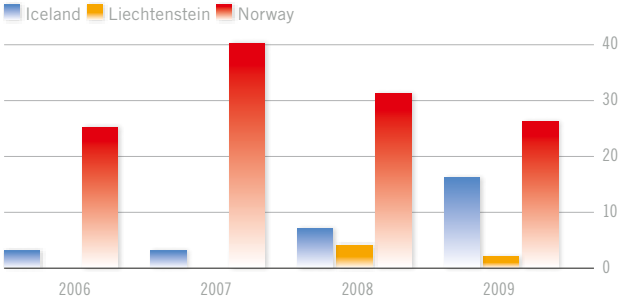
2 The remaining 21 cases concerned either two or all three of the EFTA States or were complaints concerning EU Member States that were forwarded to the European Commission.

The number of new complaints increased by two compared to 2008, from 42 to 44. As in previous years, the majority of the new complaints – 26 or 59% – were directed against Norway; 16 complaints were received against Iceland and two against Liechtenstein.

The majority of new cases (139 cases) in 2009 were opened on the Authority's own initiative in order to assess compliance of national legislation or practice with Internal Market rules. Such cases are opened by the Authority when it considers that EEA law may have been infringed. However, the cases do not necessarily lead the Authority to initiate formal infringement proceedings, as they might be solved informally or proven unfounded. Furthermore, cases are opened on the Authority's own initiative where Iceland or Norway has failed to incorporate EU regulations into national law. A large portion of the cases opened on the Authority's own initiative in 2009 related to the failure by Iceland to make regulations part of its internal legal order in a timely manner.

In 2009, the Authority opened 34 non-notification cases due to the EEA EFTA States' failure to implement directives in a timely manner. The Authority also initiated 24 conformity assessment cases during 2009 in order to assess whether national rules were in conformity with the EEA Agreement.

Figure 3 New cases/Complaints by State



Examples include incorrect implementation of EEA rules, national rules or practices that are incompatible with EEA rules, or misapplication of EEA rules.

DRAFT TECHNICAL REGULATIONS (DTR)

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

MANAGEMENT TASKS (MTA)

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

INSPECTIONS (INS)

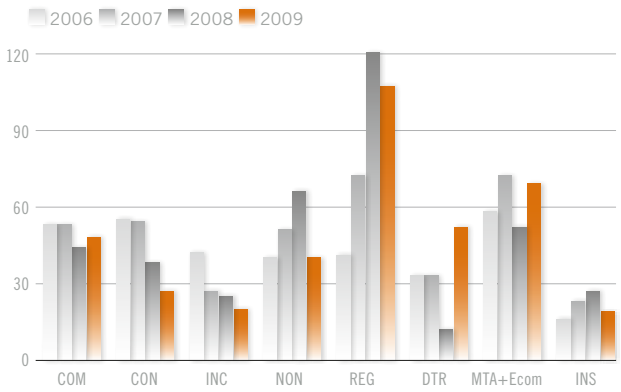
The Authority performs on-the-spot investigations to verify that the EFTA States are complying with their obligations relating to food safety and aviation and maritime security.

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

Closed cases

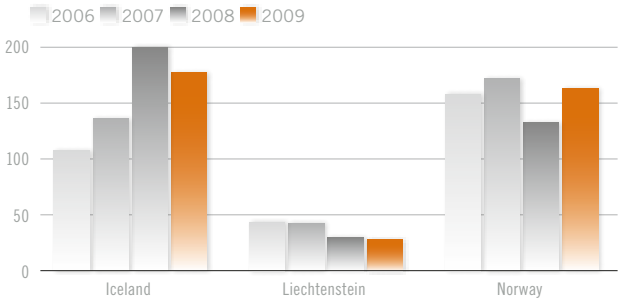
A total of 382 cases were closed during 2009, compared to 384 in 2008.

Figure 4 Closures/Case types



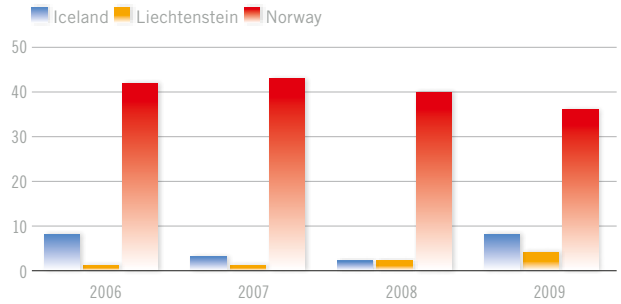
Of the cases that were closed, 164 concerned Norway, 178 concerned Iceland, and 28 concerned Liechtenstein.

Figure 5 Closures/States



A total of 48 complaint cases were closed in 2009.

Figure 6 Closures/Complaints by State

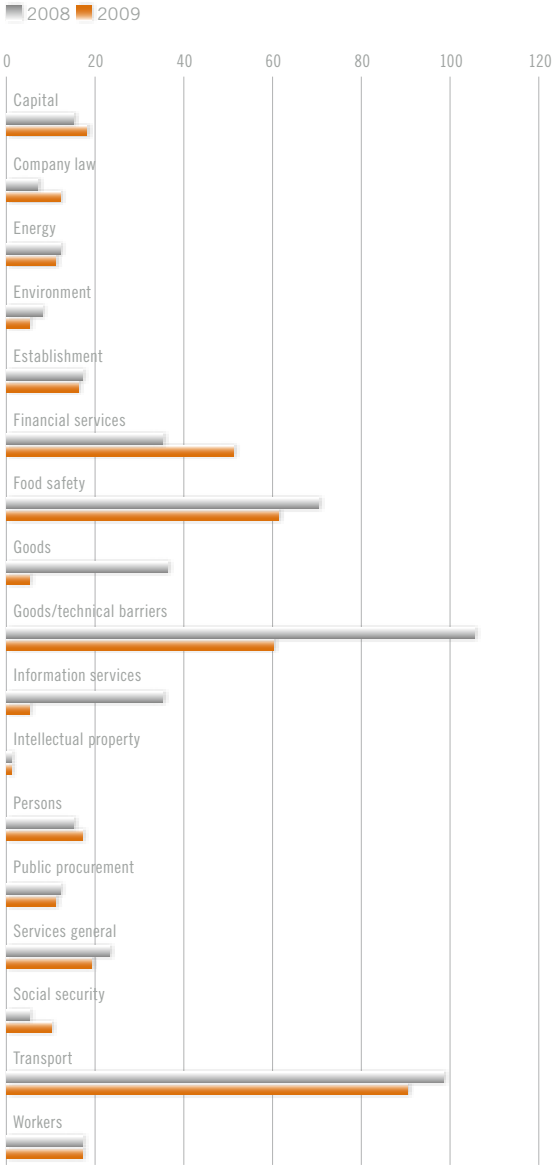


Pending cases

At the end of 2009, IMA had 409 cases under examination, a decrease of 102 cases in comparison to the 511 cases pending at the end of 2008.

There were 87 complaint cases pending, that is, four fewer than at the end of 2008. The remaining 322 cases were initiated either to carry out tasks entrusted to IMA by EEA legislation (reporting tasks, examination of draft technical regulations, food safety and aviation security inspections), or on the Authority's own initiative to examine compliance by the EFTA States with their EEA obligations.

Figure 7 Pending cases/Sectors



The sectors with the highest number of pending cases included transport (90), food safety (61), goods/technical barriers (60), and financial services (51). The number of pending cases decreased in the sectors of goods (77 cases fewer than in 2008) and information society services (30 cases fewer than in 2008), and increased most in the sector of financial services (15 more cases).

Formal infringement proceedings

In 2009, there was a decrease (of 34%, from 239 to 157) in the number of formal infringement actions (LFN, RDO, EFC) taken by the Authority as compared to 2008. The number of new infringement cases opened (by issuing letters of formal notice) decreased by 34% in 2009, and the number of reasoned opinions decreased by 35%. Three cases were brought before the EFTA Court in 2009 in comparison to five in 2008.

Of the new infringement cases initiated in 2009 by sending out letters of formal notice, 73% were directed against Iceland, 21% against Norway and 6% against Liechtenstein.

Figure 8 Infringement actions

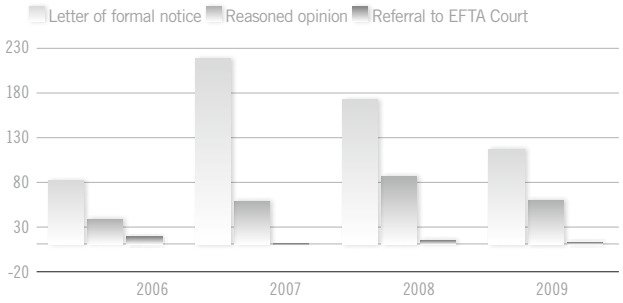
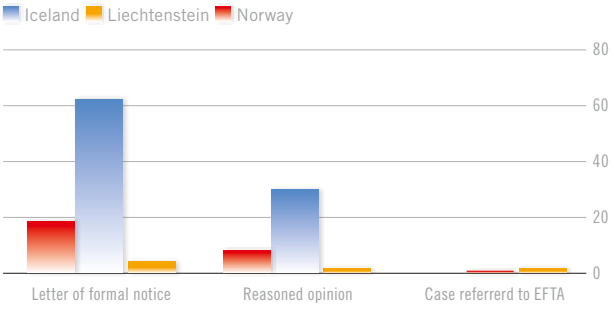


Figure 9 Cases subject to infringement actions by State in 2009



Failure by the EFTA States to implement EEA directives in a timely manner accounted for 30% of the new infringement proceedings launched by the Authority. That is considerably less than in 2008 (37%). Although the number of new infringement proceedings concerning timely incorporation of EEA regulations by Iceland and Norway decreased from 2008 (by 8%), such cases still accounted for half of the new infringement proceedings launched by the Authority in 2009. Of the 49 reasoned opinions delivered in 2009, most related to the failure by Iceland to incorporate EEA regulations into national law.

Most infringement actions in 2009 concerned three sectors: food safety (46), transport (26), and goods/technical barriers to trade (23). Infringement actions increased considerably in the sectors of persons (+9) and social security (+7), whereas infringement actions decreased significantly in the sectors of food safety (–40) and goods/technical barriers (–33) and transport (–28).

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

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

Implementation of directives

By the end of 2009, the total number of directives incorporated into the EEA Agreement was 1727. Iceland was required to implement 1490 of these directives, Liechtenstein 1458 and Norway 1648. At the end of the year, Iceland had notified full implementation of 98.5% of the directives. For Liechtenstein and Norway, the figures were 99.2% and 99.3% respectively.

The Implementation Status Database[3] available on the Authority's website contains information on all the directives referred to in the Annexes to the EEA Agreement in respect of which the deadline for implementation has expired. It indicates the status of implementation (full, partial, and no implementation) and the titles of the national implementing measures. The database is updated daily.

The statistics on implementation do not reflect the quality of the implementing measures notified by the EFTA States, or how the measures are applied in practice. An assessment by the Authority can reveal problems concerning the conformity of notified measures with the EEA rules they are intended to implement. Due to the Authority's limited resources, approximately only one third of implementing acts notified have been subject to a full conformity assessment.

Incorporation of regulations

Within the EU, regulations differ from directives in that the former automatically become part of the internal legal orders of the EU Member States and do not need to be incorporated into national law. That is not the case for regulations incorporated into the EEA Agreement, which must be incorporated into the internal legal orders of the EFTA States (Article 7 of the EEA Agreement)[5]. In Liechtenstein, under constitutional law, regulations automatically become part of the national legal order as soon as they are incorporated in the EEA Agreement. In Iceland and Norway, on the other hand, legal measures must be adopted in order to incorporate regulations "as such" into their internal legal orders. The Authority requests both countries to notify the national measures taken to incorporate regulations.

The situation regarding incorporation of regulations has been particularly problematic in Iceland due to a translation backlog and delays in publication. During the past few years, both Iceland and Norway have demonstrated a significant improvement in their performance in incorporating regulations. However, at the end of 2009 the number of unincorporated regulations remained high: 61 in Iceland and 28 in Norway. The figures at the end of 2008 were 89 for Iceland and 11 for Norway. Thus, in 2009 Iceland reduced its deficit from 10.9% to 7.0%, whereas Norway's deficit increased from 1.6% to 3.3%[6].

Cases relating to delays in incorporation of regulations still represent a majority of all infringement proceedings initiated by the Authority. In 2009, 31% of new infringement proceedings concerned non-timely incorporation of regulations by Iceland. Similarly, most of the reasoned opinions sent in 2009 related to Iceland's failure to incorporate regulations into national law (25 out of a total of 49).

3 The Implementation Status Database is available at http://www.eftasurv.int/internal-market-affairs/implementation-status-/

5 By the end of 2009, the total number of regulations incorporated into the EEA Agreement was 877. Iceland was required to incorporate 805 of these regulations and Norway 872.

6 These figures exclude regulations in the field of statistics.

Twice a year the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard.[4]
The Scoreboard indicates how well the EFTA States perform with regard to the implementation of directives.

At the time of the latest Scoreboard, published in July, the average implementation deficit of the EFTA States was 0.7%.
Liechtenstein and Norway were below the interim target of 1.0% set by the European Council, whereas Iceland was slightly above it:

- Iceland 1.1%
- Liechtenstein 0.5%
- Norway 0.4%

4. The latest Internal Market Scoreboard for the EFTA States was published in July 2009, showing the implementation status of directives as of 11 May 2009. The EFTA Scoreboard can be found at http://www.eftasurv.int/press--publications/scoreboards/internal-market-scoreboards/archive/nr/1127

Important legal activities before the courts

In 2009, the Authority brought three Internal Market cases before the EFTA Court: one against Iceland and two against Liechtenstein. All three cases concerned delays in the implementation of EEA directives. These cases are described in more detail in the following pages.

The Authority has also intervened in a number of other cases before the EFTA Court and the European Court of Justice. When the EFTA Court receives requests for advisory opinions from a national court in one of the EFTA States, the Authority intervenes. The Authority also intervenes in cases before the European Court of Justice that are regarded to be of special interest to the EEA.

NON-IMPLEMENTATION CASES BEFORE THE EFTA COURT

In 2009, the EFTA Court rendered a judgment in five cases where the Authority brought the EFTA States before the Court for failing to implement regulations and directives. The first case, had been brought by the Authority in late 2008 and concerned the failure of Norway to fully implement the Directive on energy efficiency of buildings. The second of these cases was noteworthy as it was the first time the EFTA Court had given a judgment in default when it found that Iceland had failed to incorporate a Regulation on the fees and charges levied by the European Aviation Safety Agency. In addition, both Iceland and Liechtenstein were referred to the Court for their failure to implement the Directive on cross-border mergers of limited liability companies. Finally, Liechtenstein was also found to have breached its obligations under the EEA Agreement by not implementing the Directive on reinsurance.

Financial services, capital

The financial crisis in Iceland

The Icelandic economy was particularly hard hit by the financial crisis in 2008 and 2009. In October 2008, Iceland adopted various measures to restructure its banking system following the collapse of its biggest banks: Kaupthing, Glitnir and Landsbanki.

In October 2008, the three largest Icelandic banks, Kaupthing, Glitnir and Landsbanki, had to cease operations due to refinancing and liquidity problems. The Icelandic authorities took control of the three banks and introduced legislation giving depositors priority over other unsecured creditors. Three new separate entities were created, to which the domestic operations of the three banks were transferred, together with certain assets and other liabilities. All three banks had significant business in other EEA States and foreign depositors and other creditors of the banks were strongly affected by the Icelandic measures.

The Icelandic measures have raised questions as regards their compatibility with EEA law, in particular as regards the treatment of depositors and other creditors outside Iceland. In October 2008, the Authority began an investigation on its own initiative. During 2009, the Authority received a number of complaints relating to the Icelandic measures, both from foreign depositors and general creditors (bondholders, etc.).

The foreign depositors and creditors essentially claim that they have been discriminated against as compared to Icelandic depositors/creditors, in violation of EEA rules. Some of the complainants also argue that the Icelandic measures constitute unlawful restrictions on the free movement of capital and the freedom to provide services.

The Authority has discussed the issues in detail with the Icelandic authorities. It has also met with representatives of some of the complainants and exchanged information and views with the European Commission. The Authority will continue its assessment of the issues and aims at reaching a conclusion during 2010.

Free movement of capital

Iceland abolishes restrictions on ownership in savings banks

In 2009, Iceland abolished legislation restricting ownership in savings banks, which required prior approval for transfers of shares and a 5% ceiling on voting rights.

In 2003, the Authority initiated a comprehensive survey to assess the compatibility of the Icelandic financial legislation with EEA law. One of the issues identified concerned restrictions on ownership and voting rights in savings banks. The Authority also received a complaint in relation to the ownership restrictions.

The problematic provisions were: (i) a requirement to seek the approval of the board prior to the sale of shares in a savings bank; a requirement to seek approval from the Financial Supervisory Authority (Fjármálaeftirlitið) for acquisitions of qualified holdings in savings banks; and a 5% ceiling on voting rights in savings banks.

On 19 September 2003, the Authority sent Iceland a letter in which it indicated that the relevant Icelandic provisions (Article 70(2) and (3) and Article 75 (1) of Act 161/2002 on Financial Institutions (Lög 161/2002 um fjármálafyrirtæki)) were contrary to the principle of free movement of capital (Article 40 EEA) and the Capital Movements Directive (88/361/EEC).

According to EEA case law, limitations on ownership and voting rights in undertakings restrict the free movement of capital because they are liable to deter investors from investing in the capital of undertakings.
EEA law, and in particular Directive 2000/12/EC relating to the taking-up and pursuit of the business of credit institutions (Directive of 2000/12/EC of the European Parliament and of the Council of 20 March 2000), requires that proposed acquisitions of large holdings in credit institutions be notified to the competent authority and that an assessment of the effects of the acquisition on sound and prudent management of the credit institutions be carried out.

However, in the view of the Authority, the Icelandic provisions were disproportionate in that they were more restrictive than necessary to comply with the Directive, in particular because they made the acquisition of significant holdings subject to prior approval by the authorities and provided for a ceiling on voting rights.

The case was discussed in various meetings between the Authority and the Icelandic Government and, in 2006, the Icelandic Government informed the Authority that the legislation on savings banks would be revised. In 2007, a committee was appointed to assist the Icelandic Government in that task.

On 14 July 2009, the Icelandic Parliament removed the restrictions by adopting Act 76/2009 amending Act 161/2002 on Financial Institutions. As a result, There are now no restrictions on the transfer of holdings in savings banks, apart from the general rules on the prudential assessments that must be carried out when qualifying holdings in financial institutions are acquired or disposed of.

The Authority closed its investigation in 2009.

Freedom of establishment, free movement of capital

Ownership restrictions in financial services infrastructure institutions in Norway

In December 2009, the Authority sent Norway a letter of formal notice in respect of national legislation restricting ownership in certain types of financial services infrastructure institutions (for example, stock exchanges) considered to be in breach of EEA rules.

Sections 35 and 36 of the Norwegian Act on Regulated Markets (*Børsloven*) and Sections 5-3 and 5-4 of the Act on Registration of Financial Instruments provide for a ban (subject to certain limited exceptions) on ownership of more than 20% holdings in stock exchanges and securities depositories, and a limitation on voting rights to 20% of the total capital of such undertakings or 30% of the capital represented at a general meeting.

The Authority began an own-initiative investigation into the Norwegian legislation on 17 July 2003 on the basis that the Norwegian legislation constituted a restriction of the freedom of establishment (Article 31 EEA) and the free movement of capital (Article 40 EEA), as well as a breach of the Capital Movements Directive (Council Directive 88/361/EEC). The Authority sent a letter of formal notice to Norway concerning the provisions restricting ownership. On 1 June 2004, the Authority delivered a reasoned opinion to Norway on the matter.

Subsequently, the Norwegian Government informed the Authority that a working group had been established to revise the relevant legislation. While the legislation was being assessed, the Authority and the Norwegian Government discussed the issues on a number of occasions.

On 19 June 2009, the Norwegian Parliament adopted legislation amending the ownership restriction rules. The legislation entered into force on 1 July 2009.

The Authority opened a new investigation into the amended legislation, and does not consider that the amendments sufficiently address the issues it raised in 2004. Therefore a new letter of formal notice was issued on 16 December 2009.

According to EEA case law, limitations on ownership and voting rights in undertakings, such as those provided for in the Norwegian legislation, are liable to deter investors from investing in the capital of undertakings. They therefore constitute restrictions on the freedom of establishment and the free movement of capital.

The Norwegian government is of the view that the restrictions are justified in order to ensure well-functioning and transparent financial markets. Article 38 of Directive 2004/39/EC on markets in financial instruments requires that, before a large holding in a stock exchange is acquired, the competent authority in the relevant country is notified of the proposed acquisition in advance, and that an assessment of the effects of the acquisition is conducted based on sound and prudent management of the stock exchange.

The Authority does not dispute that the Norwegian aims are legitimate under EEA law, but considers the measures to be disproportionate: they are more restrictive than what is required by Directive 2004/39/EC and what can be considered necessary in order to achieve those aims.

Tax deductions for donations to charitable institutions

In 2009, the Authority sent reasoned opinions to Liechtenstein and Norway in respect of legislation making the tax deductibility of donations to charitable institutions dependent on certain residency requirements. In Liechtenstein, only donations to charities in Liechtenstein and Switzerland could be deducted, and in Norway, only donations to charities in Norway.

In 2002, the Authority carried out an examination of tax legislation in both Liechtenstein and Norway. One of the issues identified was that both States were limiting the tax deductibility of donations to domestic charitable organisations, although in Liechtenstein donations to organisations in Switzerland were also deductible.

The Authority raised these issues with the Norwegian and Liechtenstein governments, pointing out that the rules constituted an incentive to make donations to charitable organisations located in Liechtenstein, Switzerland and Norway in preference to charities based elsewhere in the EEA.

Unconvinced by the explanations received from Liechtenstein and Norway, in 2003 the Authority sent both countries letters of formal notice to the effect that the national rules were not compatible with EEA law.

Discussions continued, and in 2007 the Liechtenstein Government indicated that a revision of the relevant rules was envisaged.

On 27 January 2009, the European Court of Justice gave its judgment in Case C-318/08 *Persche*, where it concluded that German legislation limiting deductions for tax purposes to gifts made to charitable organisations established in Germany was contrary to the free movement of capital.

Following that judgment, the Authority sent reasoned opinions to Norway and Liechtenstein, finding that the national legislation was incompatible with the free movement of capital.

CASE E-1/09: THE END OF RESIDENCE REQUIREMENTS FOR BOARD MEMBERS IN BANKS, LAWYERS, AUDITORS AND TRUSTEES IN LIECHTENSTEIN

On 6 January 2010, the EFTA Court handed down a judgment condemning Liechtenstein for residence requirements for board members in banks, lawyers, auditors and trustees.

This judgment put an end to the long-standing saga of residence requirements in Liechtenstein. On 1 July 2005, the EFTA Court declared in its judgment in Case E-8/04 that Section 25 of the Banking Act, which imposed a residence requirement in Liechtenstein, was contrary to the principle of freedom of establishment, as laid down in Article 31 of the EEA Agreement. As a consequence, Section 25 of the Banking Act was amended, but still contained a residence requirement, although different from the one ruled upon by the EFTA Court.

The new provision required that all the members of the management board and of the executive management must, by reason of their residence, be in a position to actually and flawlessly perform their functions and duties. At the same time, similar residence requirements were introduced for lawyers, patent lawyers, auditors and trustees.

The Authority lodged an application before the EFTA Court against these new provisions in February 2009. In its judgment, the EFTA Court upheld the position of the Authority by declaring that these provisions were indeed in breach of the freedom of establishment and could not be justified. To comply with this judgment, Liechtenstein will have to repeal these residence requirements.

Free movement of workers, right of establishment, free movement of capital

Discriminatory taxation of profits from the sale of real estate

In 2006, the Authority commenced an own-initiative investigation into Icelandic tax legislation. One of the issues identified concerned the different tax treatment of profits from the sale of owner-occupied residential real estate depending on whether they were reinvested in Iceland or in other EEA States.

The Icelandic Act on Income Tax 90/2003 (Lög um tekjuskatt 90/2003) was being interpreted by the tax authorities in such a way that deferrals of, and eventual exemption from, taxation of profits from the sale of owner-occupied residential real estate was made dependent on the profits being reinvested, within two years, in comparable real estate located in Iceland.

In 2006, the Authority received a complaint from a person claiming to have been discriminated against by being required to pay such a tax when relocating to Denmark from Iceland.

The Authority considered that the legislation discriminated against workers and persons wishing to relocate from Iceland to other EEA States. The Authority also considered that it discriminates against those wishing to invest in real estate located in other EEA States.

On that basis, in 2007, the Authority sent a letter of formal notice to Iceland for breach of the rules on free movement of workers (Article 28 EEA), freedom of establishment (Article 31 EEA) and free movement of capital (Article 45 EEA). The Authority based its assessment in particular on the judgments of the European Court of Justice in Cases C-345/05 *Commission* v *Portugal* and C-104/06 *Commission* v *Sweden*, which found similar measures to be incompatible with EEA law.

In 2008, the Authority sent a reasoned opinion to Iceland on the same issue. Thereafter, Iceland amended its legislation to include real estate investments in other EEA States and, in 2009, it informed the Authority that it had taken measures to reassess and repay taxes to those persons wrongfully subjected to tax.

CASE C-72/09: SAME PROTECTION AGAINST PROPERTY TAXATION RESTRICTING FREE MOVEMENT OF CAPITAL UNDER THE EC TREATY AND THE EEA AGREEMENT?

In June 2009 the Authority submitted written observations in Case C-72/09 pending before the European Court of Justice. In this case, a Liechtenstein company challenged the imposition in France of a 3% annual tax on the value of property situated in France, before the French courts. The legal basis for the tax had previously been found by the Court of Justice in Case C-451/05 ELISA to be contrary to Article 63 TFEU (ex. 56 EC) dealing with the free movement of capital. In Case C-72/09, the French Supreme Court, the Cour de Cassation, asked whether the result in ELISA applied equally when the capital movement took place between an EU State and an EFTA State.

The Authority submitted to the Court that the same solution as in Case C-451/05 ELISA should apply in this case where a capital movement involves an EFTA State: there was no reason why the solution required under the EC Treaty should not be equally applicable under the EEA Agreement.

Taxation of foreign registered rental cars

EEA States may impose taxes within their territory but must comply with the freedom to provide services principle.

Under legislation in Norway and Iceland, persons that are permanently resident on the territory of the state do not have the right to import tax-free a foreign-registered rental car for temporary use. As a result, it is more attractive for permanent residents to seek the services of car rental companies established in their own state rather than services of car rental companies established in another EEA State. This also hampers companies established in other EEA States offering their services to Norwegian or Icelandic residents. Therefore, the national legislation in both countries amounts to a restriction on the freedom to provide services. The restriction cannot be considered justified by reasons of general interest, such as the prevention of tax fraud, since the measure appears to be unnecessary and disproportionate.

In reply to the Authority's reasoned opinion of 16 July 2008, the Norwegian Government stated that it recognised the breach of EEA law and expressed its willingness to amend the legislation. In the final draft proposal for amendment, it is foreseen that Norwegian residents may import and use a foreign-registered rental car tax-free for a period of up to six weeks per year and a system of prior notification is set up to replace the current system of prior permission. The amended legislation should be adopted and applied early 2010.

On 28 May 2008, a letter of formal notice was sent to Iceland addressing both the issue of the rental cars for personal use and a similar issue concerning company cars. In March 2009, the Icelandic Government sent the Authority a copy of the amended Customs Act, which addressed the issue of the company cars but not the issue of the rental cars. The concerns raised by the Authority do not, therefore, appear to have been addressed entirely and proceedings are, therefore, ongoing.

Electronic communications

Electronic communications

In 2009, the Liechtenstein regulator notified the Authority of three regulatory decisions in the electronic communications markets.

The first two draft regulatory measures submitted by Liechtenstein and assessed by the Authority concerned the markets for wholesale access to the fixed network infrastructure (wholesale physical access and wholesale broadband access). This access is fundamental to foster competition at the retail level.

The third analysis, notified at the end of 2009, concerned retail access to the public telephone network at a fixed location for residential and non-residential customers.

Despite the increase in the number of notifications, the Authority remains concerned about the delay in the application of the regulatory framework in Liechtenstein, as it has not yet notified all of its regulatory decisions.

Year	EFTA notifications	Comments from the Authority	EU notifications	Single coordinated communications
2000	19	3	751	0
2001	22	5	530	1
2002	49	4	508	1
2003	29	5	486	0
2004	37	10	557	1
2005	55	11	733	0
2006	23	6	668	1
2007	28	7	757	0
2008	25	6	601	1
2009	16	9	708	0

Goods

Procedure to prevent new technical barriers to trade

The Technical Standards and Regulations Directive (98/34/EC) establishes a notification procedure the aim of which is to provide transparency. This procedure prevents the creation of new, unjustified barriers to trade which can arise from the adoption of restrictive technical regulations.

According to the Directive, the EFTA States shall notify technical regulations in draft form to the Authority. Following the notification, there is a three-month standstill period during which the Authority, the European Commission and other EEA States have time to examine the measures and issue comments if it appears that questions exist as regards the draft regulation's compatibility with the EEA Agreement.

In 2009, the Authority received only 16 notifications of draft technical regulations from the EFTA States. This is a significant decrease in notifications compared to previous years and constitutes the lowest number of notifications received by the Authority since 1997. Of the 16 notifications received in 2009, nine came from Norway, six came from Liechtenstein and one came from Iceland. Nine of the notifications prompted the Authority to send comments. The Commission commented on eight of the notifications.

The Authority received 708 notifications from the EU Member States, which were forwarded to it by the Commission.

Private import of alcohol

Following a reasoned opinion by the Authority in 2007, Norway removed its ban on the private import of alcoholic beverages and increased the amount of alcohol which is permitted to be brought into Norway.

In 2004, the Authority opened an own-initiative case concerning the ban on the private import of alcoholic beverages for personal use into Norway. Under the Norwegian rules, private import of alcoholic beverages could only take place through the Norwegian retail monopoly, Vinmonopolet. The Norwegian restrictions were similar to a ban on the private import of alcoholic beverages in place in Sweden, which was subject to procedures before the Swedish courts, as well as infringement proceeding by the Commission. In 2007, the European Court of Justice in a preliminary reference ruling from a Swedish court (Case C-170/04 *Rosengren*) found that the restrictions in place in Sweden went beyond the scope and purpose of the retail monopoly on the selling of alcoholic beverages and were in breach of the principle of the free movement of goods.

The Authority issued a reasoned opinion to Norway concerning the ban in 2007 and Norway removed the restrictions in the summer of 2009. Following the removal of the import ban, the Authority closed the case in November 2009.

Aviation safety

Exemptions and derogations from aviation safety legislation

The European Union has, in recent years, taken on an active role in improving aviation safety by developing a legally binding minimum set of aviation safety rules. By the incorporation of this aviation safety legislation into the EEA Agreement the legislation is also applicable in the EFTA States.

There are several EEA Acts within the field of aviation safety which have so called "flexibility provisions". These provisions allow the EFTA States to grant temporary exemptions and long-term derogations from the established rules. In such cases, the EFTA States must adopt measures which are considered equivalent to the harmonised standards.

If the EFTA States wish to grant such derogations or exemptions, their intention to do so should be notified to the Authority. The Authority then assesses whether the notification is in line with the regulatory requirements. The Authority can, based on the outcome of its assessment, either accept the notification or ask the EFTA State to withdraw or amend its decision if considered not justified. The Authority works in close cooperation with the European Aviation Safety Agency (EASA) and the European Commission in order to ensure that the way in which the Authority and the Commission assess notifications is harmonised.

As some of the cases are very complex, cooperation with EASA is essential since the Agency provides the Authority with technical assessments on the various implications an exemption or derogation might have on the level of aviation safety. In some cases, EASA also issues opinions on submitted notifications.

In 2009, the Authority received several notifications on exemptions granted by the EFTA States made with reference to Article 8(2) of the *EU-OPS Regulation* (3922/91) and Article 10(3) of the *EASA Regulation* (1592/2002). Some of these cases have already been closed by the Authority whilst others are still being assessed. So far, all notifications have been considered justified and, therefore, accepted by the Authority.

Aviation security

Aviation security inspections

The main objective of the EU's aviation security legislation is to establish and implement appropriate measures in order to safeguard passengers, crew, ground personnel and the general public against acts of unlawful interference perpetrated on flights or within the confines of an airport. By the incorporation of this aviation security legislation into the EEA Agreement, the legislation is also applicable in the EFTA States.

A key component of the EEA Acts within the field of aviation security is the organisation of inspections by the European Commission. For the EFTA States, these inspections are carried out by the Authority.

The Authority has been carrying out airport security inspections since 2005. In 2009, the Authority carried out four airport inspections in the EFTA States. The inspections have been targeted at specific areas of airport operations. Special attention has, in 2009, been paid to airport security, screening of passengers and cabin baggage as well as hold baggage security, and standards for technical equipment. As of 2009, the Authority also started to inspect the implementation of cargo, catering and cleaning security.

The Authority inspections have identified deficiencies in several areas, some more serious than others. This relates especially to access control, staff screening and passenger and cabin baggage screening.

However, monitoring activities have also indicated that there have been improvements within key areas of aviation security in the EFTA States. It is difficult, though, to draw clear conclusions on the level of overall improvements because a different set of airports are selected each year. The Authority inspections have showed a vast divergence in the level of implementation of aviation security at the different airports in the EFTA States. The Authority has not initiated any infringement proceedings linked to findings made on inspections, since the EFTA States have addressed the findings made during these inspections in a satisfactory manner. The majority of deficiencies are now, based on the information provided by the EFTA States and on follow-up activity performed by the Authority, considered to be rectified.

The Authority cooperates with the appropriate authorities in the EFTA States and the Commission to work towards the common goal of increasing aviation security within the EEA.

Transport

Working time in road transport

Iceland and Norway have requested exemptions from EEA working time principles for certain road transport operations within these countries. However, the relevant EEA legislation in the field is intended to ensure safety and improved working practices and all exemptions have to be assessed carefully.

Iceland applied for several exemptions from the *Regulation on social legislation relating to road transport* (561/2006/EC) in 2008. This application was based on Article 14 of the Regulation which only applies in exceptional circumstances which was not the case in the opinion of the Authority. In September 2009, Iceland withdrew its application. Again on 10 November 2009, Iceland applied for exemptions from the Regulation relating, inter alia, to transportation on the route between Reykjavik and Egilstadir via Freysnes and to the transport of perishable food on long-haul routes. This application was not as broad as the previous one; however, it had the same legal basis. In late summer 2008, Iceland had also sent a supplementary application for certain bus lines and transport connected to gravel extraction as permitted by a different Article in the Regulation. A decision in this case is expected to be taken in early 2010. Finally, Norway also applied for exemptions from Article 14 of the Regulation in early summer 2009. Norway is of the opinion that transportation of live animals to slaughterhouses in Norway is carried out in exceptional circumstances.

The *Regulation on social legislation* relating to road transport lays down rules on driving times, breaks and rest periods for drivers engaged in the carriage of goods and passengers by road in order to harmonise the conditions of competition and to improve working conditions and road safety.

These are all considerations the Authority has to take into account before an exemption can be granted. Case law provides that the exemptions under the Regulation are to be interpreted restrictively.

Exemptions from safety rules for passenger ferries in Norway

Norway has exempted most domestic passenger ferries from certain safety rules of the EEA. These decisions have to be notified to the Authority, which may disagree.

The *Directive on registration of persons on board passenger ships* (98/41/EC) provides that before a passenger ship departs the number of people on board the ship must be communicated to the master of the passenger ship and to the company's passenger registrar or to a shore-based company system that performs the same function. EFTA States may give exemptions from this obligation provided certain conditions have been fulfilled, including that the ships are sailing exclusively in a protected sea area. These decisions should be notified to the Authority which must then assess whether the exemptions are justified. Norway notified exemptions for 33 ferries in 2009.

The Authority, based on an expert opinion from an external consultant, has considered the exemptions incompatible with the Directive on several occasions. The Authority has to consult the EFTA States when taking those decisions. The EFTA State may decide on the matter in the Standing Committee of the EFTA States if they disagree with the Authority.

In 2009, the EFTA States disagreed with the Authority on two occasions and decided to permit exemptions which the Authority did not consider justified, as they were not exclusively in a protected sea area and were exposed to the open sea effects.

Incorporation of certain EEA acts on transport by Norway

Article 7 of the EEA Agreement requires the EFTA States to incorporate EEA Regulations as such into their internal legal order. The Authority has been in a continuous dialogue with Norway about the need to incorporate EEA Regulations.

Norway has generally agreed that Article 7 of the EEA Agreement requires incorporation of EEA Regulations into its legal order. However, lately it has contested that several EEA Acts which have limited impact on individuals and undertakings need to be incorporated as such. Norway has stated that these Acts do not merit implementation into the Norwegian legal order because of the nature or content of the Acts. These Acts are the *Regulation on the establishment of the European Maritime Safety Agency (EMSA)* (1406/2002/EC), the *Regulation on multiannual funding of EMSA* (1891/2006/EC) and the *Regulation amending Regulation (EC) No 2099/2002 establishing a Committee of Safe Seas and the Prevention of Pollution from Ships (COSS)* (93/2007/EC).

The Authority does not agree with this view as it considers that Article 7 of the EEA Agreement requires the EFTA States to make these Acts in their entirety part of their internal legal order without regard to their content.

On 1 July 2009, a reasoned opinion was delivered to Norway for the non-incorporation of Regulation (EC) No 1 and a letter of formal notice for the non-incorporation of Regulation 1406/2002. On 15 July 2009, a letter of formal notice was sent for the non-incorporation of Regulation 93/2007. No further action was taken in 2009 as Norway asked to be given until 2 December 2009 to respond to the Authority so that it could reflect on the issue. However, unless a solution is found further action will be considered in 2010.

Road tolls

The Authority received three complaints in 2007 and 2008 in which it was alleged that the levy charged on the toll road in Bergen was in breach of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructure, because the revenue was used for infrastructure in other places than where the charges were collected.

The aim of Directive 1999/62/EC is to eliminate distortions of competition between transport undertakings by harmonising the levy systems in the EEA States and establishing mechanisms for charging infrastructure cost to haulers. Tolls and user charges may not discriminate between haulers on grounds of nationality, origin or destination.

The toll booths where the contested charges are levied are all located in areas which have to be considered as urban areas. The aim of the tolls on the Bergen ring road is to regulate the traffic in and around Bergen by increasing the share of public transport and, thereby, reduce the use of private cars. It is assumed that this will lead to a better environment and improved traffic safety in the city. Only traffic within, or passing through, the urban areas of Bergen are affected by the charge. On that basis, the Authority concluded that the charges were so-called specific urban charges and therefore outside the scope of the Directive. Moreover, they were not incompatible with other provisions of the EEA Agreement.

In October 2009, the Authority decided that there were no grounds for pursuing these cases further and closed them.

Veterinary and phytosanitary matters foodstuffs
Veterinary medicinal products

Food safety, animal health and welfare

The Authority is responsible for monitoring the EFTA States' implementation and application of EEA legislation related to the whole food chain. The legislation covers fields such as seeds, feed and food, animal health and welfare, animal by-products, residues of medicines, pesticides and contaminants.

The surveillance by the Authority includes controls on the application of EEA legislation in the EFTA States through on-the-spot inspections to verify the effectiveness of the national control systems.

The Authority has the legal competence to adopt decisions related to animal disease status, eradication and monitoring programmes, border inspection posts etc.

In 2007, it was decided to make EEA legislation in the above mentioned fields applicable to Iceland, except for the legislation on live animals. So far, Iceland has only been obliged to apply the legislation on fish and fishery products and feed. In 2007, the EEA Agreement was also amended to incorporate the new Hygiene Package to make it applicable to both Norway and Iceland[7]. National parliamentary procedures for the approval of the extended scope of new EEA legislation applicable to Iceland were completed in December 2009. The legislation is expected to enter into force for both Norway and Iceland during the first half of 2010. Iceland will have an 18-month transitional period in which it must become compliant with the new rules.

Stunning of reindeer in Norway

In 2009, the Authority closed a case against Norway concerning the stunning of reindeer with a curved knife following the adoption of new rules by Norway that enhance animal welfare protection by restricting the use of the curved knife.

Norway had, prior to the adoption of these rules, allowed the use of a traditional curved knife to stun reindeer for private consumption. These rules were challenged by a complainant on the grounds that the curved knife was not included in the list of stunning methods laid down in the so-called Animal Welfare Directive (Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing).

Norway agreed with the Authority that only the methods listed in the Animal Welfare Directive could be used for stunning animals before slaughter. However, 'cultural events' are not covered by the Animal Welfare Directive.

The Authority accepted the statement made by Norway that the traditional use of the curved knife by the Sami people at gatherings which take place once a year in the autumn could have a cultural dimension. Furthermore, on the basis of statistical information assessed by the Authority, it was confirmed that the economic significance of this activity was very small (marginal production of meat).

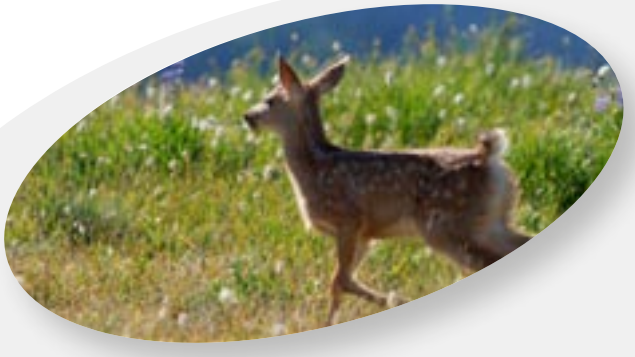
On this basis, the Authority concluded that the use of a curved knife by Sami people for the stunning of reindeer for private consumption could be justified, while its use outside the Sami context should not be allowed. Norway has amended its national rules accordingly, and has given assurances that the Sami people will continue to receive training on the use of the curved knife.

Additives in fishery products

The so-called *Food Additives Directive (95/2/EC)* allows the use of polyphosphates as food additives in certain fishery products provided certain conditions are met. However, incorrect use can result in water retention and an increase in the weight of the product.

The Authority took action in 2009 to ensure that polyphosphates were not used in the production of salted and dried fish in Norway and Iceland, as polyphosphates should not be used in this type of production process. Norway and Iceland agreed with the Authority that it would not be possible to justify the presence of polyphosphates in salted and dried fish as a result of a possible carry over from the salt used in the processing of these products and that polyphosphates cannot be used as a processing aid for the bleeding of fish.

[7] This includes, amongst others, Regulation 178/2002, Regulation 882/2004, Regulation 852/2004, Regulation 853/2004, Regulation 854/2004 and Regulation 1774/2002.



Norway issued additional guidelines 'Presisering ang bruk av fosfater i fiskeindustrien' addressed to the competent authorities in charge of enforcing the legislation in this field. In the guidelines, it is stated that polyphosphates should not be present in fishery products other than those mentioned in the *Food Additives Directive*. The fish industry has been informed and Norway has given assurances to the Authority that controls will be carried out to ensure compliance with the relevant EEA requirements.

The Icelandic Government informed the fish industry that polyphosphates cannot be used as processing aid and that the presence of polyphosphates in fishery products cannot be justified as a result of a carry over from the salt used in the processing of the fish. The enforcement control authorities in Iceland have been instructed to report any illegal use of polyphosphates in the production of salted and dried fish.

Veterinary inspections

The Authority carried out eight planned inspections in the EFTA States in 2009. The programme for the second half of the year was amended because the Hygiene Package had not yet entered into force in the EFTA States.

In addition, the Authority carried out an inspection in Norway, in cooperation with the Food and Veterinary Office of the European Commission (FVO) and the Norwegian competent authority, on the suspected fraudulent import into Norway of frozen meat from a third country.

The inspection programme and the final reports from the missions carried out in 2009 are available on the Authority's website (http://.www.eftasurv.int).

Medicine and pesticide residues in food

Under the EEA Agreement, Norway is required to prepare a national residues monitoring plan every year. Medicine and pesticide residues are included in the plan, with live animals and animal products (such as meat, milk and honey) being checked. The Authority made a number of comments on the Norwegian 2009 monitoring plan, which Norway subsequently amended.

EEA EFTA States in the European Emission Trading Scheme

The EU Emission Trading Scheme (EU ETS), established by the Emission Trading Directive (2003/87/EC), is the main market-based instrument to help EU Member States comply with the commitments made under the Kyoto Protocol. It has been developed as a cap and trade system aiming to reduce greenhouse gas emissions among large emitting companies within the EU. The EFTA States have participated in the EU ETS since 2008.

One core task in the run-up to the implementation of the current scheme was the elaboration of National Allocation Plans (NAPs) by EEA States. Each State determines in its NAP the total number of allowances for the country and individual allocation to installations. The EFTA Surveillance Authority assessed the NAPs notified by EFTA States for the 2008–12 trading period.

The Norwegian National Allocation Plan[8]

The assessment of the NAP notified by Norway in March 2008 led the Authority to raise three main objections in July 2008. These objections made it necessary for Norway to amend its initial NAP before it could take its final allocation decision and allocate allowances to installations. Norway notified in December 2008 the amendments to its NAP aimed at addressing the objections. The Authority evaluated the proposed amendments against the criteria listed in the Emission Trading Directive. In February 2009, the Authority accepted the amendments to the Norwegian NAP for the 2008–12 period without objections.

Following the Authority's positive decision on the Norwegian NAP, Norway adopted its final allocation decision for the 2008–12 period at national level in March 2009 and notified it to the Authority by means of the NAP table. Having checked the allocations, the Authority instructed the Central Administrator of the Community Independent Transaction Log (CITL) to enter Norway's NAP table for the period 2008–12 into the CITL in March 2009. This allowed Norway to issue allowances and transfer their annual allocation to the Norwegian installations early in April 2009.

Norway's unilateral inclusion

The Emission Trading Directive provides States with the option to apply for the unilateral inclusion of additional activities and gases in the EU ETS, subject to certain conditions laid down in the Directive and the approval of the Commission, regarding EU Member States, or the Authority, regarding EFTA States.

To extend the EU ETS to other sectors and gases, Norway submitted to the Authority in June 2008 an application for the inclusion in the EU ETS for the 2008–12 period of emissions of nitrous oxide (N_2O) from the production of nitric acid. The Authority assessed Norway's application to ensure that it fulfilled all relevant criteria, in particular those relating to the effects on the internal market and the environmental integrity of the scheme. In February 2009, the Authority approved Norway's unilateral inclusion in the EU ETS of N_2O emissions associated with the production of nitric acid.

8 The situation in Iceland and Liechtenstein has been developed in the Annual Report 2008 (p. 20) available at http://www.eftasurv.int/?1=1&showLinkID=16168&1=1

Energy

Internal Market rules and energy efficiency

The completion of the Internal Market in energy is key in providing Europe's citizens and companies with a secure supply of affordable energy. But it is as important to ensure a sustainable future, in particular through energy efficiency.

EEA law establishes common rules for the generation, transmission and distribution of electricity and gas, and lays down principles for the non-discriminatory access to petroleum and natural gas exploration and production.

Despite their particular energy situation, it is important that the EFTA States comply with this legislation in order to ensure legal certainty for operators and guarantee equal competitive conditions across the EEA. The Authority has thus stepped up its scrutiny of the implementation of energy legislation in the EFTA States.

Energy efficiency is also of great importance as it will contribute to secure a sustainable future for Europe. In light of this, the Authority brought a case against Norway before the EFTA Court for the incomplete implementation of the *Energy Performance of Buildings Directive* (2002/91). In May 2009, the EFTA Court confirmed that Norway was in breach of its obligations. Norway has indicated that the necessary rules will be in place as of 1 January 2010. The Authority will now follow-up on this implementation.

Labour law

Labour clauses in public procurement contracts

In July 2009, the Authority issued a letter of formal notice to Norway concerning Regulation No 112/2008 on pay and working conditions in public procurement contracts (lønns- og arbeidsvilkår i offentlige kontrakter).

The Norwegian regulation requires contracting authorities to include a clause in their contracts that obliges contractors and subcontractors to make sure that collective agreements or minimum pay and working conditions considered normal for the place and profession concerned are respected. This requirement has its origins in the ILO Convention No 94 concerning Labour Clauses in Public Contracts, which Norway ratified in 1996.

The Authority takes the view that this requirement does not comply with the *Posting of Workers* Directive (96/71) and the provisions in the EEA Agreement relating to the freedom to provide services as interpreted by the European Court of Justice in Case C-346/066 *Rüffert*.

The Rüffert case provides that, should a state decide to impose obligations concerning wages and other terms of employment on foreign service providers posting their workers to their territory, the rules adopted for this purpose must comply with one of the methods prescribed by the *Posting of Workers Directive*. In doing so, the right balance can be achieved between the aim of providing posted workers with social protection and the aim of facilitating the free provision of services within the EEA.

The Directive, as interpreted by the European Court of Justice, sets out the methods which EEA States may use should they chose to impose terms and conditions of employment within the meaning of the Directive on undertakings established in another EEA State, in the framework of transnational provision of services. This must either be done by fixing in law a general minimum wage or by making collective agreements generally applicable to all undertakings.

The Authority considers that the Norwegian regulation does not fix a rate of pay in accordance with any of the procedures laid down in the Directive.

The Authority notes that Norway could pursue its policy of preventing social dumping in the field of public procurement by other means, such as by making use of the system established under the General Application Act.

Labour law – Posting of workers

Icelandic Posting Act

In November 2009, the Authority decided to deliver a reasoned opinion to Iceland concerning its Act on the rights and obligations of foreign undertakings that post workers temporarily in Iceland and on their workers' terms and conditions of employment.

The Authority takes the view that the Act, which was adopted in 2007, imposes restrictions on foreign service providers which are not in compliance with free movement of services under the EEA Agreement and the *Posting of Workers Directive* (96/71).

First, the Authority concludes that provisions in the Act, which require foreign service providers to send the Icelandic authorities a declaration eight working days prior to operating in Iceland, together with the duty imposed on the domestic recipients of that service to make sure that these formalities have been complied with, constitute a *de facto* prior authorisation requirement. Such a requirement is a disproportionate restriction of the freedom to provide services, as the objective of protecting workers may be reached by a less restrictive procedure.

Second, the Authority maintains that provisions in the Act, which aim to guarantee posted workers a right to only two days of leave in the event of illness for every month worked and a right to be insured against accidents at work, go beyond what the *Posting of Workers Directive* allows. These issues are not among those that the Directive permits the host state to impose its own requirements on posted workers. The Directive presupposes that in this respect the workers are protected by the legislation in their home state.

Iceland has been given two months to take the measures necessary to comply with the reasoned opinion. The Authority will, in light of any forthcoming response from the Icelandic Government, decide whether to bring the matter before the EFTA Court.

Transfer of undertakings and employees' rights

The Authority has initiated formal infringement proceedings against Iceland concerning the national rules implementing Directive 2001/23/EC relating to employees' rights in the event of transfers of undertakings. The case concerns the question of where liability for unpaid wages rests when a company is transferred and continues to operate under the direction of a new employer.

The Directive lays down the principle that obligations arising from a contract of employment existing on the date of transfer must be transferred from the seller to the buyer of the company (the new employer). In 2005, the Icelandic Supreme Court handed down a judgment in which the Court stated that that claims for unpaid wages which fall due before a transfer takes place cannot be based on the rules implementing the Directive.

The Authority considers, based on the case law of the European Court of Justice and of the EFTA Court, that the Directive must be interpreted as meaning that after the date of transfer the new employer automatically becomes liable for all obligations arising under employment contracts, including claims for unpaid wages. Consequently, the Authority takes the view that the national measures, as interpreted by the Supreme Court of Iceland, do not fully guarantee the mandatory rights of workers as laid down in the Directive.

In December 2009, the Authority decided to issue a letter of formal notice to Iceland. Iceland has been given two months to submit comments on the letter before the Authority will consider taking the proceedings to the next step by issuing a reasoned opinion.

Social security

Full pension rights for migrant workers in Liechtenstein

Liechtenstein has eliminated discrimination against part-time workers residing outside of the country with regard to their retirement pension.

Between 2001 and 2009 Liechtenstein legislation did not fully recognise pension periods of part-time workers who resided outside the country. This resulted in a lower amount of retirement pension compared to part-time workers who resided in Liechtenstein as their insurance periods were fully taken into account.

The Authority issued a letter of formal notice in December 2008 concluding that this rule was unjustified discrimination under EEA law. In July 2009, Liechtenstein abolished the provision, retroactive to January 2001 which is the date on which the contested rule entered into force. As a consequence, all those affected will be able to request a reassessment of their pensions.

Iceland facilitates the access to healthcare for migrant workers

In 2007, one of the requirements for the registration of migrant workers with the Icelandic health insurance was to demonstrate that the Icelandic employer has paid social security contributions for him. This prevented immediate access to healthcare on the same terms as those for Icelandic nationals, as such information is only available for migrant workers after the first month of work.

In May 2009, the Authority issued a letter of formal notice to Iceland concluding that this practice was an unjustified restriction under EEA law. As a consequence, Iceland confirmed a change in the procedures in September 2009 stating that it is now sufficient to provide the health administration with an Icelandic ID-number ("*kennitala*"), a copy of the work contract and the relevant proof of insurance periods abroad to become registered with the Icelandic health insurance.

Equal treatment of men and women

Equal treatment – follow-up to the EFTA Court judgment in the survivors' pension case

In October 2009, the Authority issued a reasoned opinion to Norway for failing to comply with the judgment of the EFTA Court of 30 October 2007 in the so-called "Golden Widows Case". In the judgment, the Court found Norway to be in breach of its obligations under the EEA Agreement, which require the EFTA States to ensure that men and women receive equal pay for equal work. Pensions are considered as pay in this instance.

The judgment concerned a provision in the Norwegian Public Service Pension Act which provides that a survivors' pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 shall be reduced in relation to his other income. A widow, however, in the same circumstances receives her survivor's pension without curtailment. In its judgment, the EFTA Court declared that this difference in treatment between widowers and widows constituted a breach of the rules of the EEA Agreement in the field of equal treatment of men and women.

In January 2009, the Authority was informed of Norwegian proposals which are intended to amend the Pension Act. After having received no information from Norway indicating that these proposals had become law, the Authority concluded that measures to comply with the judgment had not been taken.

As a result, and in order to put further pressure on the Norwegian Government, the Authority decided in October 2009, two years after the Court rendered its judgment, to issue a reasoned opinion to Norway.

In November 2009, the Norwegian Government informed the Authority that rules amending the Pension Act were expected to enter into force in January 2010. Once the new rules have entered into force, the Authority aims to examine their content in order to decide whether they comply with the requirements set out in EEA law on gender equality.

Chapter 3

State aid

Introduction

State aid is assistance provided by public bodies to entities engaged in economic activities. The most obvious form of State aid is, for example, governments giving grants to businesses to facilitate capital investment, or providing aid to rescue and restructure ailing companies. State aid can, however, consist of public support measures in numerous forms, such as tax exemptions, loans on preferential terms, state guarantees and investments in share capital made by public authorities on terms that would not be acceptable to a private investor. State aid is present when assistance is provided:

- by an EFTA State or through state resources;
- that confers an advantage to a recipient(s);
- that favours certain economic undertakings or the production of certain goods;
- that distorts or has the potential to distort competition; and
- that affects trade across the EEA.

The EEA Agreement contains a general prohibition on state aid in order to prevent distortions of competition and negative effects on intra-EEA trade. The rules seek to ensure a level playing field for companies across Europe, and to prevent government assistance being used as a form of protectionism in the absence of trade barriers. The prohibition is, however, subject to exceptions, recognising that government intervention can be necessary to correct market failure and for other purposes.

The role of the Authority

The prohibition on state aid that applies in Iceland, Liechtenstein and Norway is enforced by the Authority. It is also the Authority's role to decide how the exceptions to the prohibition are to apply. In its enforcement of the rules, the Authority has equivalent powers and similar functions to those of the Commission. The Authority is, like the Commission, independent from the states over which it has jurisdiction.

Plans to grant state aid must be notified to the Authority prior to implementation. The Authority must then assess whether such a plan constitutes state aid and, if it does, examine whether it is eligible for exemption.

HIGHLIGHTS OF 2009

The state aid rules became more prominent than ever before during 2009 due to the financial crisis. The EFTA Surveillance Authority has had major cases resulting from the crisis, in particular a scheme for the recapitalisation of Norwegian banks, with work ongoing on emergency measures undertaken in Iceland. Other prominent developments over the year have included a number of environmental aid cases, mainly in Norway, and various transport cases in both Iceland and Norway.

Overview

State aid activities in 2009

In 2009, the Authority adopted 52 State aid decisions, the highest number in the Authority's history. Over the same period, for the second year running the Authority also closed more cases than before, 72 in total. The Authority put considerable emphasis in 2009 on completing the assessment of the oldest state aid complaints, closing 21 pending cases.

Fifty new state aid cases were opened by the Authority, of which 33 concerned the implementation of individual state aid grants or aid schemes. The Authority opened 11 new cases based on complaints (four concerning Icelandic cases and seven relating to Norway). Iceland notified six new state aid measures during the year, while 13 new notifications were registered from Norway. Two new cases were launched on the own initiative of the Authority, one of which led to the opening of the formal investigation procedure. A new recovery case was also commenced and the Authority opened the formal investigation procedure in four cases. Of the 65 cases pending at the end of 2009, 34 are based on complaints, there are only nine cases which follow from notifications by the EFTA States.

As was the case in 2008, a large proportion of the Authority's state aid cases in 2009 concerned environmental and energy related issues. A considerable amount of the Authority's time was also devoted to the adoption of guidelines for the assessment of state aid relating to the financial crisis and to the review of various measures envisaged or put in place by Iceland and Norway as a result of the crisis.

The revision of the state aid Guidelines

The Authority adopts guidelines to explain how it interprets and applies the state aid rules. They are consolidated into a document on Procedural and Substantive Guidelines in the field of state aid. These State Aid Guidelines are regularly amended and supplemented. In 2009, the Authority prolonged the Rescue and Restructuring Aid Guidelines until 30 November 2012 and adopted a new chapter on ship management companies. In addition, new rules setting the conditions for approving state aid for training and employment requiring individual notification were also adopted.

The application of the state aid rules in the context of the financial crisis

The financial crisis and the break-down of the inter-lending banking market required the Authority to adopt measures setting out guidelines on aid to the banking sector. Based on Article 61(3)(b) of the EEA Agreement (aid allowed in order to remedy a serious disturbance in the economy), the Authority has adopted four sets of guidelines (which correspond to those issued by the European Commission) to facilitate state action to restore financial stability and ensure continued lending to the real economy.

Measures to assist financial institutions

On 29 January 2009, the Authority adopted guidelines on the application of the state aid rules to measures taken in relation to the **financial institutions** (commonly referred to as "the Banking Guidelines"). The guidelines provide for expedited approval of schemes which are well-targeted and proportionate to the stabilisation of financial markets and which include safeguards against unnecessary negative effects on competition.

On the same date, the Authority adopted Guidelines on the **recapitalisation of financial institutions** affected by the financial crisis. Recapitalisations of banks by national authorities involve state aid when no private market investor would have undertaken similar transactions. The guidelines require that in the case of recapitalisations of fundamentally sound banks the state must receive adequate "market" remuneration (based on the capital instrument, interest rate and the risk profile of the bank), while the state remuneration from distressed banks must be higher and require the submission of a restructuring plan within six months of recapitalisation.

On 22 April 2009, the Authority adopted guidelines on the treatment of impaired assets in the banking sector. **Impaired assets** are assets on which banks are likely to incur losses. Where impaired assets are purchased or insured by the state at a value above the market price, or where the price of a state guarantee does not fully compensate the state for its liability, the measure involves state aid. The guidelines set out methodologies on the valuation of the impaired assets.

On 25 November 2009, the Authority adopted new guidelines on **return to viability** under the framework of the Banking Guidelines which provides further explanation on when a bank needs to submit a restructuring plan and explain the approach and criteria relevant for the purposes of assessing it.

Measures for the real economy

On 29 January 2009, the Authority adopted guidelines on aid for assisting the real economy. Due to the drying up of the lending market, even otherwise sound companies have been unable to obtain financing. Based on Article 61(3)(b) of the EEA Agreement, the framework enables national authorities to provide grants of up to EUR 500 000 as compatible state aid for companies affected by the crisis.

New guidelines for the handing of state aid cases

The Authority has adopted new guidelines on a simplified notification procedure for the treatment of certain types of state aid; and a Best Practices Code. Both have the purpose of improving the effectiveness of procedures thereby enhancing cooperation with national authorities.

These guidelines are effective from 1 January 2010.

Recovery on unlawful State aid

The Authority has included a new Chapter on recovery of unlawful and incompatible state aid in its State Aid Guidelines, which sets out detailed rules applicable to recovery cases. Recovery of unlawful and incompatible state aid is usually a lengthy process in the EFTA States, and generally the cases are not completed within the time-limits set out in the relevant legislation and the recovery decisions. The Authority's oldest unresolved recovery case dates back to February 2004 and concerns an Icelandic scheme in favour of International Trading Companies. There are two recovery cases pending in Norway concerning an energy savings fund "Enova" case from 2006, and the "Wood scheme" from 2008. In 2009, the Authority closed two recovery cases. One was closed because recovery had been completed by the national authorities. The other was closed because the beneficiary company (the Norwegian Aviation School) was declared bankrupt and had insufficient assets to cover its debts.

Environmental aid

Carbon capture and storage – Kårstø project

In January 2009 the Authority authorised state funding to a carbon capture and storage facility (a "CCS") at Kårstø, Norway (collectively the "Kårstø project"). The CCS is intended to capture and store CO_2 emitted by a power plant owned by Naturkraft. The CCS will be owned and managed by the 100% state owned company, Gassnova SF.

The aim of the Kårstø project is to prevent approximately 1 million tones of CO_2 from being released to the atmosphere, which represents approximately 85% of the emissions of the power plant. It therefore could facilitate a reduction of 2% in Norway's total CO_2 emissions.

The intention is to test full-scale carbon capture using current technology (i.e. amine based post-combustion solution), and further develop the technology with the aim of reducing its costs and encouraging its global deployment at affordable prices. The state funding will cover 100% of the investment cost and operating costs of the CCS for a period of 10 years.

The Authority approved the state aid to the project under its environmental aid guidelines as it is aimed at the protection of the environment through capturing and storing carbon, a long established objective of common interest. The Kårstø project is also well designed – it is generally acknowledged that cost reductions are necessary in order to enable CO_2 capture and storage to move forward and contribute to combating climate change. An essential step for cutting operating costs of CCS is to test the technology and learn from the experience gained. The investment undertaken by the Norwegian state and the lessons to be learned from the Kårstø project will contribute to showing how and to what extent the CCS technology can be made less costly for investors. The state investment can thereby pave the way for making CCS accessible at lower cost and facilitate more private sector investment in CCS.

The aid is limited to 10 years, which should allow enough time and opportunity to meet the objectives of the aid, while limiting the potential that the state funding could affect private market investor initiatives in the long term. Distortion of competition and effects on trade should also be limited given that the state owned company will share know-how acquired via the Kårstø project at conferences and workshops as well as within the framework of early CCS movers established by the European Commission.

Norwegian Bioenergy Scheme

In February 2009, the Authority approved a Bioenergy Scheme notified by the Norwegian authorities based on its Guidelines on state aid for environmental protection.

The objective of the scheme is to promote and increase the production and use of renewable energy for heating, and thereby to reduce the emission of CO_2 and other greenhouse gases. The scheme is aimed primarily at generating bioenergy activities within the agricultural and forestry sector, but all sectors are eligible for funding under the scheme. State support is available for farm heating, greenhouse heating, sale of heating, production of biofuel used for transportation, for cogeneration units producing both electricity and heat and for environmental studies.

The scheme is administrated by Innovation Norway. The Norwegian authorities plan to allocate NOK 35 million (approximately EUR 4 million) per year under the scheme until January 2014.

In July 2009, the Authority closed a formal investigation into a Norwegian scheme on support for alternative, renewable heating and electricity savings in private households. The scheme supports consumer investment in certain environmentally friendly heating technologies in order to reduce the use of electric heating in private households. The technologies covered by the scheme are pellet stoves and boilers, heat pumps and solar heating collectors connected to waterborne heating systems, and control systems for reducing consumption of electricity. Although grants under the scheme are paid directly to consumers, the Authority took the view that the scheme indirectly subsidises certain undertakings active in the sector of the technologies covered by the scheme and therefore involved state aid within the meaning of Article 61 of the EEA Agreement.

The Authority assessed the scheme after receiving a complaint which contested the compatibility of the scheme with the EEA Agreement in light of the fact that wood-burning stoves are not covered by the scheme. The Authority accepted the Norwegian authorities reasoning for not including wood-burning stoves under the scheme, which was that they are not as suited to reducing electrical heating in a normal household as the technologies covered by the scheme. On the basis of its environmentally friendly objectives, therefore, the Authority found the scheme to be compatible with Article 61(3)(c) of the EEA Agreement.

Norwegian CO_2 tax on gas and LPG on the use of gas for purposes other than the heating of buildings

Norway's planned exemption from its CO_2 tax for the use of natural gas and LPG was disallowed by the Authority in July 2009.

The Norwegian state imposes a tax, levied on the use of certain mineral products, on CO_2 emissions. The tax has historically only been levied on the use of mineral oil and petrol and it was proposed that it be extended to the use of natural gas and LPG, but only when used for the purposes of heating buildings.

The Authority concluded, however, after a formal investigation, that taxation in such a form would constitute state aid to those who benefit from the exemption, and that such aid could not be justified under the EEA Agreement as it would not be compatible with the Authority's Environmental Aid Guidelines. The Authority took the view that compatibility with the guidelines would require that the minimum level of taxation specified in the European Community's Energy Taxation Directive (or equivalent measures) be imposed upon the consumption of natural gas and LPG.

Although the *Energy Taxation Directive* has not been incorporated into the EEA Agreement, for the purposes of assessing the compatibility of state aid, the Authority applied the same points of reference as those contained in the Community guidelines. This was done in order to ensure uniform application of state aid rules and equal conditions of competition throughout the EEA.

Aid in the transport sector

Maritime transport

NORWEGIAN SPECIAL TAX SYSTEM FOR SHIPPING

In December 2008, the Authority approved a new special tax system under which income generated from eligible maritime activities is exempt, with ship owners instead of being taxed directly on the tonnage of shipping that it transports irrespective of actual profits or losses. Transitional measures dealing with the exit from the former system were also approved.

In February 2009, the Norwegian authorities notified a change to the functioning of environmental funds established by deferred taxes (the abolition of the need to invest in environmental measures within 15 years) and an extension of the guarantees for loans to companies outside the special tax system. The Authority took the view that both changes were compatible with the functioning of the EEA Agreement.

TONNAGE TAX AND SEAFARERS REFUND SCHEME IN ICELAND

In July 2009, the Authority found a tonnage tax scheme (similar to that operated in Norway) and a refund scheme for the employment of seafarers incompatible with the EEA Agreement. No recovery provisions were, however, necessary as no payments had been made to ship owners under either scheme.

The schemes were incompatible mainly because of the obligation for the ship owner to register ships in the Icelandic International Ship Register. Moreover, the tonnage tax scheme was based on tonnage tax rates which were lower than in other EEA States, and the duty to remain within the scheme for a shorter duration than in other EEA States.

The refund scheme for the employment of seafarers, was considered incompatible because it was not clear that the condition that aid be only given in relation to the employment of EEA seafarers for scheduled passenger services between ports of the EEA would be met.

ICELANDIC HARBOURS ACT

In July 2009, the Authority concluded that certain amendments to the Icelandic Harbour Act passed in 2003 and in 2007 enabled payment of unlawful state aid and therefore breached the EEA Agreement. Funding for quay installations, and damage compensation for those installations, as well as for ship lifts and hoists, were considered to constitute state aid. Such funding could not be justified as the Harbours Act limits funding to harbours owned by municipalities and excludes private sector harbour operators.

The Authority, however, also concluded that other funding provisions – for pilot vessels – did not constitute state aid, concurring with the Icelandic authorities that such vessels perform an essential safety function necessary in the public interest and which is not economic in nature.

PORT OF REYKJAVIK

On 30 October 2009, the EFTA Surveillance Authority opened a formal investigation procedure in order to examine measures by the Port of Reykjavik alleged to constitute unlawful state aid.

The case was brought to the attention of the Authority following a complaint concerning several transactions involving the Port of Reykjavik and its subsidiaries. In opening the investigation, the Authority expressed doubts regarding the compatibility of two transactions whereby the Port of Reykjavik bought shares in the two Icelandic companies Dráttarbrautir Reykjavíkur and Stálsmiðjan-Slippstöðin (later Hafnarhús ehf). In particular, the Authority expressed doubt as to whether the price paid by the Port reflected the market price of those companies.

In the same decision, the Authority concluded that several other measures by the Port of Reykjavik and its subsidiaries did not amount to state aid within the meaning of the EEA Agreement.

Airports

ROUTE DEVELOPMENT FUND FOR BODØ

In March 2009, the Authority considered the Route Development Fund for Bodø in Norway compatible with the EEA Agreement on the basis of the Guidelines on start-up aid to airlines departing from regional airports. This Fund makes financial support available for airlines launching new international air routes from the regional airport in Bodø. Funding may cover a maximum of 40% of the start-up costs for up to three years. Aid is available to all airline operators on the condition that a business plan for the creation of genuinely new international routes is approved.

INVESTMENTS IN INFRASTRUCTURE AT SKIEN-GEITERYGGEN AIRPORT

In April 2009, the Authority approved several investments in infrastructure at Skien-Geiteryggen Airport in Norway under the State Aid Guidelines on financing of airports and start-up aid to airlines operating flights departing from regional airports. The Authority considered that the investments were necessary and proportionate to the objective of the continuing operation of the airport. The Authority also concluded that trade would not be affected to an extent contrary to the functioning of the EEA Agreement given the low volume of traffic at Skien-Geiteryggen airport.

NEW ROUTES FROM NORWEGIAN AIRPORTS

In a decision adopted in May 2009, the Authority concluded that a newly notified incentive scheme for the establishment of new routes from Norwegian airports did not constitute state aid as the airport manager, Avinor, was acting as a market economy investor by seeking to maximise its income and revenues. Avinor may grant reductions to take-off charges if the reduction will entail an increase in its income and a better use of aircrafts and airport facilities. Any air carrier may obtain reductions if it shows that the new route will be profitable in the long run and that it will be profitable for Avinor to provide an incentive in the form of a start-up rebate. Avinor may also provide assistance to route development funds, provided that the same principles of ensuring profitability are complied with.

LISTA AIRBASE

On 27 July 2009, the Authority closed its investigation into the sale of Lista airbase and concluded that the price paid did not contain any element of state aid.

An independent expert appointed by the Authority concluded that the airbase had been sold at a fair price, reflecting the remoteness of the property, the considerable need of repair and maintenance of the buildings and the downturn in the property market at the time. Having investigated the case, in light of the conclusions of the independent expert and the fact that the property was burdened with pre-emption rights, the Authority came to the conclusion that the sale of Lista airbase did not constitute state aid.

CASE E-6/09 MAGASIN- OG UKEPRESSEFORENINGEN V ESA: ESA'S ALLEGED FAILURE TO ACT

In May 2009, a Norwegian association of undertakings, Magasin- og Ukepresseforeningen, brought an action against the Authority before the EFTA Court in Case E-6/09 seeking a declaration that the Authority failed to act on its complaint concerning alleged state aid to newspapers with regard to the VAT exemption of newspapers and periodicals in Norway.

In July 2009, the Authority submitted to the EFTA Court that the action, based on Article 37 of the Surveillance and Court Agreement, was inadmissible because there was no challengeable obligation to act in cases relating to aid existing before the entry into force of the EEA Agreement, and because Magasin- og Ukepresseforeningen lacked standing as it was not individually concerned by the alleged failure to act.

As to the merits of the complaint, the Authority is still in discussions with the Norwegian government and has not yet taken a final view on whether to issue a recommendation to Norway for appropriate measures or to close the case without further action.

Energy sector

Landsvirkjun and Orkuveita Reykjavíkur

In July 2009, the Authority asked Iceland to abolish unlimited state guarantees to the National Power Company (Landsvirkjun) and Reykjavík Energy (Orkuveita Reykjavíkur).

Following receipt of a complaint, the Authority has investigated a series of measures directed at publicly owned electricity undertakings active in Iceland finding that all utilities benefited from tax exemptions and state guarantees. Since then, all tax exemptions have been abolished and most of the utilities have become limited liability companies, meaning that they are no longer able to benefit from unlimited state guarantees.

However, Landsvirkjun and Orkuveita Reykjavíkur benefited from an unlimited state guarantee which was not compatible with the state aid rules of the EEA Agreement. In its decision in July, the Authority decided to propose to Iceland that it should take appropriate measures to eliminate state aid resulting from the unlimited state guarantees enjoyed by two electricity utilities. The decision concludes that, as from 1 January 2010, the utilities can only benefit from state guarantees that are limited in duration and upon which a premium is payable. The Icelandic authorities fully accepted the proposed appropriate measures.

Becromal

In July 2009, the Authority decided to close the formal investigation procedure opened in December 2007 into the sale of electric power by the Municipality of Notodden to the aluminium foil producer Becromal Norway AS. The contract in question was found not to entail aid in favour of Becromal.

The Authority became aware of Notodden municipality's sale of electric power to the company Becromal Norway AS through press reports in July 2007. Power sales by municipalities to private undertakings may constitute state aid if the price paid is below market prices.

Parts of the power volumes sold to Becromal were bought by the municipality under special contractual arrangements, as well as under certain provisions of Norwegian law which allow municipalities in which power plants are located to buy power at cost (referred to as "concession power"). In the majority of cases, the price of the concession power that the municipalities are entitled to buy is significantly lower than the market price. As a result, in December 2007, having had doubts that the contract prices reflected market prices, the Authority decided to open the formal investigation procedure in respect of power sales between 2001 and 2007.

However, having examined Norway's comments to the decision to open the formal investigation as well as publicly available price statistics for the period in question, the Authority, in its final decision, found that the price in this particular contract did not seem to differ sufficiently from the likely market price for state aid to be present.

Aid for cultural, sports and educational purposes

NORWEGIAN AID SCHEMES FOR AUDIOVISUAL PRODUCTION AND DEVELOPMENT OF SCREENPLAYS

In April 2009, the EFTA Surveillance Authority approved a scheme for audiovisual productions and a scheme for the development of screenplays and educational measures on the basis of Article 61(3)(c) of the EEA Agreement and the Authority's Guidelines relating to state aid to cinematographic and audiovisual works

The audiovisual productions scheme entails 13 different types of support measures such as support for the production of cinema films, short films, documentaries, television series and support for the promotion and distribution of cinema films. Most of the measures corresponded to previously applicable measures.

The scheme for the development of screenplays and educational measures is aimed at individual workers at the early stages of a film project development and education of film workers.

Icelandic film support schemes

In June 2009, the Authority approved an increase in the proportion of reimbursable production costs from 14 to 20% in the Icelandic support scheme for temporary reimbursement of certain film making costs. The scheme provides a mechanism for support of film production in Iceland under which a share of production costs may be reimbursed to the producer.

The Authority concluded that the amendment is compatible with the functioning of the EEA Agreement as it complies with the conditions set out in its Guidelines on state aid to cinematographic and other audiovisual works.

NORSK FILM GROUP

On 2 December 2009, the Authority decided to open a formal investigation procedure into alleged State aid granted to companies previously belonging to the Norsk Film group. The case was brought to the attention of the Authority by a complaint filed by nine Norwegian film companies.

In its decision, the Authority expressed doubts as to the compatibility of the aid in respect of two measures. The first measure concerned the payment of an ad hoc aid of NOK 36 million to Norsk Film AS in 1998 and 1999 for the upgrading of production facilities called Filmparken. The second measure concerned the application of a preferential tax regime to companies previously belonging to the Norsk Film group over the period 1995–2001. The two measures were not notified to the Authority before the aid was granted and the Authority only became aware of the grants after receiving the complaint.

The Authority recognises the importance of cinema as a cornerstone of cultural expression and has over the years approved many aid schemes for cinema production and audiovisual works in Norway. In this case, however, the Authority has doubts with regard to the compatibility of the two measures under investigation.

Support of sport activities and infrastructure

In the course of the year, the Authority has investigated several cases concerning the granting of state support to sporting activities and to sport infrastructure in Norway. The main question raised in these cases was to what extent sport should be considered as an economic activity or can it (in certain circumstances) constitute a service of general economic interest and in consequence can benefit from compensation from the state for operational and to a certain extent investment costs.

STUDENT WELFARE ASSOCIATION OF BERGEN

The Student Welfare Association of Bergen (SiB) runs several fitness centres in the Bergen area. Costs of the running of a fitness centre with a view of satisfying students' welfare needs can be paid for by the state as compensation for services of general economic interest. However, since some of the fitness centres concerned were open to both students and the general public, the Authority requested that certain amendments be made to the system of financing of SiB's fitness facilities. Following the changes, most notably the establishment of separate accounting procedures for revenue received from non-students, a dual system for the admission fee for students and non-students and an appropriate monitoring of the new system, the Authority concluded that appropriate safeguards mechanisms had been put in place to avoid cross-subsidisation of the commercial activities of SiB from state resources.

KIPPERMOEN LEISURE CENTRE

In December 2009, the Authority opened a formal investigation following a complaint concerning the financing of Kippermoen Leisure Centre. The centre is owned by the municipality of Vefsn. Its costs have been covered by the municipal budget and user fees since it was established in the early 1970s.The Authority has expressed doubts as to whether the financing can be accepted as compensation for the costs of a service of general economic interest. In the course of the formal investigation the Authority will also examine whether aid can be justified on the basis of cultural or regional considerations.

TIME

Based on a complaint received in 2007, the Authority has investigated whether certain property sales in the municipality of Time in western Norway, including the transfer of the ground for football stadium to the local football club, entailed state aid in violation of the EEA state aid rules. The land for the stadium was transferred to Bryne fotballklubb in 2003 without remuneration. As any transfer of a property to an undertaking below market price may entail state aid, the Authority, in December 2007, decided to open the formal investigation procedure.

The Authority concluded in July 2009 that the transaction did not entail state aid since the advantage was granted to the club in its capacity as a non-economic entity providing recreational football activities in the local community, primarily to children and young people. The professional part of the club, which (at the time of the transfer) played in the Norwegian premier league, did not benefit from this advantage as it was paying market-based (arms-length) rent for the use of the stadium. At the time of transfer, financial and organisational separation ensured that there was no spillover benefit from the advantage given to the non-economic activities to the commercial activities carried out by the professional football club.

Norwegian Aviation School

In July 2009, the Authority found that the direct grant of NOK 4.5 million from the Norwegian State budget and a loan guarantee by Troms County, both in favour of Norwegian Aviation College (NAC) in Bardufoss, Norway, constituted unlawful state aid.

During the course of the same investigation, project funding and loans granted in favour of Norsk Luftafartshøgskole (a foundation whose aim is to promote the operation of airline pilot education in the north of Norway) by Troms County and Målselv Municipality were found not to amount to state aid, as it was considered not an undertaking engaged in economic activity.

Aid granted to major undertakings in the EFTA States

Helguvík aluminium plant

In July, the Authority approved State aid in the form of tax and fee concessions for a new aluminium smelter at Helguvík, Iceland.

Norðurál Helguvík ehf., a subsidiary of the American company Century Aluminium, plans to construct and operate an aluminium smelter. The annual production capacity of the plant will be 360 000 tonnes of aluminium when the smelter reaches full output and approximately 540 persons will be directly employed. The estimated total investment cost is 1,836 million USD.

The Icelandic Government notified the Authority of its intention to enter into an investment agreement with the company, consisting of tax and fee concessions to Norðurál Helguvík ehf.

The Authority deemed the state aid, granted via the proposed tax and fee concessions, to be investment aid, which could be approved as regional aid in accordance with the Authority's guidelines. The amount of aid granted will be within the maximum aid ceiling for large investment projects according to the guidelines, approximately EUR 70 million. The Authority considered the aid to be necessary for the project to be realised and recognised the positive effects of the investment for the region.

The electricity for the aluminium smelter will be supplied by geothermal power from plants to be constructed by two power companies; the publicly owned Orkuveita Reykjavíkur and the privately owned HS Orka hf. The Authority took the view that the power contracts did not involve state aid.

Mesta AS – reorganisation of road construction and maintenance activities

In October 2009, the Authority concluded a formal investigation procedure in which it considered whether Mesta AS, a fully state-owned Norwegian road construction company, received state aid by means of: (i) public funding for restructuring costs; (ii) a below market value assessment of assets; (iii) overpriced transitional contracts; and finally (iv) by means of an exemption from paying document and registration duties in relation to the transfer of ownership of real estate.

The Authority ordered the Norwegian authorities to recover incompatible state aid for (certain) restructuring costs, over-compensation to Mesta AS for operation and maintenance contracts, and aid granted via an exemption from paying document duty and registration fee.

As regards the restructuring costs, the Authority found that the Norwegian State granted aid worth NOK 993.6 million for costs consisting of early retirement pension packages and other employment benefits. In addition to this, the Authority found that state aid worth NOK 150 million had been granted to Mesta AS in the form of equity as a means to finance the costs of offering compensation for curtailed or lost salary.

With the exception of state funding for certain specific costs (relating to moving, commuting and transfer of archives), the Authority concluded that aid granted for restructuring purposes was compatible with the EEA Agreement since the measures paved the way for opening up the national road services market to competition.

The transitional contracts transferred to Mesta AS included both construction contracts and operation and maintenance contracts for carrying out work on behalf of the Public Road Administration. The Authority found that the construction contracts were transferred to Mesta AS at market value and therefore did not involve state aid. As to the operation and maintenance contracts, the Authority found that Mesta AS had been entrusted with a public service obligation within the meaning of Article 59(2) of the EEA Agreement. Following a verification of the level of the compensation to Mesta AS for the services provided, the Authority concluded, however, that Mesta AS was overcompensated by NOK 66.4 million.

Finally, the Authority found that the exemption granted to Mesta AS from paying document duty and registration fees in respect of the transfer of ownership of real estate involved state aid which could not benefit from any of the exemptions in the EEA Agreement.

Real estate

The grant of aid in the context of real estate transactions, in particular by local authorities, continues to generate a considerable number of state aid cases either on the basis of complaints or investigations carried out at the Authority's own instigation.

In December 2009, the Authority opened a formal investigation procedure into the sale of a plot of land by the Norwegian municipality of Asker to Asker Brygge AS. The Authority has doubts as to whether the sales transaction was carried out according to the market investor principle. In particular, the Authority has doubts whether the price agreed upon in the option agreement corresponded to the market price.

The Authority also closed the assessment of four additional cases concerning the grant of state aid in the context of real estate transaction.

Tax measures

Cooperatives

In July 2009, the Authority closed its investigation into a Norwegian proposal to introduce a special tax deduction for certain cooperatives.

Under the scheme, certain consumer cooperatives and co-operative building societies, as well as cooperatives within the agriculture, forestry and fisheries sectors, would be entitled to deduct allocations of equity capital from their income, thereby reducing the basis for their income tax. The Norwegian authorities argued that the scheme would compensate the cooperatives for difficulties in gaining access to equity capital.

The Authority considered that the scheme constituted state aid as the scheme would confer an advantage on the cooperatives. Moreover, the correlation between the alleged difficulties for co-operatives in gaining access to capital and the tax benefit was not been made sufficiently clear by the Norwegian authorities. The Authority eventually concluded that the scheme was not compatible with the EEA Agreement. No recovery provisions were, however, necessary as the Norwegian authorities had not implemented the scheme.

Taxation of investment undertakings under the Liechtenstein Tax Act

In March 2009, the Authority opened a formal investigation into Liechtenstein's taxation of investment companies. After a preliminary assessment, the Authority concluded that certain tax reliefs constituted state aid and questioned their compatibility with the EEA Agreement.

Under Liechtenstein law investment undertakings invest capital raised from the public following public advertising for the purpose of a collective investment, and are usually invested and managed for the collective account of the unit-holders according to the principle of risk-spreading. The management of these assets can be undertaken by investment funds or investment companies.

Between 1996 and 2005, no income tax was levied on the management activities of investment companies. The capital tax was fixed at 1% instead of the generally applicable 2% and was reduced further for any capital exceeding CHF 2 million. Moreover, no coupon tax was levied on the coupons of securities (or documents equal to securities) issued by investment companies. The coupon tax applies to companies whose capital is divided into shares, as for example companies limited by shares and companies with limited liability. The decision only related to the own assets of the investment companies and not to the assets managed by them.

The financial crisis

Agreement between the Norwegian State and Eksportfinans ASA concerning state funding of Eksportfinans

In January 2009, the Authority concluded that Norwegian State funding offered to Eksportfinans ASA was be made on market conditions and did not constitute State aid within the meaning of the EEA Agreement.

Eksportfinans provides financial services to Norwegian businesses involved in the export of goods and services. The company is also the operator of government-supported export financing to the Norwegian export industry. As a result of the financial crisis, Eksportfinans experienced increased difficulty in obtaining long-term financing. In order to remedy this, the Norwegian State entered into a loan agreement with Eksportfinans under which the State provides loans over a two-year period with a total budget of NOK 30 billion. The loans are to be used to finance new export credits.

The Authority based its assessment on its Guidelines on a temporary framework for state aid measures to support access to finance in the current financial and economic crisis and its Guidelines on reference and discount rates. Section 4.4.1 of the temporary framework guidelines declares that interest rates which are calculated according to the method set out in the reference and discount rate guidelines do not contain state aid. The Norwegian authorities have confirmed that the interest rate to be applied to any loan given under the loan agreement will be equal to or higher than the rate set out in these guidelines. The Authority therefore considered that all funding offered to Eksportfinans will be on market terms.

Norwegian scheme for recapitalisation of sound banks

In May 2009, the Authority approved a scheme for temporary recapitalisation of fundamentally sound banks in Norway. Following pre-notification contacts between the Norwegian authorities and the Authority, the formal notification of the scheme was received on 28 April 2009 and the decision adopted by the Authority on 8 May 2009.

The objective of the recapitalisation scheme was to restore financial stability and facilitate lending to the real economy. Fundamentally sound banks could, within a six-month window, apply for a state capital injection from the Statens finansfond, the body that administers the recapitalisation scheme on behalf of the Norwegian State.

The recapitalisation scheme is non-discriminatory and is limited in time and scope. Consistent with the Authority's Recapitalisation guidelines, it provides for an appropriate level of remuneration, which takes the market situation of each beneficiary into account, and has adequate safeguards to minimise potential distortions of competition. The Authority has, on that basis, concluded that the scheme was an appropriate means to remedy a serious disturbance in the Norwegian economy and therefore compatible with Article 61(3)(b) of the EEA Agreement.

Temporary aid scheme to grant compatible aid of up to EUR 500 000 to businesses

On 20 May 2009, the Authority authorised, under Article 61(3)(b) of the EEA Agreement, a Norwegian measure to help businesses deal with the financial crisis.

Aid of up to EUR 500 000 per firm may be granted until 31 December 2010 to businesses facing funding problems because of the current difficulties in obtaining credit. The aid can take the form of direct grants, reimbursable grants, interest rate subsidies and subsidised public loans and public guarantees. This measure is meant to contribute to remedying the disturbance in the Norwegian economy provoked by the financial crisis.

The scheme meets the conditions laid down in the Temporary Framework for state aid measures to support access to finance during the financial. In particular, the scheme is limited in time and scope and concerns only companies that were not in difficulty on 1 July 2008, that is before the unfolding of the crisis. Interventions of the Icelandic Housing Financing Fund in financial markets.

In view of the shortage of liquidity in the Icelandic banking sector as a result of the global financial crisis and the particular difficulties faced by Iceland, the Icelandic authorities decided to intervene in the financial markets inter alia through the national housing agency, the Housing Financing Fund (HFF). Two separate types of asset swap measures were designed and implemented during the course of 2008 and 2009, one of a temporary and one of a permanent nature, both mainly intended to assist the activities of Icelandic savings banks.

The swap arrangements involved HFF bonds on the one side and mortgage loans or bonds secured with mortgage loans entered into with the beneficiary banks on the other. It enabled the banks to exchange the HFF bonds for liquidity in transactions subsequently entered into with the Central Bank. For that reason, the Authority assessed the measure as having the effect of a guarantee which provided the banks with collateral. Based on its guidelines on state aid to financial institutions granted in the context of the current global financial crisis, the Authority found that the aid had a non-discriminatory character and was appropriate in terms of being well targeted. The Authority noted in particular the limitations of the HFF's intervention in time and scope.

The second, permanent, asset swap measure was notified in mid 2009 and was still subject to preliminary investigation by the Authority at the end of the year.

Chapter 4

Competition

Introduction

Competition policy

The competition rules in the EEA Agreement are equivalent to the competition rules in the EU and prohibit agreements and conduct that distort or restrict competition. The competition rules also prohibit dominant firms from abusing their market power. That is the case, for example, for certain practices aimed at eliminating competitors from the market. In addition, the rules provide for a regime for the control of mergers and acquisitions which may impede effective competition in the EEA territory.

The role of the Authority

The EEA competition rules are enforced across the EEA by the Authority and by the European Commission. The Authority enforces the prohibitions in Iceland, Liechtenstein and Norway and undertakings active in those EFTA States must comply with the EEA competition rules. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of rules laid down in the EEA Agreement.

The Authority enjoys wide powers of investigation and may impose fines of up to 10% of global turnover on undertakings that breach the competition rules.

The Authority also has exclusive jurisdiction to take action against any EFTA State that enacts or maintains in force measures concerning public undertakings or undertakings with special or exclusive rights that are contrary to provisions in the EEA Agreement, including the prohibitions on anti-competitive conduct.

More generally, the Authority seeks to develop and maintain uniform surveillance throughout the EEA and to promote uniform implementation, application and interpretation of the EEA competition rules. The Authority cooperates with the European Commission to that effect.

Overview of activities in 2009

In the field of competition, the Authority devoted most of its resources to a number of in-depth investigations in which it had jurisdiction to apply Articles 53 and 54 of the EEA Agreement.

In addition, the Authority was involved in various national cases in which the EFTA competition authorities envisaged applying those same provisions.

The Authority also played a role in cases under the EEA competition rules that fell under the jurisdiction of the European Commission, and was involved in a wide range of other issues relating to regulatory developments, policy issues and cooperation among European competition authorities.

Finally, resources were devoted to the Authority's cross-departmental eCOM task force (see report on the activities of the eCOM task force in Chapter 3).

THE COMPETITION RULES OF THE EEA AGREEMENT

The substantive competition rules set out in the EEA Agreement are virtually the same as those in the Treaty on the Functioning of the European Union and can be summarised as follows:

- a prohibition on agreements or practices that distort or restrict competition (Article 53(1) EEA) with the exception of restrictions necessary for improvements which benefit consumers and which do not eliminate competition (Article 53(3) EEA);
- a prohibition on the abuse of a dominant position by market participants (Article 54 EEA);
- the requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- a prohibition on State measures in relation to public undertakings or undertakings with special or exclusive rights which are contrary to Articles 53 and/or 54 EEA (Article 59 EEA).

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

The Authority's website provides further information on the EEA legal framework in the field of competition (http://www.eftasurv.int/competition/competition-rules-in-the-eea/).

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

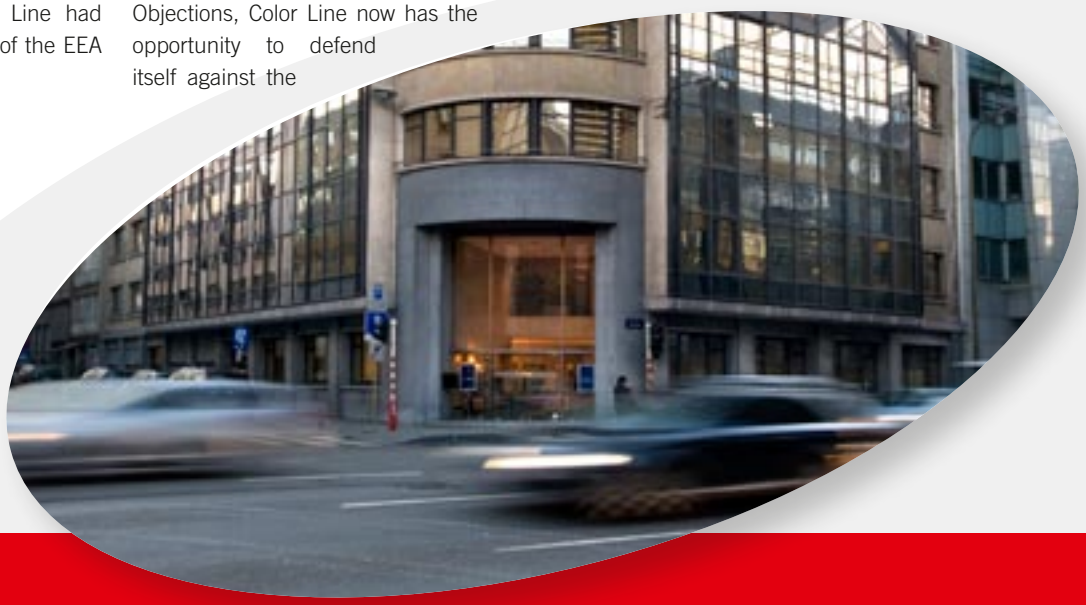
In December 2009, the Authority issued a Statement of Objections to Color Line regarding the provision of ferry services to and from Norway.

Following a complaint, the Authority carried out an extensive market investigation into whether Color Line, a major Norwegian ferry operator, may have infringed the EEA competition rules in relation to its provision of ferry services to and from Norway.

On the basis of that investigation, the Authority decided to send a Statement of Objections to Color Line at the end of 2009 informing Color Line of its preliminary view that Color Line had infringed Articles 53 and 54 of the EEA Agreement.

The Authority's investigation focused on the market for passenger ferry services between the Norwegian coastline from Sandefjord to Langesund and the northern part of the western coastline of Sweden. The Authority's objections concern Color Line's agreements with the public harbours of Sandefjord in Norway and Strömstad in Sweden. Through these harbour agreements Color Line has, in the Authority's preliminary view, secured long-term exclusive access to harbour facilities that has enabled it to prevent potential competitors from obtaining access to the market, in breach of Articles 53 and 54 EEA.

Having received the Statement of Objections, Color Line now has the opportunity to defend itself against the objections raised by the Authority. If the preliminary views expressed in the Statement of Objections are confirmed, the Authority may adopt a decision requiring Color Line to cease the restrictive conduct and may impose a fine.



HIGHLIGHTS OF 2009

In 2009, the Authority sent a Statement of Objections to leading Norwegian ferry operator Color Line, closed two in-depth investigations and conducted an oral hearing. It also adopted guidelines on the application of the competition rules to maritime transport services.

Access to the Port of Kristiansand

The Authority closed its investigation into the alleged exclusion of Fjord Line from the Port of Kristiansand, following a decision by the Norwegian authorities requiring the Port to grant harbour access to Fjord Line.

In autumn 2008, the Authority learned, through press reports and later through a complaint from Fjord Line, that the Port Authority of Kristiansand required all operators of ferry routes from Kristiansand harbour to offer year-round passenger and cargo transport services. Since 2006, Fjord Line and its predecessor Master Ferries had been operating a high speed catamaran ferry service between Kristiansand and Hanstholm in Northern Denmark during the summer season.

Fjord Line's catamaran ferry was not built for cargo transport and could not tackle the rough seas during the winter. Fjord Line's vessel was therefore not able to meet the Port's requirements for year-round services and cargo transport. Fjord Line's only competitor on the route, Color Line, was operating a year-round service for passengers and cargo between Kristiansand and Hirtshals in Northern Jutland, and would become the sole operator of ferry services between Kristiansand and Northern Denmark if Fjord Line were to be excluded from the market. This led the Authority to examine whether the Port's refusal to grant Fjord Line harbour access was compatible with the competition rules of the EEA Agreement.

In parallel with the investigation by the Authority, Fjord Line also lodged a complaint with the Norwegian Coastal Administration, alleging that the Port's requirements were contrary to Norwegian harbour legislation. In May 2009, the Coastal Administration found in favour of Fjord Line, and required the Port of Kristiansand to grant Fjord Line access to the harbour in the future.

At that stage of its investigation the Authority remained concerned about the potential negative impact on competition of the Port's requirements. However, in the light of the fact that the problem had been resolved by the decision of the Coastal Administration and that it appeared that Fjord Line would be granted harbour access in the future, the Authority took the view that its resources would be better devoted to other cases.

CASE C-360/09 PFLEIDERER: FIGHTING ILLEGAL CARTELS: FINDING THE RIGHT BALANCE BETWEEN DIVERGING INTERESTS OF PUBLIC AND PRIVATE ENFORCEMENT

In December 2009, the Authority submitted written observations in Case C-360/09 *Pfleiderer*, pending before the Court of Justice, on whether EU competition law prevented a Member State from granting access to antitrust investigation files in cases that fell under the national leniency programme. In this case, a potential plaintiff of a civil claim in damages against participants in a secret cartel requested access to the file, including to leniency documents held by the national competition authority. The case dealt with how to balance the interests of fighting illegal cartels by means of leniency programmes with those of assisting or encouraging private claims in damages by giving access to information which could substantiate such claims.

Many private actions for compensation fail because the plaintiff cannot establish that the cartel complained of caused direct harm to his interests.

The Authority submitted in this case that national law granting access for private enforcement reasons to leniency information given outside the specific oral procedure did not compromise the effectiveness of the European Union competition rules as they stand.

Distribution of parcels to Norwegian consumers

In 2009, the Authority continued its proceedings against the Norwegian national postal operator, Posten Norge AS, relating to a possible abuse of a dominant position in the market for parcel distribution to consumers.

In December 2008, the Authority issued a Statement of Objections to Posten Norge in which it took the preliminary view that Posten Norge had abused its dominant position contrary to Article 54 of the EEA Agreement.

The alleged abuse relates to the distribution of parcels from mail-order and e-commerce companies to Norwegian consumers. The Authority has been concerned that adverse effects on competition have resulted from the granting by Posten Norge from 2000 to 2006 of preferential treatment and exclusivity in agreements with large retail groups and their outlets in relation to its Post-in-Shop distribution network. The Authority's preliminary view, set out in the Statement of Objections, was that in the absence of Posten Norge's behaviour, other suppliers could have challenged Posten Norge's leading position in the market to the benefit of mail-order and e-commerce companies and, ultimately, to end-consumers.

In spring 2009, Posten Norge submitted a detailed reply to the Authority's Statement of Objections. It also requested an oral hearing, which was held in June 2009. At the hearing, Posten Norge presented its comments on the Statement of Objections to the Authority, in the presence of representatives from the EFTA States. The complainant was also present and expressed its views on the case.

The review of Posten Norge's reply will continue into 2010 with a view to formulating the Authority's final position on the case.

Express bus services in Norway

After a detailed examination of the evidence obtained at an inspection, the Authority finalised its investigation into the express bus sector in Norway.

An investigation into express bus services in Norway was initiated in June 2008, when unannounced inspections were carried out at the premises of Nor-Way Bussekspress (NBE) and two of its members, Nettbuss AS and Tide AS. During 2009, the examination of the evidence obtained was finalised.

Express bus routes are routes that cross county borders. The Authority's investigation focused on the nation-wide cooperation that takes place within NBE, the umbrella organisation for a commercial express bus network throughout Norway. The routes in this network are operated by the individual members of NBE under the brand name Nor-Way Bussekspress. Almost all express bus operators in Norway participate in the NBE cooperation and are shareholders in NBE.

The Authority had doubts as to whether there was effective competition in the express bus sector in Norway. In particular, the fact that the largest bus companies were all members of the NBE network and shareholders in NBE was regarded as a matter of concern. Such close ties between actual or potential competitors can, in certain circumstances, facilitate anti-competitive behaviour prohibited by the EEA competition rules, such as price fixing, market sharing and exchanges of commercially sensitive information.

After careful examination of the information in its possession, the Authority found that there was insufficient evidence to establish an infringement of the EEA competition rules. It therefore decided to close the case.

WHAT IS A STATEMENT OF OBJECTIONS?

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

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

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

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

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

Guidelines on maritime transport services

In December 2008, the Authority adopted Guidelines on the application of the EEA competition rules to maritime transport services.

Certain types of maritime transport services have been subject to a distinct enforcement regime under the EEA competition rules. The services concerned are liner shipping services, tramp services and cabotage services.

Liner shipping involves the transport of cargo on a regular basis to ports on a particular geographic route, generally known as a trade. **Tramp vessel services** refer to the transport of goods in bulk or in break-bulk in a vessel chartered for non-regularly scheduled or non-advertised sailings. **Cabotage** involves the provision of maritime transport services linking two or more ports in the same EEA State.

Following regulatory amendments, all types of maritime transport services are now subject to the general procedural framework under EEA competition law. This means that since October 2008 liner companies have to assess themselves whether their business practices comply with the EEA competition rules.

The Authority's new guidelines have been adopted, with a view to helping maritime operators understand the implications of this change.

The Guidelines explain how markets are defined in the fields of liner and tramp shipping services; provide detailed guidance with regard to the exchange of commercially sensitive and individualised market data between competitors; and explain under which circumstances pool agreements in tramp shipping may fall within the prohibition set out in Article 53(1) of the EEA Agreement, and the requirements that must be fulfilled in order to be exempt from that prohibition.

WHAT IS AN ORAL HEARING?

An oral hearing is an opportunity for the parties to whom the Authority has addressed a Statement of Objections to develop their arguments in defence.

An oral hearing can only be requested by addressees of a Statement of Objections. However, if they do so the Authority may also allow complainants and other interested parties to attend the hearing and to express their views on the case.

The competition authorities of the EFTA States are always invited to take part in an oral hearing. In cases which qualify for cooperation with the European Commission, officials from the Commission and from EU Member States are also invited.

Oral hearings are conducted by a Hearing Officer in full independence.

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

Cooperation with the Commission

There are rules in the EEA Agreement on cooperation between the European Commission and the Authority. These rules allow the Authority and the competition authorities of the EFTA States to be involved in discussions on competition policy at EU level. Cooperation also takes place in individual cases where the two surveillance authorities apply the EEA competition rules.

The Commission applies the EEA competition rules in a significant number of cases. Sometimes those cases can have considerable impact on markets in the EFTA States. The EEA cooperation rules in the field of competition ensure that the Authority and the EFTA States can make their voices heard in cases that concern them.

Merger cases in 2009

Mergers are examined at European level where the annual turnover of the combined merging firms or businesses exceeds specified thresholds in terms of global and European sales. The rules on jurisdiction are such that the Commission is, in practice, the competent authority to assess mergers under the EEA Agreement. The Authority is involved in merger cases by virtue of the EEA cooperation rules.

The financial crisis had a significant impact on the number of merger cases that were notified to the Commission in 2009. By December 2009, 259 cases had been notified to the Commission compared to 402 cases in 2007. In-depth investigations, which often also trigger cooperation under the EEA Agreement, were only initiated in five cases.

One case in which the Commission opened an in-depth investigation was Oracle/Sun **Microsystems**. In that case, which qualified for cooperation, the Commission investigated the planned acquisition of Sun Microsystems by Oracle Corporation, a US database and application software company. By virtue of Article 57 EEA the Commission investigation also extended to the territory of the EFTA States. The competition concerns in the case related essentially to the market for databases. At the end of 2009, those concerns had not yet been resolved.

The Commission may also examine mergers referred to it from the national competition authorities in the EEA either on their own initiative or on the request of the merging parties. When the Commission takes over such cases its review will normally also cover the EFTA States. In 2009, the Authority was involved in 21 cases in which the Commission accepted referral requests submitted by merging parties.

Under certain circumstances, the Commission may refer a case to the national competition authority of an EFTA State. However, no such referrals took place in 2009.

Antitrust cases in 2009

The Authority is also involved in cases in which the European Commission applies Articles 53 or 54 of the EEA Agreement. In one such case, relating to **Intel**, the Commission imposed a record fine of EUR 1.06 billion on the computer chipmaker for abuse of a dominant position. The Commission found that Intel had engaged in illegal practices aimed at excluding competitors from the market for computer chips for personal computers by preventing or delaying the launch of computers based on competing products. These practices harmed consumers throughout the EEA. The Authority supported the position adopted by the Commission in this case. The case is on appeal before the General Court of the European Union.

Another case the Authority was involved in concerned **Microsoft**'s tying of its web browser Internet Explorer to the Windows PC operating system. This case was settled by the Commission at the end of 2009. Microsoft has committed to offer users of Windows a choice among different web browsers through a "choice screen". It will also allow computer manufacturers and users to turn Internet Explorer off. The commitments are valid for five years in all countries of the EEA. The origin of the case was a complaint by the Norwegian web browser developer Opera. The Authority welcomed these developments.

Many cases in which the Commission applies Article 53 EEA concern EEA-wide or worldwide cartels which the Commission has been able to detect and sanction. In 2009, one such case related to **heat stabilisers**. Heat stabilisers are added to PVC products in order to improve their thermal resistance. The companies involved fixed prices, shared customers, allocated markets and exchanged sensitive commercial information, including in relation to Norway. The Commission imposed fines totalling over EUR 173 million on 24 companies for this infringement.

Cooperation with the EFTA competition authorities and courts

Under the current enforcement regime, national competition authorities and courts apply Articles 53 and 54 EEA side-by-side with the equivalent national competition rules.

In the EFTA network of competition authorities, the activities of the Authority in the field of competition are coordinated with the activities of the national competition authorities of the EFTA States.

The EFTA competition authorities inform each other when they initiate investigations where they envisage that Articles 53 and/or 54 EEA may be applied. The purpose is to allocate cases to the authority that is best placed to act, and to ensure effective enforcement. In 2009, the Authority was informed of 15 new cases by the EFTA competition authorities. At the end of the year, 17 pending national investigations were registered with the Authority.

Before they adopt decisions applying Articles 53 and/or 54 EEA, the national EFTA competition authorities are required to submit their draft decisions to the Authority for review. However, within the network of EFTA competition authorities all members are regarded as equal partners, with the common objective of enforcing competition rules to the benefit of consumers. Therefore, there is an informal exchange of views inside the network with a view to contributing to that objective and to ensuring consistent application of competition rules throughout the EEA. In 2009, the Authority made substantive comments on two cases that were dealt with by national competition authorities.

National courts in the EFTA States may, where they find it necessary to reach a decision in a particular case, request assistance from the Authority with regard to the EEA competition rules. The Authority also has the possibility to submit written observations to the national court where it considers that the coherent application of Articles 53 and/or 54 so requires.

During 2009, no courts in the EFTA States requested assistance from the Authority regarding the application of the EEA competition rules and the Authority did not submit written observations in any case.

Chapter 5

Statistics

Case handling by the Authority

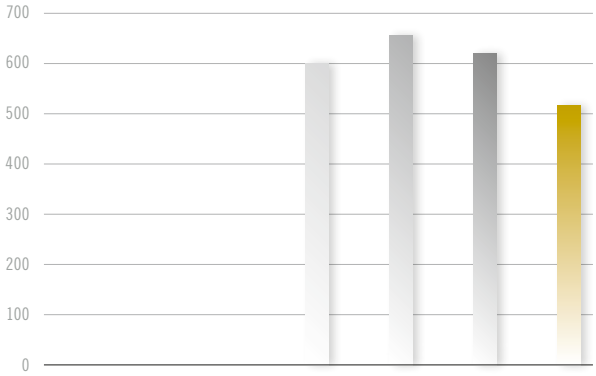
Developments and activities relating to individual cases and sectors in 2009 have been dealt with in the preceding chapters of this annual report. The aim of this chapter is, therefore, to give a brief overview of the Authority's total caseload, sorted by types and countries, as well as of the cases that were opened and closed within the Authority's different fields of work during the past year.

Pending cases

Figure 1 shows that, at the end of 2009, the Authority had 510 pending cases, more than 100 cases fewer compared to the start of the year. This substantial reduction is a result of the Authority's continuous emphasis on diminishing the backlog of pending cases, now for the second year running. The conclusion of many assessments based on *notifications* (see definitions, below), and *own-initiative* cases opened in past years, in particular relating to the untimely incorporation of directives and regulations, have contributed to the reduction of pending cases. This allows the Authority to apply greater resources on fewer, but more complex, new cases (see Figures 3 and 5), e.g. relating to the financial crisis.

The following figures show the developments in pending cases in the period 2006–09.

Table/Figure 1 Pending cases, by category



	2006	2007	2008	2009
Complaints	149	145	143	130
Notifications	82	94	113	50
Obligatory Tasks	103	101	91	115
Own Initiative	266	325	272	215
Total	**600**	**665**	**619**	**510**

Complaints are cases where the Authority examines information received from economic operators or individuals regarding measures or practices in the EFTA States which are not considered to be in conformity with EEA rules.

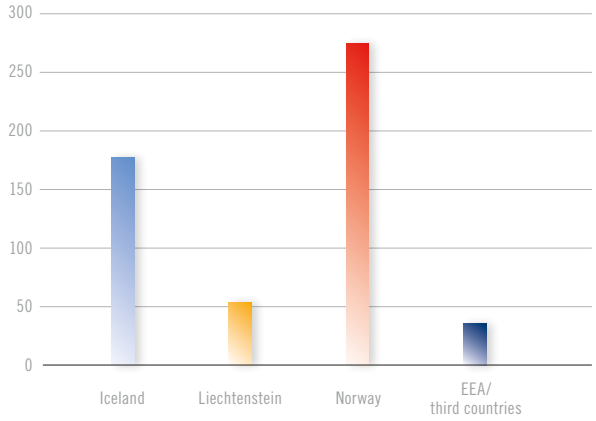
Notifications cover state aid measures, draft technical regulations, and telecommunications market notifications that are submitted to the Authority by the EFTA States for examination or approval.

Obligatory Tasks are cases which are opened on the basis of an obligation of the Authority arising from the EEA Agreement directly, or from secondary legislation, such as inspections in the area of food safety or transport.

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

Own Initiative refers to cases the Authority opens on its own instigation. Such cases include the non-implementation of directives, and non-incorporation of regulations which have been incorporated into the EEA Agreement by Iceland and Norway[9], and the examination of implementation (e.g. the verification of the conformity of national laws with EEA legislation) and application of EEA law. The latter covers, for example, examination of individual award procedures for procurement, state aid or concessions where the Authority considers such examination is warranted based on different sources of information.

Table/Figure 2 Pending cases, by country



	2006	2007	2008	2009
Iceland	156	252	223	172
Liechtenstein	95	72	63	57
Norway	294	294	303	242
EEA/third countries	65	47	30	39
Total	**600**	**665**	**619**	**510**

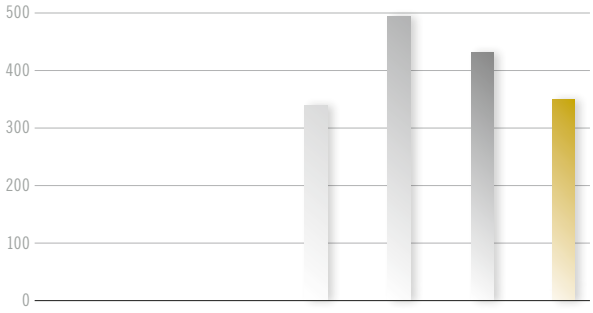
Figure 2 shows the number of cases by country in the period 2006–09. The category *"EEA/third countries"* refers to cases where more than one EFTA State was involved, typically two or all three EFTA States, or cases transferred to, or dealt with in cooperation with the Commission that concerned EU Member States or third countries.

Cases opened and closed by the Authority

The activities of the Authority can also be illustrated by the number of cases which were opened and closed during the year. A case is closed when the issue at stake has been solved, or when the Authority finds that no infringement of EEA law has taken place.

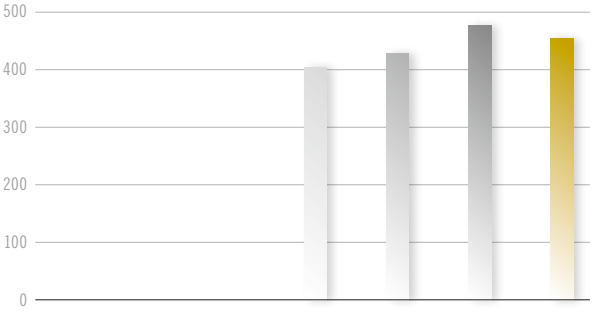
As it has been a priority of the Authority to reduce the backlog of pending cases, the number of closures has remained higher than the opening of new cases for the second consecutive year.

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



	2006	2007	2008	2009
Competition	16	9	19	19
Internal Market Affairs	270	421	356	276
State aid	53	63	56	50
Total	**339**	**493**	**431**	**345**

Table/Figure 4 Cases closed by the Authority, divided by field of work



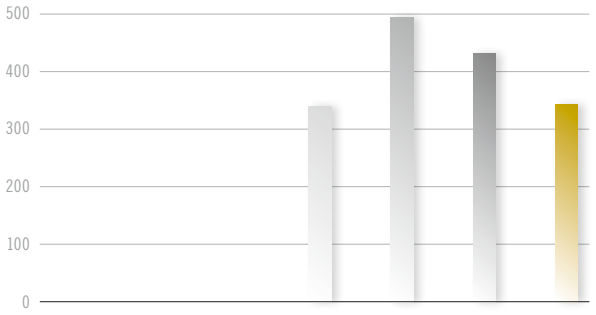
	2006	2007	2008	2009
Competition	20	4	36	9
Internal Market Affairs	338	385	384	382
State aid	45	39	57	72
Total	**403**	**428**	**477**	**463**

Figures 3 and 4 show that the great majority of cases related to internal market affairs, which comprise areas such as the free movement of capital, goods, persons and services, the environment and energy matters as well as public procurement. See Chapter 2 more detailed information on Internal Market Affairs.

In the area of state aid it should be noted that the number of closures has risen significantly over the last two-year period.

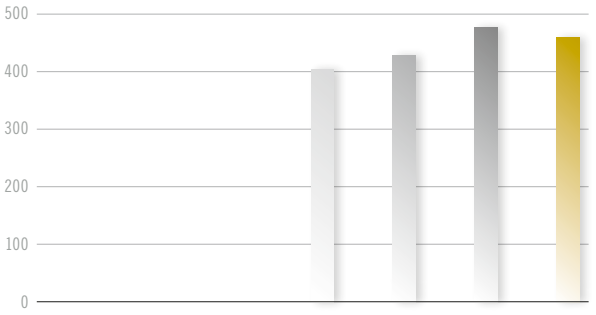
[9] In Liechtenstein, regulations are automatically incorporated the internal legal order through the EEA Joint Committee Decision whereas, for Iceland and Norway, national implementing measures must be subject to additional domestic decisions.

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



	2006	2007	2008	2009
Iceland	95	237	181	138
Liechtenstein	40	21	24	25
Norway	163	203	190	144
EEA/third countries	41	32	36	38
Total	**339**	**493**	**431**	**345**

Table/Figure 6 Closed cases, by country of origin



	2006	2007	2008	2009
Iceland	119	141	210	187
Liechtenstein	45	44	33	31
Norway	190	203	181	214
EEA/third countries	49	40	53	31
Total	**403**	**428**	**477**	**463**

Figures 5 and 6 show that there was a further reduction in the number of new cases in 2009, for the third year running. Moreover, the number of new cases remained below the number of closures. As a result, and as shown in the section above, the number of pending cases fell, and the Authority was able to shift resources and focus on larger, complex cases.

A comparable number of cases were opened in relation to Iceland and Norway, while only a small number related to Liechtenstein. In 2009, most closures concerned Norway and Iceland, while again only a relatively small number related to Liechtenstein.

Complaints in 2009

In order to fulfil its surveillance tasks regarding the situation in the EFTA States, and their compliance with EEA law, the Authority receives complaints from interested and concerned parties. In principle, anyone is entitled to lodge a complaint with the Authority, which will then examine it to determine whether there is need for an investigation. Following the examination, the Authority may decide to close the case, or to initiate formal infringement proceedings based on the complaint. It must be emphasised that in these circumstances the Authority will pursue the case on its own initiative and not on behalf of the complainant.

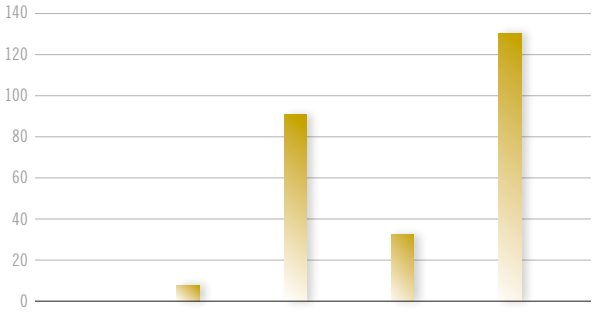
One in every four cases still under examination at the end of the year was a complaint.

As in past years, most complaints concerned Norway's implementation and application of EEA law: 99 of 130 cases still pending at year-end concerned Norway. Equally, most new complaints (33 out of 58) and closures (54 out of 72) also concerned that country.

For all three EFTA States, most new complaints related to internal market affairs, followed by state aid and competition cases. Although not apparent from these figures, it is worth mentioning that the number of new complaints against Iceland more than doubled from the previous year, as the Authority registered more new complaints relating to the banking sector and/or capital movement in Iceland.

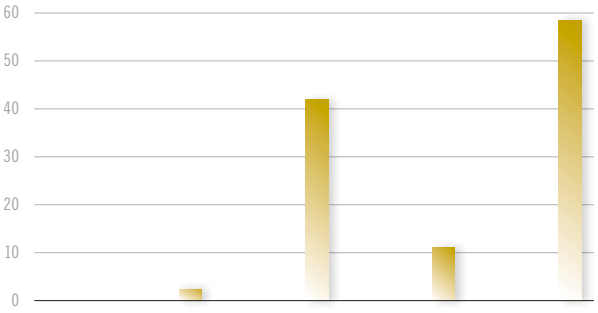
Table/Figure 7–9 Number of complaint cases, by country of origin and field of work

Pending complaints on 31 December 2009



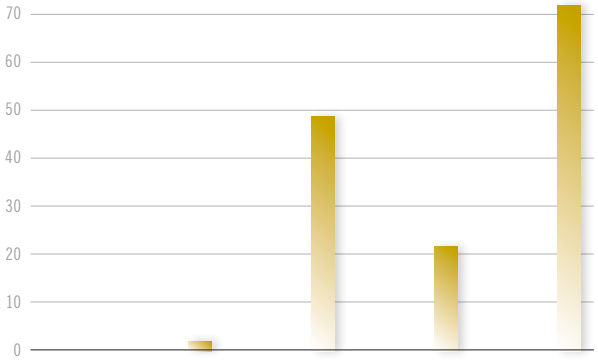
	Competition	Internal Market Affairs	State aid	Total
Iceland		21	7	**28**
Liechtenstein	1	2		**3**
Norway	8	64	27	**99**
Total	**8**	**87**	**34**	**130**

New complaints lodged with the Authority in 2009



	Competition	Internal Market Affairs	State aid	Total
Iceland	1	16	4	**21**
Liechtenstein	2	2		**4**
Norway		26	7	**33**
Total	**3**	**44**	**11**	**58**

Complaints closed during 2009



	Competition	Internal Market Affairs	State aid	Total
Iceland	1	8	3	**12**
Liechtenstein	1	4	1	**6**
Norway	1	36	17	**54**
Total	**3**	**48**	**21**	**72**

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Bjerkebo, Kjersti – CSA

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