


EFTA SURVEILLANCE AUTHORITY

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EFTA SURVEILLANCE AUTHORITY DECISION

OF 9 JULY 1997

CONCERNING ALLEGED INFRINGEMENT OF
THE COMPETITION AND STATE AID PROVISIONS OF THE EEA AGREEMENT
OWING TO THE FRAMEWORK CONDITIONS
FOR THE NORWEGIAN STATE HOUSING BANK
(NORWAY)

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area¹, in particular to Articles 59, 61 to 63 and 109,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular Article 1 of Protocol 3 thereof,

WHEREAS:

I. FACTS

1. Correspondence and contacts

By letter dated 7 November 1995, received and registered on 8 November 1995 (Doc. No. 95-6439-A), a complaint was lodged with the EFTA Surveillance Authority concerning the framework conditions for the Norwegian State Housing Bank. The complainant's submission was supplemented by letters and telefaxes of 17.11.95, 27.11.95, 20.12.95, 22.2.96, 21.3.96, 25.3.96, 3.4.96, 18.4.96, 21.6.96, 28.6.96, 29.8.96, 2.10.96, 31.10.96, 13.11.96, 08.01.97 and 14.3.97.

¹Hereinafter referred to as the EEA Agreement

²Hereinafter referred to as the Surveillance and Court Agreement

By letter of 22 January 1996, the EFTA Surveillance Authority requested certain information from the Norwegian authorities, to which they responded by letter from the Royal Ministry of Local Government and Labour dated 1 March 1996.

On 25 June 1996 officials of the EFTA Surveillance Authority had a meeting in Oslo with representatives of the complainant to discuss and exchange information on matters raised by the complaint.

At a meeting in Oslo on 13 September 1996, the matter was discussed with officials of the Royal Ministry of Local Government and Labour, following which the Authority received certain additional information from the Mission of Norway to the EU by letter of 22 October 1996.

2. Substance of the complaint

2.1 Summary

The complainant considers the provision of credit to private individuals, commerce and industry as well as to municipalities to be a customary and natural activity for private banks and mortgage companies in Norway, but expresses concern that in some areas these financial enterprises face strong competition from “state banks”, a term which according to the complainant includes seven banks/loan funds, whose main function is to provide credit for special investment purposes.

The complaint concerns the competitive conditions between commercial and savings banks and mortgage companies on the one hand, and the Norwegian State Housing Bank (Husbanken) on the other.

The complainant claims that owing to special framework conditions, within which Husbanken operates, including annual subsidisation over the government budget and an effective "monopoly" on providing subsidized lending for housing purposes, Husbanken is shielded against competition from banks and mortgage companies. The complainant submits that this represents distortion of competition which is in breach of Norway's obligations under the EEA Agreement, in particular of the State aid provisions of the Agreement. The complainant considers the present arrangement for publicly supported housing finance through Husbanken to be highly detrimental to competitive conditions in the Norwegian credit market.

2.2 Husbanken's loan schemes, interest rate terms and funding by the State

According to the complainant, Husbanken receives funding exclusively from the state. Its lending quotas and lending rates are fixed by the Norwegian Parliament. Husbanken operates a number of different loan schemes of which the most important are building loans, establishment loans and improvement loans, and it also manages several grant schemes.

The complainant provides a description of the terms of Husbanken's loans prevailing at the time when the complaint was lodged, and states *inter alia* that Husbanken grants loans on the basis of so-called I-terms and II-terms, as well as certain loans on special terms. Husbanken's I-loans, the complainant submits, were at the time subsidised by direct grants over the government budget, carrying interest rates rising over the term of the loan (tiered interest rates), but II-loans were stipulated as not being subsidised and carried a flat interest rate. In the period 1 January 1993 to 31 December 1995, the interest rate on II-loans and the top rate on I-loans was, according to the complainant, set equal to the average rate on government bonds with about 5 years to maturity (in the twelve-month period October - September in the year prior to the budget year). The opening interest rate for new I-loans stood 2 percentage points below the top rate, and rose by 0.5 percentage points annually, until the top rate was attained.

The complainant claims that the rate payable by the state banks for funding received from the state has generally been higher than the lending rate charged on state bank advances, and that the resultant gap is covered by annual appropriations for interest support over the government budget. The complaint cites figures from a report by the Commission on State Banks (NOU 1995:11 p. 73), according to which interest support received by Husbanken in 1994 came to NOK 3.3 billion.

The complainant furthermore asserts that in addition to direct subsidization of credit terms, Husbanken enjoys special state appropriations to cover losses which it incurs on loans and guarantees, and that administrative expenses are also covered in a similar way. Ordinary loan losses of Husbanken in 1994 are said to have amounted to NOK 189 million, equivalent to just over 0.2 per cent of outstanding loans, and administrative expenses for the same year to have come to NOK 181.5 million. The state is said to receive no return on its equity in Husbanken nor any compensation for ensuring it a supply of favourable financing based on the state's creditworthiness.

The complainant explains that, at the time when the complaint was lodged, the Government had proposed, in a White Paper, to change Husbanken's interest rate terms and subsidy profile³, according to which Husbanken should as from 1 January 1996 offer fixed and floating interest rates on its loans. The interest rate on Husbanken's loans was to be pegged to the interest rate on government securities with about the same residual maturity plus an interest margin of 0.5 percentage points. According to the complainant, a mortgage company is, by contrast, stated (on page 42 of the same report) to normally require at minimum a net interest margin of a good percentage point.

According to the complaint, "A further pertinent fact is that the Housing Bank benefits from the State's ability to borrow in the market more cheaply than mortgage companies are able to. The disparity is put at 0.6 percentage points by the Commission on State Banks (cf. NOU 1995:11 p. 29). Hence, in the case of loans with the same maturity, fixed-interest period and security, the Housing Bank will altogether be able to offer an interest rate a good 1 per cent below the lowest rate that a mortgage company can offer."

³The complainant refers here to Report No 34 to the Storting (1994-95).

The complainant's concern over the interest rate terms of Husbanken is summarized in the following passage from the complaint:

"Framework conditions for the Housing Bank that entail a good percentage point lower lending rate than the lending rate charged by mortgage companies also entail that it is impossible in practice for mortgage companies to compete with the Housing Bank on price. The position of commercial banks, savings banks and foreign credit institutions with branches in Norway is no different from that of mortgage companies, i.e. they cannot compete with the Housing Bank in terms of price."

2.3 The activities of Husbanken in relation to the objectives of a social housing policy

The complainant expresses the opinion that Husbanken's activity in the market for housing loans, and for the financing of new housing in particular, is of such considerable scope and addressed to such a broad range of borrowers that it is questionable whether it is correct to characterise it as social housing policy. The following information on Husbanken's market share is cited from the National Budget for 1996: "the Housing Bank's share of housing finance was just over 50 per cent in the early 1980s. In the period 1990-93 the Housing Bank accounted for 80-90 per cent of financing of new dwellings. In 1994 and 1995 the share is estimated at between 70 and 80 per cent, while the proposed quota for 1996 corresponds to almost 45 per cent of estimated housing starts." On the basis of this information the complainant concludes that "Considering the relatively speaking good housing standard and high standard of living in Norway and the very scale of the Housing Bank's activity, the Housing Bank seems to be somewhat more than just an instrument of social housing policy."

The complainant cites data showing that Husbanken's annual loan losses are in the range of 0.1 to 0.2 per cent of outstanding loans, which the complainant considers to represent a low loss risk and evidence that Husbanken does not assume higher risk than ordinary credit institutions. It is suggested that the relatively low loss rate "may also be explained by the fact that the Housing Bank is generally only responsible for the basic financing of housing construction, and that the more risky top financing and construction loans are essentially left to other credit institutions."

2.4 Legal basis of the complaint

As a legal basis for his request, the complainant refers primarily to Article 61 of the EEA Agreement. Referring to a letter by the Norwegian Ministry of Finance of 18 September 1995, which concludes that support for private individuals' housebuilding etc., in the form of housing benefits or subsidised loan schemes, must be assumed to fall outside the scope of the EEA State aid rules, the complainant states that he does not contest the right of the Norwegian government to provide subsidies to groups of people as an element of a social housing policy, but he questions the legitimacy of the

present arrangement whereby such subsidies are only granted when Husbanken is the lender.

The complainant also submits that “the Housing Bank arrangement must be viewed not only in the light of the rules governing state support but also in a broad perspective of competition law. In concrete terms his submission on the relevance of the anti-trust rules of the EEA Agreement is limited to the following passage: “[The complainant] considers that the current scheme, where the Housing Bank has a monopoly of subsidised lending, represents an economic barrier to free trade in financial services. As of 1995 the Housing Bank accounts, [...], for about one quarter of all loans for residential purposes in Norway, and finances about three quarters of new housing construction (NOU 1995:11 p. 10). This **market dominance** is due solely to the above-mentioned linkage, which precludes the ordinary credit institutions from an important section of the market for financial services. **Hence cross-border trade is also affected.** In EU’s 2nd Banking Directive, which is the basis for the free right of establishment for credit institutions within the EEA area, lending activity, including mortgage lending, is included in the list of activities subject to mutual recognition. We would recall that several foreign banks are operating in the Norwegian market today under such an EEA licence - [.....]”

2.5 *Effects of the arrangement on competitive conditions in the credit market*

As for the effects of the framework conditions for Husbanken on competition conditions in the credit market, the complainant refers to the following statements in the report by the Commission on State Banks (NOU 1995:11):

“That portion of the state banks’ lending which would alternatively have been provided by private financial institutions is partly in the form of soundly secured loans. Substantial parts of state bank loans today are in the form of debt finance with relatively good quality security and thus low risk. In these cases private financial institutions are responsible for the top financing and thus incur greater risk. The state banks’ activity can therefore be said to limit private institutions’ opportunity to acquire a diversified loan portfolio by tending to reduce their share of relatively secure loans.”

The Norwegian Competition Authority is also quoted to have made *inter alia* the following statement on the report of the Commission on State Banks;

“In the view of the Competition Authority subsidised loans have the effect of distorting competition to the detriment of other credit institutions. If the Housing Bank’s activity were changed from providing interest rate subsidies to making direct grants, this could contribute to enable other credit institutions to increase their lending to dwellings with good quality security. Use of grants instead of interest subsidies could bring about greater competition for credit for a larger portion of housing loans than is the case today, and thereby contribute to more effective channelling of credit to dwellings.”

The complainant considers that the above statements confirm his view that the present framework conditions for Husbanken have detrimental effects on competition in the credit market. He also submits that these effects are relevant for assessing the situation in the light of the EEA Agreement.

Finally, the complainant refers to Article 59 of the EEA Agreement, and with regard to paragraph 2 of that Article, he submits that the present arrangement for Husbanken with regard to mediation of subsidised housing loans goes beyond what is required to achieve the objectives of the housing policy and that, accordingly, it cannot be justified under Article 59 of the EEA Agreement.

3. Submission by the Norwegian authorities

3.1 Description of Husbanken's activity

Objectives of the housing policy and role of Husbanken

The Norwegian authorities state that the over-riding objective of their housing policy is to ensure that everyone can have a good dwelling in a good housing environment. It is emphasised that health, the environment and the quality of the housing shall be enhanced both in connection with new housing and in the existing housing stock. It is stated that the housing policy and urban renewal are important components of the Government's policy to contribute to an equitable distribution as regards standard of living and welfare.

In addition the housing policy is said to have the following subsidiary goals:

- Good housing coverage and a well functioning housing and building market
- Good distribution of housing
- Good housing standards, high quality construction and a good residential environment
- Security of tenancy
- Functional and fair organisation of ownership and tenancy

Husbanken's role in the housing policy is summarised as follows:

- To assist underprivileged groups of the population to become established in the market, as owners
- To ensure good quality housing of moderate standard
- To contribute to the construction and improvement of dwellings for the elderly and the handicapped
- To stimulate urban renewal and the development of good residential environments

Husbanken's loan and grant schemes

According to the Norwegian authorities, Husbanken's loan and grant schemes, together with housing allowances, play an important role in the housing policy. Husbanken provides loans for:

- Construction of new dwellings

- Financing kindergartens, school reforms, dwellings that are specially adapted for persons in need of care, and nursing homes
- Rehabilitation of housing and housing environments
- Entry into the market - i.e. for purchase of a dwelling

Husbanken’s loans for new housing are granted without any means-testing as regards income, and the interest is the same for all recipients of these loans. It is nevertheless found that, on average, the households that receive such loans from Husbanken have a low income.

As can be seen from the following paragraph, the Norwegian authorities underline that the award of general (non-means-tested) loans is subject to conditions, which are designed to achieve objectives of their housing policy:

“In order to obtain a loan for a new dwelling from Husbanken, certain demands will be made as to reasonable floor space, and various housing qualities over and above the requirements in the Building Regulations. Extra economic stimulant is provided by increasing the size of the loan and/or award grants when the dwelling satisfies certain quality requirements, for example a life course standard, environmentally sound construction and materials, or suchlike. In our opinion, it is effective to use economic instruments to stimulate the desirable housing quality over and above the requirements defined in the Building Regulation.”

As an important element of the Government’s policy on equitable distribution of welfare, Husbanken also provides selective means-tested loans, where the recipient groups consist primarily of households with a low income. In order to stimulate urban renewal and other activity designed to improve the standard of housing and the housing environment in the existing housing stock, Husbanken also offers selective improvement loans to individuals, municipalities and foundations. According to the Norwegian authorities, the private credit market regards urban renewal projects as being exposed to risk, and it is considered desirable that the State accepts the risk by providing credit.

Husbanken can also award grants to persons on the basis of social criteria to help finance dwellings of moderate size and standard. The target groups for such grants are households with permanently low income and little equity, who are either unable to obtain a loan on the private market or have to pay high interest rates because of poor creditworthiness.

Husbanken does not offer financing to building contractors during the construction period. It is normally only when the construction has been completed and the dwellings are offered for sale that Husbanken offers loans to the buyers.

The recipients of Husbanken’s loans for new dwellings are usually private persons, housing co-operatives, foundations or municipalities. In 1994, the percentage distribution of recipients of loans for new dwellings was as follows:

	Private persons	Housing co-operatives	Foundations	Municipalities	Others
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Percentage of recipients	70	6	13	7	4
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Private economic operators who wish to rent housing on a commercial basis are not excluded from a loan from Husbanken if they comply with Husbanken's rules for area and cost. However, partly for tax reasons, the market for this type of housing is very small in Norway and there are practically no applications for loans from private economic operators. Husbanken does not offer any loans for commercial buildings.

Interest rates on Husbanken's loans

In their submission, the Norwegian authorities emphasise that on the basis of Report No. 34 (1994-95), a decision was made by the Storting, in connection with the State Budget for 1996, to change the principles for setting the interest rates of loans from Husbanken. The changes were implemented as from 1 January 1996.

As from 1 January 1996, Husbanken offers loans at a floating rate of interest or at a fixed rate. The interest rates are determined respectively by the interest rate on Government securities with 0-3 months remaining term (loans with a floating rate) and Government bonds with about 5 years remaining term (loans with a fixed rate). A margin of 0.5 percentage points is added to both of these interest rates in order to compensate for the cost to the State of operating Husbanken.

The Norwegian authorities consider that as a result of the changes of Husbanken's interest rates and subsidy profile referred to above, the system of general interest subsidies has been discontinued.

The Norwegian authorities consider that "Several conditions affect the interest on loans in the private credit market. [The complainant] maintains that the interest in the private market will always lie one percentage point higher than the interest on a loan from Husbanken. The interest on Husbanken's loans with a floating interest is currently 5.7 per cent, while the best offer in the private market is 6.05 per cent (both within 80 per cent of the assessed value of the property). For fixed interest loans, the best offer on the private market is identical with Husbanken's offer of 7.2 per cent during the first six months of 1996."

Husbanken's legal status and position on the Norwegian financial market

Husbanken is a state institution governed by a special act, i.e. Act No. 3 of 1 March 1946. The Act contains *inter alia* provisions on the objectives of Husbanken, its organisation and lending activities. Although Husbanken is organised as a separate legal entity, it is closely connected to the national public authorities, it is regulated by public law, its Board is appointed by the political authorities, the annual allocation available to it for loans is decided in connection with the National Budget, and its activities are subordinate to the instructional authority of the public administration.

The Norwegian authorities therefore regard Husbanken as a government administrative undertaking.

Unlike banks and credit institutions, Husbanken does not itself fix its interest rates; according to the Husbanken Act interest rates on permanent loans and the terms of their amortisation are decided in accordance with rules laid down by the Norwegian Parliament. The award of a loan or grant is regarded as an individual decision, and is subject to the provisions concerning administrative procedures in the Public Administrative Act.

According to Act No 40 of 10 June 1988 concerning financing activities and finance institutions, as adjusted in connection with the EEA Agreement, “a credit institution is taken to be an undertaking whose activity consists of receiving deposits from the public - and granting loans on its own responsibility”. This corresponds to the definition in the first Banking Directive (Council Directive 77/780 EEC).

Following amendments of the Norwegian legislation in 1992, Husbanken is no longer authorised to borrow money from the public. Husbanken now borrows solely from the State. Therefore, Husbanken is not a credit institution as defined in EU’s first banking directive, and it is not governed by any of the provisions in the Norwegian act relating to financing activities.

3.2 The concept of a social housing policy and the need for loans from Husbanken

The complainant has argued that in view of the wide scope of Husbanken’s activity in the market for housing loans, the broad range of its clientele and the fact that applicants for loans are generally not means-tested, as well as considering the relatively good housing standards and high standard of living in Norway, it was questionable whether it is correct to characterise Husbanken as being only an instrument of a social housing policy. The Norwegian authorities were invited to comment on this view. They were also requested to indicate which of Husbanken’s loan schemes or terms were regarded as non-subsidised and whether they consider such loans nonetheless to be instruments of a social housing policy.

In response to this request the Norwegian authorities submit that in principle there is no unambiguous definition of the term “social housing policy”. The basis for Husbanken’s activities is that “it serves as an instrument in the social housing policy by arranging and providing public support to the groups that are given priority in the housing policy and for realising the objectives with regard to housing quality. Husbanken is an instrument in the national social housing policy independent of the level of the general housing standard in Norway, and independent of the fact that Norway has a high housing standard and high standard of living in international terms.”

The Norwegian authorities also underline that private ownership of dwellings is an important feature of their housing policy, when they state that “Unlike many other European countries which to a large degree use publicly owned or publicly managed rented housing as an instrument in the social housing policy, Norway has first and

foremost given priority to privately owned dwellings and cooperatively owned housing financed through Husbanken as a means of realising the objectives of the social housing policy. In the Norwegian model for financing housing it is considered expedient to have a public agency like Husbanken with the necessary expertise on housing matters in a market where most households participate only once or just a few times.”

In contrast to the complainant’s doubts, the Norwegian authorities clearly consider Husbanken’s non-means-tested loans for new housing to be an important instrument to promote a social housing policy; this is so because of the purposes for which the loans are used, and in view of the groups which avail themselves of loans. They claim that existing statistics and a recent research project confirm that Husbanken’s loans for new housing have generally financed dwellings for people with lower than average income and in areas of the country where private banks and credit institutions have been reluctant to provide financing because of a low second hand value.

The Norwegian authorities are of the opinion that a large share of Husbanken’s borrowers would either have had difficulties in financing their dwelling by other means or would not even have been able to do so at all. Therefore, they consider that the availability of a loan often plays a decisive role in the social housing policy.

The Norwegian authorities also refer to unfortunate concentration in certain parts of large cities of underprivileged households and claim that Husbanken’s emphasis on financing dwellings of moderate standard with a certain minimum quality has enhanced the quality of the housing stock. They furthermore submit that Husbanken plays an important role in furthering urban renewal, in order to avoid unfortunate segregation. In the opinion of the Norwegian authorities “A housing credit system with more differentiation of the terms of the loan, depending on the households’ economic resources, would have had serious negative effects as regards segregation of residential areas in the cities.”

The Norwegian authorities furthermore mention that as a result of the so-called bank crisis in Norway, which culminated in the first years of the 1990s, the credit market was not functioning well. After the credit market had stabilised, the allocation over the State Budget for Husbanken’s loans for new housing was reduced considerably in 1996, which the Government expected would lead to an increase in the same year of the share of private credit undertakings in the basic financing of new dwellings to about 55%.

3.3 The Norwegian authorities’ view on the relevance of the rules of the EEA Agreement on competition and State aid

The Norwegian authorities regard Husbanken as an instrument in the public housing policy and as a part of the public sector. They refer to Husbanken as not being a credit institution according to Norwegian law or the relevant acts of the EEA Agreement, but that it is a public administrative undertaking established under public law and subject to instructions from the Ministry of Local Government and Labour. They furthermore refer to the provisions of Article 125 of the EEA Agreement, which they

consider to imply that the Contracting Parties “are free to determine the scope and internal organisation of their public sectors. In our view, the conferment of the exclusive right to provide subsidies for housing purposes to Husbanken constitutes part of the internal organisation of the public sector, and the purpose of Article 59 is therefore not relevant. Thus we would argue that Husbanken’s exclusive rights to provide direct housing subsidies, and to give loans in connection with these subsidies, are not in themselves governed by Article 59.”

According to the Norwegian authorities, the same considerations are relevant with regard to Article 59(2); “it is up to the Norwegian authorities to determine the extent and internal organisation of the aid scheme for housing. We therefore disagree with [the complainant]: Article 59(2) does not require national authorities to refrain from providing loans on a non-commercial or a commercial basis as part of their public housing policy.”

Finally, the Norwegian authorities state as their opinion that the Norwegian aid scheme for housing does not fall within the scope of Article 61 of the EEA Agreement. Husbanken is an instrument of public policy and administers a general aid scheme which provides different types of subsidies to house builders, almost all of which are private persons building or owning one residence. Only in exceptional cases are loans provided to economic operators, and such loans at any rate represent only a marginal part of Husbanken’s portfolio. On this basis the Norwegian authorities submit that the support administered by Husbanken cannot be considered as being aid “which distorts or threatens to distort competition by favouring certain undertakings” (cf. Art. 61(1) EEA).

Even if subsidies provided by Husbanken should formally be viewed as State aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian authorities consider that such aid should in any case be exempted pursuant to Article 61(2)(a) as aid having a social character, granted to individual consumers (households).

II. APPRECIATION

1.1 Relevance of the rules of the EEA Agreement on competition and State aid

The Norwegian authorities regard Husbanken as an instrument in the public housing policy, and by reference to Article 125 of the EEA Agreement they have expressed the view that the conferment of an exclusive right on Husbanken to provide subsidies for housing purposes and to grant loans in connection with these subsidies represents part of the internal organisation of the public sector, which is the prerogative of the Norwegian Government. The purpose of Article 59 is therefore not relevant and any privileges afforded to Husbanken are not governed by Article 59 or 61.

Article 125 of the EEA Agreement is intended to secure the neutrality of the Agreement with respect to private and public ownership of enterprises, as it provides

that “This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership”. On the other hand this Article does not provide any category of undertakings, public or private, with exemptions from the rules of the Agreement.

The scope of applicability of the competition and State aid rules of the EEA Agreement in regard to public undertakings is determined by Article 59 of the Agreement. The main rule is set out in the first paragraph of that Article, which provides that “*In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.*” This means in other words that, as a main rule, the provisions of the EEA Agreement on competition and State aid apply to public undertakings.

Articles 59 and 61 of the EEA Agreement correspond, respectively, to Articles 90 and 92 of the EC Treaty. When considering the question whether Article 92 of the EEC Treaty is restricted to private businesses or also includes non-profit making institutions governed by public law, the European Court of Justice (ECJ) has concluded that “save for the reservation in Article 90(2) of the Treaty, Article 92 covers all private and public undertakings and all their production”⁴. This makes it clear that the fact that a State institution does not have a commercial objective is in itself not sufficient to relieve it from the discipline of State aid control under the EEA Agreement. The above statement of the ECJ could possibly also be interpreted to mean that any public sector institution could only escape the State aid provisions of the Agreement if it meets the test of the derogation in Article 59(2). The latter interpretation may however be too wide. In a document entitled “Services of a general interest in Europe”⁵, the European Commission has set out certain policy principles, which *inter alia* include the following statement (in para. 18) concerning the applicability of Article 90 of the EC Treaty:

“It should be pointed out that the conditions of Article 90 do not apply to non-economic activities (such as compulsory education and social security) or to matters of vital national interest, which are the prerogative of the State (such as security, justice, diplomacy or the registry of births, deaths and marriages).”

The EFTA Surveillance Authority considers that the answer to the question whether or not the provisions of Articles 59 and 61 apply to public institutions depends not on the legal status of such entities but on the nature of the service which they provide, and the extent to which a similar service is or can be made available in the market place. Given the fact that regular operators in the financial market also have a considerable presence in the housing finance market, the Authority considers that the lending activities of Husbanken cannot be regarded as non-economic activities. This implies that the Authority considers the lending activities of Husbanken to fall within the scope of Articles 59 and 61 of the EEA Agreement. Consequently, the Authority

⁴ Case 78/76, *Firma Steinike und Weinlig v Federal Republic of Germany*.

⁵ Official Journal of the European Communities No. C 281, 26.9.96.

cannot accept the above submission of the Norwegian authorities, that Articles 59 and 61 do not apply to the financial relations between Husbanken and the Norwegian State.

1.2 Compatibility with Article 54 of the EEA Agreement

The complainant submits that “the Housing Bank arrangement must be viewed not only in the light of the rules governing state support but also in a broader perspective of competition law”. He also briefly states that owing to the framework conditions within which Husbanken operates, it enjoys a market dominance. However, the complainant does not explicitly allege that an abuse of a dominant position has occurred, which is required for Article 54 to be applicable, nor has he submitted any clear evidence to substantiate a claim that this Article has been infringed. Furthermore, the Authority’s examination of the facts available to it has not given any reason to suspect that Husbanken has acted in infringement of the provisions in Article 54 of the Agreement. The Authority has therefore seen no reason to examine the allegation any further.

1.3 Compatibility with Article 61 of the EEA Agreement

The measures which the complaint gives reasons to examine are the funding of Husbanken by the Norwegian State Treasury and other framework conditions for Husbanken, which the complainant considers to involve an infringement of the State aid provisions of the EEA Agreement, in particular those contained in Article 61.

Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

This implies that for a measure to constitute State aid in the meaning of Article 61(1) EEA it must:

1. be granted through State resources;
2. distort or threaten to distort competition by favouring certain undertakings or the production of certain goods;
3. affect trade between Contracting Parties.

It is clear that the first condition is fulfilled in the present case, as Husbanken’s framework conditions are established by the State and its financial means are derived from State resources.

Apart from a very small equity, consisting of risk and loss funds, Husbanken's core activity of providing loans for housing purposes is based on borrowings, which are obtained exclusively from the State, as Husbanken is not authorised to receive deposits from the public or borrow elsewhere. For new loans from the State, Husbanken pays interest corresponding to the average interest rate on new, five-year term government bonds. Therefore, Husbanken, being a government agency financed by the State, enjoys the borrowing terms and favourable credit rating of the State. Such borrowing terms are generally not available to regular, non-governmental operators in the credit market, such as commercial and savings banks and mortgage houses, which also offer loans for housing purposes. Husbanken also in other ways clearly enjoys the financial backing of the State Treasury, for instance by way of budget appropriations, if needed, to cover the losses it incurs on loans as well as administrative expenses. It is therefore clear that as a State institution, Husbanken enjoys financial advantages of a kind not afforded to other providers of credit for housing purposes and which fulfil the condition referred to in point 2 above. The changes of the principles for setting the interest rates on Husbanken's loans, which were implemented as from 1 January 1996, are in the long run likely to reduce the level of direct interest subsidisation and thus to limit the distortive effects in the relevant credit market of Husbanken's preferential financial relations with the State. However, given that Husbanken continues to enjoy financing from the State Treasury of the kind referred to above and also considering that its lending rates, although in the long run probably closer to market rates than before, are fixed by adding only a relatively small margin (0.5 percentage points) on the Government's borrowing rates, the Authority does not have reason to question the complainant's contention that potential distortions of competition have not been removed.

The granting of loans to individuals for financing their purchase of residential accommodation is a financial service which, in the present market circumstances, is predominantly of a local character and normally does not involve any direct cross-border transactions. Distortions of competition arising from financial advantages accorded to a State agency operating such services are therefore *prima facie* likely to have only limited direct trade effects.

It should nevertheless be borne in mind that the EEA Agreement establishes *inter alia* the general principles, both applicable to financial services, of the right of establishment for nationals of EEA States and their freedom to provide services within the territory of the Contracting Parties. However, the secondary legislation which, under the EC Treaty and the EEA Agreement, has been adopted to make these basic provisions effective, does not extend to mortgage credit institutions or specialised housing finance institutions of the kind which Husbanken is⁶. Consequently, such institutions are at present not able to benefit from the principles of mutual recognition and home country control contained in the banking legislation of the EEA Agreement. Therefore, due to different national credit rules and practices and the absence of effective harmonisation or mutual recognition at EEA level, there continue to be considerable obstacles to effective cross-border operations in this area. On the other hand, it can be said that the State supported activity of Husbanken tends

⁶ The EC Commission has on more than one occasion presented proposals for a directive to regulate mortgage credit activities, but legislation in this field has not yet been adopted.

to limit the opportunity of regular private credit institutions operating on the Norwegian market to acquire a diversified loan portfolio by reducing their share of relatively secure loans. To the limited extent that branches of foreign banks operating in Norway are active in the provision of credit for

households⁷, the effects last referred to are likely to be substantially the same for them as for other financial institutions on the Norwegian market, and thus to make the establishment of such branches or the expansion of their activity less attractive than would otherwise be the case. It therefore cannot be ruled out that the financial advantages enjoyed by Husbanken may, at least potentially, affect trade between Contracting Parties to the EEA Agreement, although in practice such effects are likely to be limited.

In view of the declared objectives of the State's financing of Husbanken, none of the exemptions provided for under the third paragraph of Article 61 would appear to be relevant in the present case, and the same applies to indents (b) and (c) under the second paragraph of Article 61. It is on the other hand appropriate to consider whether the aid provided to Husbanken qualifies for the exemption under Article 61(2)(a), as "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned". There does not seem to be any reason to question the contention of the Norwegian authorities that the aid has a social character and is intended to benefit those who take up loans in Husbanken, i.e. households or consumers in Norway. However, the aid is granted to Husbanken, which must be considered as an undertaking in the meaning of Articles 61 and 59, and is not made available to other undertakings competing with Husbanken in the provision of credit for housing purposes. The derogation in Article 61(2)(a) is therefore considered not to be applicable as the aid is not neutral with respect to operators in the credit market. It is therefore concluded that the aid provided to Husbanken does not qualify for any of the exemptions provided for under the second and third paragraphs of Article 61.

1.4 Derogation under Article 59(2) EEA

General considerations

As explained above the first paragraph of Article 59 implies that as a main rule public undertakings shall be subject in full to the rules of the EEA Agreement on competition and State aid. The second paragraph of the same Article can be said to provide a limited derogation, in as much as it provides that "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks*

⁷ According to information submitted by the complainant (by telefax of 28.06.96), foreign providers of credit were at the end of 1995 responsible for little less than 19% of total credit supply in Norway, while domestic credit institutions provided the rest. The great majority of loans provided by foreign credit institutions are loans to industry. Households have so far availed themselves of little credit finance from foreign banks. The foreign banks, which have established activity in Norway are partly banks competing with Norwegian banks in special niches of the market, and partly universal banks participating in ordinary lending activities. The group of banks last referred to will be offering housing loans in competition with other operators on the market. The complainant's information also confirms that foreign banks operating on the Norwegian market have so far had only a relatively small share of loans to private individuals.

assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties”.

Article 59(2) in other words permits States parties to the EEA Agreement to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights or other privileges which may hinder the application of the rules of the Agreement on competition and State aid, in so far as restrictions on competition, or even the exclusion of all competition by other economic operators, are necessary to ensure the performance of the particular tasks assigned to the undertakings concerned.⁸

Is Husbanken entrusted with the operation of services of general economic interest?

Husbanken was established in 1946 by an act of the Norwegian Parliament (Act No Act No. 3 of 1 March 1946), which according to Article 1 entrusts Husbanken *inter alia* with the task to “provide loans or loan guarantees against security in built property” (“å gi lån eller garanti for lån mot sikkerhet i bebygde eiendommer”). The tasks of the institution have been further specified in subsequent amendments of the law as well as in regulations and guidelines issued by the responsible government ministry, the Royal Ministry of Local Government and Labour. The Norwegian State has in other words taken specific steps to assign the services to Husbanken.

According to the Royal Ministry of Local Government and Labour, the overriding objective of the Norwegian Government’s housing policy is to ensure that everyone can have a good dwelling in a good housing environment. The housing policy also has certain subsidiary objectives, as has been recalled above. Husbanken’s role in this context is *inter alia* to provide credit for housing purposes and by so doing to ensure good quality housing of moderate standards; to assist underprivileged groups of the population to become established in the market, as house owners; and to stimulate urban renewal and the development of good residential environments. Unlike regular operators in the credit market, Husbanken organises its activity under directions from the responsible ministry, which the management of the institution may not unilaterally vary.

As the complainant’s allegations relate in particular to Husbanken’s non-means tested loans, it is appropriate to pay particular attention to the terms of these loans. Loans for new dwellings (“oppføringslån til ordinære boliger”) represent a substantial share of all loans provided by Husbanken⁹. The objective of these loans is to cover the need for new, good quality, reasonably sized dwellings, in a good housing environment. The rules of this loan scheme foresee that building costs and the size of dwellings

⁸ The Court of Justice of the European Communities and the Court of First Instance have in the following cases considered the relationship between the substantive provisions of the EC Treaty on competition and State aid and those of Article 90 as well as application of the exemption in Article 90(2): Case C-320/91, Paul Corbeau; Case C-387/92, Banco de Crédito SA et. al.; and Case T-106/95, Fédération Française des Sociétés d’Assurances et. al. v. Commission of the European Communities.

⁹ According to Husbanken’s annual report for 1994, loans for new dwellings (oppføringslån I & II) granted in 1994 amounted to a total of NOK 7.068 million (of which NOK 5.911 for ordinary new dwellings), representing approx. 75% of all new loans granted by Husbanken in that year.

shall remain within defined limits, while at the same time the accommodation shall meet certain minimum quality standards defined specifically for this purpose. Thus, the scheme limits the floor space of dwellings eligible for loans to a maximum of 120 square metres and provides detailed rules for calculation of floor space (*'arealregler'*). The maximum size can be exceeded only in the case of households of more than five persons or where a member of the household is handicapped. At the same time dwellings to be financed under the scheme must comply with technical specifications (*'Husbankens minstestandard'*) aimed at securing certain minimum standards of quality. Furthermore, the guidelines for the scheme set limits on the building costs of dwellings to be financed and a maximum cost of building grounds (currently NOK 300 thousand per dwelling of 120 m²). The amounts of the loans, which normally shall not exceed 80 per cent of approved building costs, are determined as fixed amounts depending on the size of dwelling, which implies that in percentage terms low-cost dwellings receive higher loans than more expensive ones. The basic loan can then be increased in a number of specified circumstances, e.g. when Husbanken accepts increased floor space for bigger households or handicapped persons, for dwellings in the county of Finnmark and certain municipalities within the county of Troms, for buildings adjusted to harsh climate conditions and for projects meeting criteria for protection of health and the environment. These rules in other words involve public housing policy objectives, which impose certain monitoring obligations on Husbanken and also constraints on the recipients of its loans.

In their submission to the EFTA Surveillance Authority the Norwegian authorities have furthermore explained and underlined Husbanken's role to provide a universal financing service on affordable and equal terms to all households, irrespective of their economic situation and creditworthiness, and of the geographical location of the dwelling. The Norwegian authorities consider Husbanken to be an essential instrument for the implementation of their social housing policy. This applies also to Husbanken's non-means tested loans for new dwellings, which the relevant Norwegian authorities clearly consider to be in the interest of the general public.

In view of the above facts and considerations, and given that there is no legislation at the EEA level providing a uniform definition of the boundaries of a social housing policy and public housing finance services, the Authority has no grounds to dispute that Husbanken is entrusted with the operation of services of general economic interest.

Would the application of the rules of the EEA Agreement on competition and State aid obstruct the performance of the particular tasks assigned to Husbanken?

It is now relevant, firstly, to consider further to what extent the framework conditions for Husbanken imply that competition is restricted or distorted, and, secondly, to evaluate whether the actual restrictions on competition go beyond what is necessary to allow Husbanken to perform the services of general economic interest with which it has been entrusted, and thus to conclude whether the arrangement involves restrictions which are not proportional to Husbanken's public service obligations.

As to the extent of competition restrictions, it shall firstly be noted that the framework conditions for Husbanken do not constitute a monopoly on housing finance. There are no mandatory exclusive rights reserved for Husbanken to provide financing for housing purposes. Commercial and savings banks, mortgage houses and other financial enterprises are free to offer housing finance in competition with Husbanken. Indeed, these other operators are also active in the market, as is indicated by the fact that in 1996 they held, according to the Norwegian authorities, a market share of approximately 55% in the financing of new dwellings and a considerably higher share of loans for the financing of second-hand dwellings.

The scope of Husbanken's lending activity is clearly limited to housing finance and financing of investments in kindergartens and similar buildings by municipalities. It does not compete with regular operators in the credit market outside the scope of its housing finance business. It does not for instance provide any lending to economic operators such as contractors in the construction industry or property developers.

Husbanken is not a credit institution in the meaning of the relevant EEA legislation. It is not authorised to accept deposits from the public and therefore does not compete with credit institutions in that area. It does not engage in other financial services, e.g. payment intermediation, outside the scope of its core activity to provide credit for housing purposes.

Given that the Norwegian authorities have entrusted Husbanken with the operation of loan schemes, whose interest rate terms are fixed by the Norwegian parliament, and these loans being considered to form an integral part the Government's social housing policy, *inter alia* by virtue of their nation-wide and universal availability and on uniform terms, irrespective of the economic situation of the recipients, the funding by the State to service these loan schemes must be deemed to be necessary for the performance of these services of general economic interest. This funding is earmarked to allow Husbanken to annually meet the lending quotas, also determined by the Norwegian parliament, of its individual loan schemes, which as stated above are not applied to go beyond Husbanken's core housing finance activity. The funding by the State Treasury is therefore genuinely needed to allow Husbanken to perform the particular tasks assigned to it and does not allow the undertaking to compete in lending activity outside its statutory functions.

The complainant has submitted that the framework conditions for Husbanken entail a distortion of competition in the credit market, which is unnecessary for the attainment of the objectives of the Norwegian Government's social housing policy; and that these objectives could be achieved through less distortive means by providing direct government housing grants independent from the lending activity.

In this context it must be acknowledged that in most developed countries, including most States parties to the EEA Agreement, governments, both at central and local level, intervene in housing and housing finance markets. This intervention takes different forms from one State to another, depending *inter alia* on certain realities in the housing markets, in particular the pattern of housing tenure, and the objectives of the housing policy of the governments concerned. There is for instance likely to be a relationship between the extent to which private individuals' home ownership is an

objective of public housing policy and the scope of intervention by the government concerned in housing finance; a government who sees it as an important objective of its housing policy that as many households as possible own their own dwelling is likely to want to support the financing of such investments on a broad scale. In other countries, including some countries within the European Economic Area, the share of owner-occupied dwellings of the total housing stock is relatively low (down to about 40% in certain countries), which in some cases also coincides with a relatively high share of publicly owned and rented houses (up to 40%). In the latter circumstances housing policies tend to take different forms, with more direct provision of subsidised housing rather than subsidised housing finance.

The Norwegian residential housing market is characterised by a very high proportion of owner-occupied dwellings¹⁰, which reflects the long standing policy of Norwegian governments in that direction. According to the report “NOU 1995:11 Statsbankene under endrede rammevilkår”, subsidies to housing construction in per cent of GNP in the Scandinavian countries were as follows in 1993: Sweden 2,66%, Denmark 0,90%, Finland 0,57% and Norway 0,47%. These statistics indicate that government support at least for new construction of residential housing is moderate in Norway in comparison with the other Scandinavian countries.

It shall furthermore be noted that the Authority is aware of no relevant case-law, according to which the EC Court of Justice has ruled on the compatibility with the State aid provisions of the EC Treaty of support granted through any of the numerous publicly supported housing finance institutions which exist in the EU Member States, or for that matter other types of institutions, which serve as instruments of public housing policy, nor is the Authority aware of any decision whereby the EC Commission has intervened to prohibit or limit the granting of such support.¹¹

As concerns assessment of whether restrictions or distortions of competition due to special measures in favour of public undertakings can be justified on the basis of the second paragraph of Article 59, the last sentence of that paragraph provides that “The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties”. This implies that the assessment of the derogation shall be done in an EEA context, i.e. it is subject to a proviso intended to safeguard the interests of other Contracting Parties. Whereas it clearly does not require that trade effects be non-existent, measures involving major trade effects are excluded. As has been concluded above the Authority considers that although it

¹⁰ According to the Population and Housing Census of 1990, 78% of all private households in Norway owned their own dwellings.

¹¹ It can on the contrary be noted that it appears that the EC Commission has in certain State aid cases, e.g. Case No. NN 193/95 - France - “Comptoir des Entrepreneurs” (OJ No. C 70, 8.3.96) and Case No. C 30/96 (NN 44/96) - France - “Crédit Foncier de France” (OJ No. C 275, 20.9.96), considered that support measures in favour of specialised financial institutions, which have been entrusted to carry out public housing policy service tasks (e.g. distribution of loans for building low-cost housing, the organization of the mortgage market and the payment of premiums under housing savings contracts to credit institutions), fall outside the scope of Article 92(1) of the EC Treaty. It appears that the Commission’s main concern in these cases has been to prevent cross-subsidisation from these publicly funded housing finance activities to those activities of the administering companies, which it considers to belong in full to “the competitive sector” of the economy and to fall within the scope of Art. 92(1) of the EC Treaty.

cannot be excluded that the measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited.

For the above reasons the Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to allow that undertaking to perform the services of general economic interest with which it has been entrusted. Consequently, the Authority does not see a reason to take any further action with respect to the matters raised by the complaint. However, this does not preclude that the Authority may at a later stage find reason to intervene, for instance as a result of changes in the market situation, introduction of new legislation at EEA level or in response to changes of the Norwegian Government's policy with regard to the scope of Husbanken's lending activities.

HAS ADOPTED THIS DECISION:

1. The complaint initiated by letter of 7 November 1995 (Doc. No. 95-6439-A), concerning the framework conditions for the Norwegian State Housing Bank and their compatibility with the provisions of the EEA Agreement on State aid and competition, is closed without further action by the Authority.
2. The Norwegian authorities, the complainant and the European Commission shall be informed by means of a copy of this decision.

Done at Brussels, 9 July 1997

For the EFTA Surveillance Authority

Knut Almestad
President

Hannes Hafstein
College Member