


EFTA SURVEILLANCE AUTHORITY

Doc. No. 96-5521-IV
Dec. No. 195/96/COL
Ref. No. ~~SAM020.100.005~~
SAM030.95.022

EFTA SURVEILLANCE AUTHORITY DECISION

OF 30 OCTOBER 1996

CONCERNING ALLEGED STATE AID TO THE NORWEGIAN SALMON INDUSTRY

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area¹, in particular to Articles 20, 61 to 63, 108 and 109, as well as Protocol 9 and Protocol 26 of the Agreement,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice², in particular to Articles 5 and 24,

WHEREAS:

I. FACTS

1. Background

By letter of 24 February 1994 (Doc. No. 94-3290-A; File No. SAM020.100.005) from the law firm Forrester Norall & Sutton, acting on behalf of the Scottish Salmon Growers' Association (SSGA), a complaint was lodged with the EFTA Surveillance Authority against alleged State aid to the Norwegian salmon industry. It was noted that an identical complaint had at the same time been filed with the EC Commission.

By letter of 24 March 1994 (Doc. No. 1994/5222D), the EFTA Surveillance Authority acknowledged receipt of the complaint. At the same time the complainant was informed that the relevant provisions of the EEA Agreement did not confer upon the Surveillance Authority the competence to assess State aid to fisheries, and consequently, that the Authority had decided to close the case.

¹ Hereinafter referred to as the EEA Agreement.

² Hereinafter referred to as the Surveillance and Court Agreement.

By an application to the EFTA Court dated 27 April 1994, the SSGA brought an action under Article 36 of the Surveillance and Court Agreement against the EFTA Surveillance Authority, requesting the Court to annul what was referred to as the decision of the EFTA Surveillance Authority of 24 March 1994.

By Judgement of 21 March 1995 (in Case E-2/94), the EFTA Court annulled the decision of the EFTA Surveillance Authority to close the case, for failure to state adequate reasons for the decision.

Under these circumstances it is for the EFTA Surveillance Authority to re-examine the case and define its position on the complaint.

2. Substance of the complaint

The complainant, the Scottish Salmon Growers' Association, claims that "their competitors in Norway have been supported by the Norwegian government in a way which is contrary to the rules contained in the EEA Agreement, in that the aids in question distort competition and significantly affect trade between EEA Member States".

The complainant considers the relevant rules for assessment to be the State aid discipline applicable to the fisheries sector, as stipulated in Protocol 9 of the EEA Agreement, in particular Article 4(1), which provides that:

"aid granted through State resources to the fisheries sector which distorts competition shall be abolished".

In the complainant's view the aid provided to the salmon industry by the Norwegian government is incompatible with the State aid provisions under Protocol 9 of the EEA Agreement. The Surveillance Authority is called upon to act so as to "remedy this breach of the law". It appears that the same request was being made to the EC Commission.

For a description of the alleged aid measures by the Norwegian authorities and their effect on the salmon market, the complainant relies on a study by Messrs. Ernst & Young (E&Y), whose key findings conclude i.a. that the EU salmon market has collapsed three times in the past five years³, owing to massive supply of Norwegian salmon, and that such levels of production at low prices could not have been achieved had it not been for a number of different aid measures in support of the salmon industry.

The description by E&Y of the alleged aid measures can be summarized as follows:

General subsidies applicable to Norwegian salmon producers' geographical location

³The report by Ernst & Young is dated 8 February 1994.

In this context it is claimed that fish farms located in the northern provinces of Norway benefit from reduced rates of employers' social security contributions and that transport costs are subsidized by a system of grants paid as a percentage of freight cost and designed to compensate producers in remote areas for the extra freight costs arising from their geographical location.

Guarantees and grants provided from the Regional Development Fund

According to the E&Y report the main source of grants, risk loans and guarantees for the fish-farming industry is the SND (*Statens Nærings- og Distriktutviklingsfond*). The report estimates the total support of SND to the sector of "Fisheries, hunting and fish-farming" to have been NOK 115.6 million in 1990, NOK 75.1 million in 1991 and NOK 54.5 million in 1992. E&Y consider a very substantial proportion of this support to relate to fish farming. Furthermore, the report quotes from SND's reports total losses suffered by the SND in the fisheries, hunting and fish-farming sector to have amounted to NOK 150.5 million in 1990, NOK 125.8 million in 1991 and NOK 105.4 million in 1992. As concerns guarantees, E&Y estimate claims in excess of income in the period 1988-1992 to have amounted to NOK 243,8 million. A further indication that the SND's guarantee programme is not self-financing is considered to be demonstrated by the fact that the premium rate charged by the SND to fish farmers was reduced from 2% per year in 1991 and 1992 to 1% in 1993, despite very substantial claims being made under the guarantees.

Support of the fish farming sector by banks, and State funding of the Norwegian banking system

The allegations in this respect relate to the provision by Norwegian commercial banks of working capital finance to the salmon farming industry. The lending of the banks to the salmon industry and their credit risk exposure in that context is considered to have been excessive, to the extent that some 50% of the Norwegian fish-farming sector was controlled by the banks. It is claimed that, in turn, some 80% of the Norwegian banking sector is state-controlled, following a series of crises during the five year period since 1988. During this period the Norwegian government is said to have paid funds totalling some NOK 25 billion to support the commercial banking sector. According to the complaint, extensive losses suffered by the Norwegian fish-farming industry in the period since 1988, and particularly 1990 to 1992, were financed either directly by the Norwegian government through the SND or indirectly through its support of "the bankrupt commercial banking system. The bank-controlled and bank-financed farms would, on this basis, have effectively been bankrolled pending a return to more favourable market conditions. This would serve to frustrate the normal market pressures which would, in an unsubsidised environment, have led to a contraction of the industry and consequent reduction in production capacity to a profitable level with a balance between supply and demand."

Effective state funding to recompense farmers for part of the losses suffered by the collapse of the FOS

According to the complaint, the Fish Farmers' Sales Organisation (FOS) was a statutory organisation responsible for marketing over 70 percent of Norway's farmed salmon for the 13 years up to November 1991, when it was declared bankrupt with debts of £177 million. The FOS had been financed by Christiania Bank which in 1992

became wholly state-owned and which apparently wrote off the FOS debt. The FOS had become heavily indebted as a result of its programme to freeze some 90,000 tonnes of farmed Atlantic salmon in an effort to stabilise world salmon markets. The E&Y report considers that the bankruptcy of the FOS casts doubt on the financial well-being of the entire Norwegian salmon industry. Norwegian farmers were secured with fixed prices from the FOS and were thus sheltered from the low market prices that were the result of their overproduction. It is claimed that to ensure that farmers received at least half of what the FOS owed them, the Norwegian government had agreed to finance, with credits of up to £35 million, the creation of a new export sales company, Rødfisk AS, to purchase and market the "mountain" of frozen salmon which had accumulated. When Rødfisk AS was finally wound up in 1993, after the stocks had been sold off, it had, according to the complaint, made a net loss of around £3.6 million, even after allowing for the £35 million which the Norwegian government had in the event to write off.

II. APPRECIATION

1. The range of aid measures addressed by the complaint

The complaint enumerates both measures applied specifically in support of the salmon industry and measures of a horizontal nature applied also to other industries (e.g. regionally differentiated social security tax, transport subsidies, grants, risk loans and guarantees by the SND, and financing by state-owned commercial banks, which in turn have received state support). As concerns the latter category of aid measures, it is however quite clear from the information and allegations submitted, that the concerns expressed by the complainant relate only to the application of aid measures in support of the Norwegian salmon industry. This is underlined by the fact that the complainant expressly submits that the relevant State aid rules for assessing the complaint are found in Article 4(1) of Protocol 9 of the EEA Agreement. Consequently, the complaint is to be examined on the basis of the specific provisions of the EEA Agreement on State aid to fisheries, which in turn calls for a clarification of what those provisions are and their relationship with other parts of the Agreement, as well as the competence of the EFTA Surveillance Authority to apply these provisions.

2. Provisions of the EEA Agreement on State aid to fisheries

Article 8(3) of the EEA Agreement provides that

"Unless otherwise specified, the provisions of this Agreement shall apply only to:

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;
- (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol."

Article 8(3) in other words limits the material scope of application of the EEA Agreement to the above products, unless otherwise specified in the Agreement. Fish and fishery products, in so far as they do not fall under Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (HS) or are specified in Protocol 3, fall outside the general scope of application of the EEA Agreement.

The product allegedly being subsidized, according to the present complaint, is farmed Atlantic salmon as produced in Norway and exported to EEA markets. Farmed Atlantic salmon, whether fresh, filleted, chilled or frozen, falls in Chapter 3 of the HS, and for certain prepared salmon products Chapter 16.04 may also be relevant⁴. These commodities are neither within the general product coverage defined in point (a) of Article 8(3) nor are they covered by Protocol 3. Hence, the product the production of which is allegedly receiving State aid falls outside the product coverage of the EEA Agreement as defined in Article 8(3). It follows that application to the salmon producing industry of the provisions of the Agreement, including the State aid provisions in Chapter 2 of Part IV, is excluded, "unless otherwise specified".

Article 20 of the EEA Agreement provides that

"Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9."

Protocol 9 on trade in fish and other marine products contains rules relating to customs duties and charges having equivalent effect, rules on quantitative restrictions on imports, rules of origin, as well as rules on State aid and competition.

It shall be noted that at least as concerns customs duties, Protocol 9 is asymmetric in nature, as it does not provide for equal tariff concessions from all Contracting Parties. Whereas the EFTA States have agreed, subject to limited transitional arrangements for certain EFTA States, to abolish import duties and to apply no quantitative restrictions on imports of a comprehensive range of fishery products, as listed in Table I of Appendix 2 to Protocol 9, including all products in Chapter 3 of the HS (Fish and crustaceans, molluscs and other aquatic invertebrates), the European Community abolishes customs duties on a limited range of products listed in Table II of Appendix 2 and reduces customs duties on another set of products (Table III). The Community shall apply no quantitative restrictions on imports of the products listed in Appendix 2 in Protocol 9. Furthermore, where, in the context of bilateral agreements between the Community and individual EFTA States, reduced duties exist for certain products, those duties shall be considered as the basic duties for each of the EFTA States concerned. Hence, Protocol 9 is also partly of a bilateral character.

It shall also be noted that according to Table III to Appendix 2, which lists the products the customs duties on which the Community shall reduce, the concessions granted by the Community shall not include any products specified in the attachment to this table. This attachment covers *inter alia* all significant HS headings for farmed

⁴The HS codes of possible relevance are 0302.12.00, 0303.22.00, 0304.10.13, 0304.20.13, 0305.41.00, 0305.69.50 and 1604.11.00.

Atlantic salmon, whether live, fresh or chilled, filleted, frozen, smoked or otherwise prepared. Hence, under Protocol 9 of the EEA Agreement, the Community has not granted any tariff concessions to farmed Atlantic salmon or other salmon products.

In the light of the observations in the preceding paragraph, the question might be raised whether the State aid provisions in Protocol 9, which are quoted below, are applicable to the salmon industry in the EFTA States, to which no tariff concessions are granted by the Community in Protocol 9. It shall nevertheless be tentatively assumed here, *inter alia* in view of the general wording of Article 4(1) ("Aid to the fisheries sector..."), that the absence of tariff concessions does not preclude the application of the State aid provisions of Protocol 9 to the salmon industry.

From the content of the provisions in Protocol 9 and also the context in which reference to these provisions is set in the main body of the EEA Agreement (i.e. Part II, Free movement of goods, Chapter 2, Agricultural and fishery products), it emerges clearly that Protocol 9 in principle forms an independent, basic set of rules governing trade in fish and other marine products, separate from (except when otherwise provided) other provisions in Part II in the main body of the EEA Agreement. In other words, Protocol 9 is in principle a *lex specialis* for fish and other marine products. The general rules of the EEA Agreement, including those on State aid set out in Chapter 2 of Part IV of the Agreement (Articles 61 to 64), are not applicable to the fisheries sector, except when explicitly so provided in the relevant articles of the main part of the Agreement (cf. articles 21(4), 23, second paragraph, and 65(1) and (2)) or in Protocol 9.

Article 4 of Protocol 9 contains the following provisions on State aid and competition:

- "1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.
2. Legislation relating to the market organization in the fisheries sector shall be adjusted so as not to distort competition.
3. The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties."

In the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9, annexed to the Final Act of the EEA Agreement, the Contracting Parties have agreed on the following interpretation:

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

Attention should also be paid to Article 6 of Protocol 9, which provides that:

"Should the necessary legislative adaptations not have been effected to the satisfaction of the Contracting Parties at the time of entry into force of the Agreement, any points at issue may be put to the EEA Joint Committee. In the event of failure to reach agreement, the provisions of Article 114 of the Agreement shall apply *mutatis mutandis*."

The wording of Articles 4 and 6 and the Joint Declaration will be further considered below, but it suffices at this point to observe that no reference is made in these provisions which would make the State aid provisions in the main body of the EEA Agreement applicable. Hence, taking into account the provisions of Articles 8(3) and 20 of the EEA Agreement, and as neither the main act nor Protocol 9 provide otherwise, State aid rules in the Agreement applicable to the fisheries sector must be considered to be set out exhaustively in Protocol 9.

For the sake of completeness, a comparison can be made between the basic State aid provisions in Chapter 2 of Part IV of the EEA Agreement (Articles 61 to 64)⁵ and the State aid provisions in Protocol 9 referred to above.

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."

It shall be noted that the other State aid provisions in Chapter 2 of Part IV are all related to this basic provision. Thus, Article 62, which defines the division of responsibilities for the surveillance of State aid between the EC Commission and the EFTA Surveillance Authority, explicitly refers to Article 61, when stating that "All systems of State aid" "shall be subject to constant review as to their compatibility with Article 61."

Article 61(1) makes its application conditional upon the absence of any other provisions in the EEA Agreement stating otherwise. In this respect, Article 4 of Protocol 9 can be considered to form a derogation, as it provides that only "Aid which distorts competition shall be abolished", whereas Article 61(1) of the EEA Agreement provides that "...any aidwhich distorts or threatens to distort competition shall be incompatible with the functioning of this Agreement". Hence, according to its wording, Article 4(1) of Protocol 9 can be considered to form a *lex specialis* governing State aid for fisheries. It provides for only an ex-post system of supervision where aid "shall be abolished", whereas Article 61 provides that aid "shall, be incompatible ..." and Article 62 lays down a system of constant review of the compatibility of aids. No such system is foreseen in Protocol 9. The wording of

⁵State aid provisions are also found in Article 49 and Article 5 of Protocol 14, but the applicability of these provisions is however restricted to the transport sector and ECSC steel industry, respectively.

the Joint Declaration quoted above also supports the conclusion that the assessment referred to in it is meant to take place only when a distortion of competition is alleged.

The above comparison therefore reaffirms the conclusion already reached, that State aid provisions applicable under the EEA Agreement to the fisheries sector are exhaustively set out in Protocol 9. It also shows that Protocol 9 is a derogation from the general rules of the EEA Agreement governing State aid, as it does not envisage a continuous surveillance and monitoring function, with e.g. advance notification obligations regarding aid plans. On the contrary, only an ex-post system of assessment has been envisaged.

3. Competences of the EFTA Surveillance Authority to assess State aid to fisheries

The general surveillance responsibilities are laid down in Articles 108 and 109 of the EEA Agreement. According to Article 108(1) the EFTA States shall establish an independent surveillance authority and procedures similar to those existing in the Community to ensure the fulfilment of obligations under the EEA Agreement.

Article 109 provides *inter alia* the following:

- "1. The fulfilment of the obligations under this Agreement shall be monitored by, on the one hand, the EFTA Surveillance Authority and, on the other, the EC Commission acting in conformity with the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community and this Agreement.
2. [.....]
3. The EC Commission and the EFTA Surveillance Authority shall receive any complaints concerning the application of this Agreement. They shall inform each other of complaints received.
4. Each of these bodies shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body.
5. [.....]"

However, the general description of the obligations and powers of the EFTA Surveillance Authority laid down in Articles 108 and 109 of the EEA Agreement is supplemented by specific provisions applicable in certain fields, including in the field of State aid.

As stated in Article 62 of the EEA Agreement, the surveillance powers and functions of the EFTA Surveillance Authority in the field of State aid are set out in Protocol 26, which reads as follows:

"The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community, enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2)(e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14."

It is to be observed that this Protocol does not make any reference whatsoever to Protocol 9, although it on the other hand refers e.g. to Article 49 of the Agreement, which is a derogation from Article 61, and to Protocol 14.

The competences of the Surveillance Authority thus envisaged in the EEA Agreement are laid down in the Surveillance and Court Agreement. In a similar manner as in Article 109 of the EEA Agreement, Article 5 of the Surveillance and Court Agreement lays down the general monitoring functions of the EFTA Surveillance Authority, providing that the Authority shall, *inter alia*, ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement and the application of the rules of the Agreement on competition. The first paragraph of the article makes it clear that this task is to be carried out "in accordance with the provisions of this Agreement [i.e. the Surveillance and Court Agreement] and the provisions of the EEA Agreement", i.e. it takes account of the fact that both agreements also contain other provisions which define the Authority's functions and powers in individual fields in more concrete terms.

Article 24 of the Surveillance and Court Agreement has the following specific provisions on the Authority's competence in the field of State aid:

"The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States."

This Article contains an enumeration of the provisions on State aid of the EEA Agreement, the application of which the EFTA Surveillance Authority is to ensure. It is drafted in a similar way as Protocol 26 of the EEA Agreement, specifying not only the general provisions in Article 61, but also provisions related to specific fields, including Article 49 (transport sector) and Protocol 14 (ECSC steel industry). However, as in Protocol 26, Protocol 9 is not mentioned. Consequently, as there is no reason to consider that Protocol 26 of the EEA Agreement and Article 24 of the Surveillance and Court Agreement were not meant to exhaustively enumerate the EFTA Surveillance Authority's powers in the field of State aid, the conclusion must be drawn that the provisions of the EEA Agreement and of the Surveillance and Court Agreement, which define the scope of the Authority's competences in the field of State aid, do not confer upon it the powers to assess State aid under Protocol 9.

The question remains whether competence to assess State aid to the fisheries sector is nevertheless conferred upon the EFTA Surveillance Authority by the provisions in Protocol 9.

As no direct answer can be found in Article 4(1) of Protocol 9, it is appropriate to seek guidance in the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9, which has been quoted above. In this context it has to be borne in mind that Protocol 9 is a compromise after difficult negotiations. In this situation, the textual interpretation should prevail, unless there are imperative factors speaking against that interpretation.

The Joint Declaration does not indicate that the functions and powers of the EFTA Surveillance Authority, as explicitly defined in Protocol 26 to the EEA Agreement and Article 24 of the Surveillance and Court Agreement, are in any way extended to cover also the State aid provisions of Protocol 9. On the contrary it states quite clearly that "any distortion of competition is to be assessed by the Contracting Parties". The fact that the Joint Declaration regarding Article 61(3)(c) of the EEA Agreement is mentioned as one of the elements which the Contracting Parties in their assessment are to take into account, does not alter the conclusion that it is not for the EFTA Surveillance Authority to apply the State aid provisions of Protocol 9.

The same conclusion is furthermore supported by the formulation of Article 4(3) of Protocol 9, "The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of countervailing duties". Finally, the language of Article 6 of Protocol 9, stating i.a. that "Should the necessary legislative adaptations not have been effected to the satisfaction of the Contracting Parties at the time of entry into force of the Agreement, any points at issue may be put to the EEA Joint Committee", also reaffirms the above conclusion and makes it clear that the wording of the Joint Declaration is no coincidence.

For the reasons stated above the EFTA Surveillance Authority considers that it lacks competence to assess State aid to the Norwegian salmon industry. This applies equally to aid provided to that industry under horizontal aid schemes as to aid instruments designed specifically to support the salmon industry, as both would fall to be assessed on the basis of the State aid provisions in Protocol 9. Therefore, and as the complaint concerns only the compatibility of the alleged aid measures with those provisions, the complaint is to be closed.

It is recalled that a complaint in identical terms was at the same time also filed with the EC Commission. According to Article 109(4) of the EEA Agreement each of the surveillance bodies, the EC Commission and the EFTA Surveillance Authority, "shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body". It is noted that the present complaint has not been passed to the Authority by the EC Commission. This is in line with the view which the Commission has expressed in its intervention (paragraph 19) in Case E-2/94 before the EFTA Court, that "The ESA has correctly interpreted its competence under the EEA Agreement. By virtue of Protocol 9 the EFTA States have agreed to respect the EC State Aid rules in respect of fish and other

marine products but Articles 61-64/EEA do not apply and there is no role for the ESA".

4. Review by the EFTA Surveillance Authority of horizontal aid schemes applicable to different economic sectors

As has already been noted above, while the complaint is concerned only with aid measures in support of the Norwegian salmon industry, the complainant refers to both specific support granted to that industry and aid granted under horizontal aid schemes also applicable to other economic sectors. With regard to the latter category of aid, it should be noted that, although the Authority lacks the competence to assess aid granted to the salmon industry under such schemes, it does fall upon the Authority to assess the compatibility of the schemes as such with Article 61 of the Agreement. In view of this, and although there is nothing in the complaint to indicate that the complainant would consider any of the schemes of this kind referred to in the complaint to be as such incompatible with Article 61, the Authority would, for the sake of completeness, add the following observations regarding the review carried out by the Authority of these schemes and the decisions taken in that context.

Following the entry into force of the EEA Agreement on 1 January 1994, the EFTA Surveillance Authority upon request received information on aid measures in force in Norway (existing aid)⁶. Having examined this information and acting under Article 1(1) of Protocol 3 to the Surveillance and Court Agreement (review procedure for existing State aid), the Authority took, in November and December 1994, several decisions⁷ to propose appropriate measures to Norway for the adjustment of some 20 existing aid schemes, with a view to ensure their compatibility with the State aid provisions of the EEA Agreement. Amongst the schemes covered by these decisions were horizontal aid systems, *inter alia* aid schemes administered by the SND, in support of small and medium-sized enterprises, aid for research and development, aid for export promotion and for environmental protection. Some of the schemes also have regional development as an objective and are applied only to enterprises located in areas eligible for regional aid. Most of the existing aid instruments, and in particular the schemes administered by the SND, are applied horizontally to different economic sectors. The Authority understands that a number of the horizontal aid schemes have at least potentially been available to the salmon industry.

All the proposals made by the Authority were accepted without reservation by the Norwegian authorities. Furthermore, the Norwegian authorities followed up the Authority's proposals by amending the relevant regulations for the affected schemes by the end of March 1995. In examining the measures thus taken, the Authority has found nothing to indicate that they would not fulfil the requirements of the applicable State aid guidelines.

⁶The Authority's request in this respect did not cover aid measures which would fall to be assessed under the State aid provisions in Protocol 9 of the EEA Agreement.

⁷EFTA Surveillance Authority Decisions No. 170/94/COL, 202/94/COL, 217/94/COL, 246/94/COL and 340/94/COL.

As concerns regional aid it is also noted that by decision of the EFTA Surveillance Authority of 16 November 1994 (Dec. No. 157/94/COL)⁸ a map of assisted areas in Norway was established, which ensures that the geographical coverage and the level of regional aid in Norway is compatible with the State aid provisions of the EEA Agreement.

The Authority's examination of existing State aid has included a specific analysis of government support to the banking sector in the Nordic EFTA States, including Norway. In this respect, while observing that no new support measures had been decided upon after entry into force of the EEA Agreement and having been informed by the Norwegian authorities that no such measures were to be expected, the Authority nevertheless decided to propose to Norway that no further aid could be provided under the existing legislation for bank support without prior notification to and authorization by the EFTA Surveillance Authority. This proposal was accepted by Norway. The Authority has received no notification of support to the Norwegian banking sector after entry into force of the EEA Agreement and is not aware of any such aid having been awarded.

Furthermore, as concerns general information on the Authority's review of existing State aid in Norway, a mention shall be made of the Norwegian legislation on regionally differentiated social security tax and on direct transport aid. It shall be recalled that during the negotiations for accession to the European Union by Austria, Finland, Norway and Sweden, the Commission, aware of the existence in the Nordic countries of direct transport aid and regionally differentiated rates of social security tax and conscious of the specific regional handicaps experienced by firms in these countries, especially due to long distances, agreed by a decision in June 1994 to amend its guidelines on the method of application of Article 92(3)(a) and (c) to the EC Treaty to regional aid⁹. The new guidelines defined certain conditions under which aid aimed at providing partial compensation for the additional costs of transport can be authorised to firms located in areas qualifying for regional aid under Article 92(3)(c) on the basis of a so-called population density test.

By decision of 20 July 1994 (Dec. No. 88/94/COL), the EFTA Surveillance Authority introduced corresponding provisions on regional transport aid to its State Aid Guidelines¹⁰. One element in the new rules was that the Commission and the EFTA Surveillance Authority would aim at reviewing the existing schemes of assistance to transport, on the basis of the new criteria, before the end of 1996. Accordingly, the EFTA Surveillance Authority has initiated discussions with the Norwegian authorities on the existing systems of transport aid and regionally differentiated social security tax in Norway. The Authority endeavours to ensure that the review of these systems will be effectuated as foreseen in the State Aid Guidelines.

Finally, it shall be noted that in its examination of existing and new aid in Norway covered by Article 61 of the EEA Agreement, the EFTA Surveillance Authority has so far found no evidence of such aid having been granted in breach of the notification

⁸OJ No C 14/4, 19.1.95 and EEA Supplement to the OJ No 1, 19.1.95.

⁹OJ No C 364/8, 20.12.94.

¹⁰OJ No L 240/33, 15.9.94 and EEA Supplement to the OJ No 34, 15.9.94.

requirements laid down in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement or that such aid has been granted by incorrect application of an approved aid scheme (i.e. aid "being misused" in the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement). In other words, the Authority has found no evidence of aid, which would be unlawful on procedural grounds.

5. Conclusion

The examination carried out above has led to the following conclusions:

- The complaint is to be examined on the basis of the specific provisions of the EEA Agreement on State aid to fisheries.
- State aid provisions applicable under the EEA Agreement to the fisheries sector are set out exhaustively in Protocol 9.
- Protocol 26 of the EEA Agreement and Article 24 of the Surveillance and Court Agreement, which define the scope of the Authority's competences in the field of State aid, do not confer upon it the powers to assess State aid under Protocol 9. There is no reason to consider that these provisions were not meant to exhaustively enumerate the Authority's powers in the field of State aid.
- The provisions of Protocol 9 do not give any competence to the EFTA Surveillance Authority to assess State aid to fisheries. On the contrary, such aid "is to be assessed by the Contracting Parties".

For these reasons the EFTA Surveillance Authority concludes that it lacks competence to assess State aid to the Norwegian salmon industry.

The case initiated by the complaint of the Scottish Salmon Growers' Association is therefore to be closed.

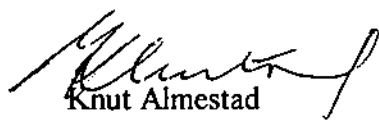
HAS ADOPTED THIS DECISION:

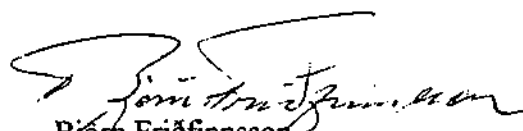
1. The case initiated by the complaint lodged by the Scottish Salmon Growers' Association by letter of 24 February 1994 (Doc. no. 94-3290-A, File no. SAM020.100.005) concerning alleged State aid to the Norwegian salmon industry is closed without action by the Authority, due to lack of competence to assess State aid to that industry.

2. The complainant is to be informed by letters stating the principal reasons on which the Authority's decision was based.
3. The Norwegian authorities are informed by means of a copy of the letter to the complainant.
4. The European Commission is informed in accordance with Protocol 27(d) of the EEA Agreement by means of a copy of the letter to the complainant.

Done at Brussels, 30 October 1996

For the EFTA Surveillance Authority


Knut Almestad
President


Björn Friðfinnsson
College Member