

HOW EEA LAW IS ENFORCED

Sven Erik Svedman

President of the EFTA Surveillance Authority

CHECK AGAINST DELIVERY

Ladies and Gentlemen,

Thank you for this opportunity to talk about the enforcement of EEA law from the perspective of the EFTA Surveillance Authority.

The starting point in this regard must be that, in the EEA, it is of course primarily the responsibility of the EEA States to ensure the correct and timely application and enforcement of EEA law.

It is President Reagan's favourite Russian proverb which underlies the establishment of my Authority: "trust but verify".¹ As you know, it is the main task of ESA to "ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement".² In doing this, we operate completely independently of the EFTA States, which is essential for the legitimacy, credibility and effective functioning of the EEA Agreement. In what follows, I would like to try and explain to you how we go about this task.

An important if very technical part of ESA's work lies in monitoring the ongoing effective incorporation of EEA rules into the domestic law of the

¹ "Doveryai, no proveryai"; Доверяй, но проверяй.

² Article 5(1)(a) SCA.

EFTA States. The need to do this flows from a central feature of the EEA Agreement which you heard about today already: the EEA Agreement is a dynamic agreement; the common rules of the EEA Agreement are updated continuously with new EU legislation. As the body of EU law grows, so does the body of EEA law. There is thus an ongoing need for the EEA EFTA States to adopt national legislation to keep national law up to date with EEA law.

The EFTA States are obliged to notify ESA of the measures they adopt to implement EU directives and, on request, to inform us of the incorporation of regulations into domestic law. If a State does not implement the EEA rules, we will intervene and initiate infringement proceedings against the State concerned, which may ultimately be adjudicated by the EFTA Court.

This is something we keep track of in our Internal Market Scoreboard. Twice yearly, the Authority publishes the Internal Market Scoreboard concerning the EFTA States. The Scoreboard keeps track of implementation by Iceland, Liechtenstein and Norway of internal market directives. The Scoreboard also contains information about infringement proceedings initiated by the Authority against the three EFTA States arising from their failure to comply with relevant internal market rules. We coordinate this with the European Commission, which publishes its own scoreboard concerning the EU States, and the results are thus comparable.

In the latest scoreboard, published in October of last year, the average transposition deficit of the three EEA EFTA States was 1.1%. The good news is that this sounds like a low figure and that it actually represents a decrease from 2.0% in the previous scoreboard. The bad news is that, by way of comparison, the average deficit among the EU Member States was only 0.7%. Only five EU Member States showed a deficit above the notional 1% target set by the European Commission. Of all the 28 EU Member States and the three EEA EFTA States, Iceland had by far the highest transposition deficit. So that

is some cause for concern on our part, as you will understand. At the same time, I should give credit where credit is due and also mention that Norway last year achieved the best performance among all of the 31 States, a perfect score of 0% transposition deficit.

Compliance with EEA law of course cannot be measured only by reference to timely transposition of directives, even if that is the basis of comparison we have in the scoreboard. Transposing EEA-relevant EU legislation into the domestic legal order is one thing; it is quite another to ensure that that legislation is applied correctly in practice on a day-to-day basis. It is these verifications which are the most work-intensive on the part of our work at ESA.

ESA's priorities in its enforcement policy are closely linked to the objectives of the EEA Agreement and the European Internal Market itself. It is underpinned by a belief that keeping markets fair, level and open is good for our economies and societies. It establishes a good environment for business in Europe where companies can generate wealth, create jobs, and invest in the future.

I would like to talk in a bit more detail about three aspects of our work which illustrate our approach:

- (1) firstly, detailed scrutiny of all State aid measures liable to distort competition;
- (2) secondly, reaching out to individuals and businesses to make them aware of their rights and ensure that they can enforce them; and
- (3) thirdly, grappling with the changes, in particular the technological changes made possible by the Internet and the digital economy, which are having a profound impact on how our societies and economies operate.

(1) State aid

State aid in the context of EEA law means an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. This can take the form a cash grant to one company or a scheme of tax breaks in favour of a whole category of businesses. A company which receives government support gains an unfair advantage over its competitors. But maybe more importantly, State aid often skews investment decisions in the wrong direction, artificially props up inefficient business models and is thus harmful to economic development as a whole. This is even before considering the social injustice which results when interest groups are able to use political lobbying clout to divert public money to bolster their projects at the expense of taxpayers generally.

Therefore, the EEA Agreement generally prohibits State aid unless it is genuinely justified by reasons of general economic development, as it is of course recognized that in some circumstances government interventions are necessary for a well-functioning and equitable economy.

To ensure that this prohibition is respected and exemptions are applied equally across the EEA, ESA is in charge of ensuring that States do not provide any State aid unless it complies with EEA rules. My Authority has strong investigative and decision-making powers in this field. In general, the States are obligated to notify the Authority prior to granting state aid. Except in certain instances, aid measures over a certain threshold can only be implemented after approval by ESA. Moreover, we have the power to order recovery of incompatible State aid.

Let me continue with a few words about current developments in the field of State Aid, where the recent reform of state aid rules is gradually leading to significant changes in policy. The guiding principles here are:

- on the one hand better targeted State aid; and
- on the other hand, administrative simplification and cutting red tape.

The new General Block Exemption Regulation involves a significant increase in the possibilities for the EEA States to grant aid without prior notification in certain clearly defined areas. The idea is that only the larger, more distortive and complex cases will need to be notified. This is to be balanced with a greater emphasis on monitoring, evaluation and transparency, which needs to be underpinned by a stronger partnership between the States and ESA.

Since the entry into force in July 2014, Norway has made a relatively active use of the new rules, with 83 block-exempted aid measures until the end of last year, that is, 69 per cent of the total number of new measures. Iceland, on the other hand, has only block-exempted a couple of aid schemes, while Liechtenstein, with very few aid measures in general, has not made use of it at all, so far. As block exempted measures are accounting for a sizeable and growing share of new aid measures, ESA must step up its surveillance activity, and will be increasingly engaged in evaluation and monitoring of such measures after the aid has been granted.

As mentioned, some larger and more complex aid measures will still need to undergo individual scrutiny and receive approval by ESA before aid can be granted.

Two recent examples concern Norwegian aid measures to promote a more environmentally friendly production process in the metallurgical industry (namely Hydro Aluminium and TiZir Titanium and Iron). If the new

technology proves successful, it may be applied in the whole industry and thus contribute to important reductions in energy consumption and CO₂ emissions.

ESA has also been called upon to assess important cases in the power intensive industry in Iceland. These are cases that are interesting as they concern the application of State aid rules to measures of public undertakings. Under the EEA Agreement, such undertakings are free to participate in the market provided they act in line with what a private operator would have done.

(2) Outreach to individuals and businesses

The second aspect of ESA's enforcement policy concerns our outreach activities to the EFTA States. This is something which we are currently looking at expanding.

It is a basic fact that the EEA legal order confers rights on individuals and businesses which can be invoked in each EEA State. But we often find that awareness of these rights – and how they can be enforced – is lacking. This is particularly so in the EFTA States, compared to at least the older EU Member States, where reliance on EEA rights is much more commonplace. There, individuals and businesses know of these rights, invoke them freely, complain about violations to both national authorities and the Commission and, ultimately, are prepared to go to court if need be. This is leveraged in the EU by compulsory teaching of EU law to law students and general awareness among lawyers and judges.

Within the EEA, there is work left to be done in this respect. And where there is no claimant, there is no judge, as the saying goes. That is why we are for example sponsoring an EEA Law Moot Court – a competition aimed at law students where students can try their hand at a real EEA law case and learn not only about substantive law but also about the arts of rhetoric and advocacy.

But I am not only – and not even primarily – thinking of private enforcement when I say that we need to increase awareness of EEA law rights.

The fact of the matter is that ESA is in many fields reliant on complaints by individuals in order to identify areas where there is need for action. We do not operate a police force at national level, and neither do we have detectives walking the streets of EEA States to identify infringements. We can of course read through the national legislation from our offices in Brussels and verify that it is in line with EEA law. But as already mentioned, the main work is to be done in ensuring that the day-to-day application of the legislation is also compliant. In this regard, it is thus only natural that many matters come to our attention only through complaints.

Let me give you two examples of how this happens, one concerning the environment, the other from the field of public procurement.

As you are all very well aware of, local air pollution is unacceptably high – maybe not here in Luxembourg – but in many other European cities, and the largest cities in Norway are unfortunately no exception. A complaint put forward by the Norwegian Asthma and Allergy Association led my Authority to act, and in December 2014, it was decided to bring Norway's breach of the Ambient Air Quality Directive before the EFTA Court.

The Directive establishes legally binding limits for certain pollutants present in the air, which may pose a serious threat to public health. Although air pollution has been given a lot of attention by local and national authorities over several years, Norway has not managed to effectively tackle the problem. The EFTA Court handed down its judgment in October last year, in which it held that Norway had failed to fulfil its obligations under the Directive. It is my hope and belief that this judgment from the EFTA Court puts additional

pressure on the relevant authorities at all levels to deal with this challenge in a way that will lead to concrete reductions in local air pollution. A proposed ban on circulation in the centre of Oslo can be seen as a direct consequence of this action. ESA will of course continue to keep an eye on the developments and how Norway follows up on the judgment.

The air quality case serves as a good example of an interesting trend, where we see environmental organisations, as well as others, turning to the EEA Agreement and coming to ESA with complaints in order to attract attention and induce political pressure.

Another example concerns what is on its face a run-of-the-mill local construction project for an underground car park. Earlier this month, ESA issued a letter of formal notice to Norway regarding the Municipality of Kristiansand's possible breach of EEA rules on public procurement when awarding a contract for the construction and the operation of an underground parking garage. A letter of formal notice is the first step in an infringement procedure against an EEA State. The reason ESA takes an interest even in such decisions, to award the tender of a car park in Kristiansand, is two-fold: to ensure that public funds are spent in the most effective manner, according to the principle of "best value for money", and to enhance cross-border competition for public contracts in the EEA, creating business opportunities for enterprises and contributing to economic growth and job creation.

The public sector is the biggest single spender in the EEA, with public expenditure on goods, works, and services representing approximately 14% of EEA GDP. The stakes and opportunities involved in public procurement are thus enormous, both from the point of view of the taxpayer and for businesses. In order to ensure that the public sector can choose from the widest possible range and the best offers, EEA law seeks to create a level playing field for all

economic operators, permitting businesses from across the EEA to participate in public tenders. Active enforcement on part of the Authority is therefore necessary to ensure these objectives.

Both of these cases came about as a consequence of complaints. They also illustrate another key reason for the very existence of ESA: neither case would probably have been raised, or at least raised so quickly and effectively, in the absence of ESA. In the environmental case, the effects on air pollution were by no means hidden and affected many thousands, maybe millions, of ordinary citizens. However, the effects on each individual are not such as to prompt an individual to take action and go to the expense and trouble of enforcing their rights in court. It is thus essential to have an authority like ESA which is able to act in the public interest at large. The situation is similar in relation to public works projects like the one in Kristiansand that I mentioned. Awards of contracts, even if they involve spending vast sums of public money, are usually not scrutinised closely by ordinary citizens, and the businesses which loose out because the rules are not complied with usually do not have a real incentive to take action. They do not want to get a reputation as troublemakers and their chances of obtaining real financial compensation from a claim are usually slim as they would have to establish that the contract would actually have been awarded to them had it not been for the violation of the rules. That is usually very difficult to prove.

(3) Changes brought about by the Internet and the digital economy

As part of the fast development of internet-based technology since the turn of the new century, there has been a soaring number of service providers offering new types of services consisting in providing an online platform for connecting

potential offer and demand. Uber and Airbnb are some of the most visible of these and have experienced a massive uptake of their services.

The services provided by these sort of new intermediaries are archetypal examples of “disruptive innovation”: they create new markets by applying new sets of rules, values and models which ultimately disrupt and potentially overtake existing markets by displacing earlier technologies and alliances. Fostering this type of development is an important part of the wider strategy for making the European Economic Area one of the most competitive in the world, creating jobs and increasing consumer welfare. As such, it notably constitutes part of the European Digital Agenda launched by the European Commission.³

From a legal point of view, the innovative services do not always neatly fit within the traditional classification of activities in existing national or European legislation, and it may be a challenge to determine which rules apply to some of them. At the same time, the technological developments in issue here are both very fast and by their nature unpredictable, which makes it difficult for any legislative initiatives to keep up and provide the clear legal framework and legal certainty which one would ideally hope for. For some time to come, the onus of reconciling the new businesses with the existing regulatory framework will have to be borne by the courts, and in particular by the European courts.

The main challenge in these cases lies in balancing two fundamental considerations:

- (i) On the one hand, the existing legal rules should to the extent possible be interpreted so as to accompany and accommodate technological

³ As part of this, the Commission recently carried out a Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy: <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>

change and innovation and not stand in its way. It would be unfortunate if these developments were to be held back by an overly formalistic or restrictive application of rules which were made at a time long before the new business models could ever have been contemplated, with all the negative effects for the competitiveness of the European Economic Area.

- (ii) On the other hand, it must be ensured that the legitimate interests of consumers and any other stakeholders are not bypassed in the process. To the extent that existing regulations pursue legitimate objectives which are also valid in the context of new business models, they should continue to apply.

This challenge is something which we at ESA are beginning to tackle, and have to bear in mind when scrutinising whether national regulations made a long time ago do not nowadays amount to disproportionate restrictions which needlessly hamper the EFTA economies in competition both within the EEA and in the global marketplace.

Thank you for your attention.