Annual Report 2003

EFTA SURVEILLANCE AUTHORITY

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Hannes Hafstein, President Einar M. Bull, Bernd Hammermann

> *Foreword*

When 2003 drew to a close the EEA Agreement had been in force for ten years. This anniversary marks ten years of existence for the world's largest Internal Market. The EEA Agreement is based upon common rules that are binding on all its contracting parties. Compliance with these rules is ensured in common by the European Commission and the EFTA Surveillance Authority. Without a vigilant EFTA Surveillance Authority, the body of common law on which the EEA is built would erode and, indeed, the Agreement would not exist.

The Authority's workload has increased in 2003, although the statistics show that the total number of cases has declined. The trend over the last years has been towards an increasing focus on complaints received from the beneficiaries of the EEA Agreement – citizens, organisations and economic operators. The bulk of these complaints concerns Norway. In 2003, the Authority, for the first time, opened more cases on the basis of complaints than it did on its own initiative. This trend does not imply that the Authority has let down its guard when it comes to timely and correct implementation of new EEA law. Transposition control, ensuring incorporation of EEA provisions into national law, will remain a top priority. Changes in the Authority's workload illustrate, however, that Iceland, Liechtenstein and Norway, the three EFTA States that are party to the Agreement, have succeeded in their efforts to ensure timely implementation of new EEA law. The latest Internal Market Scoreboards bear further witness to this success. The three EFTA States are all within the implementation target set by the Authority and the European Commission, with an average transposition deficit lower than that of the EU States.

The Authority's work and the way in which this affects business and citizens in a wide range of fields are described throughout this Report. A few areas deserve particular attention here, however.

The Authority has paid special attention to the financial services sector in 2003, reviewing legislation in all three EFTA States. Safety issues have also become increasing areas of focus. For example, assessment of national derogations from EEA transport safety standards is an important and resource-intensive task undertaken by the Authority. The differentiated social security tax scheme in Norway has been a particularly contentious and time-consuming issue in 2003. The Authority has invested considerable resources in ensuring prompt handling of this matter. Modernisation of the EU and EEA competition rules will introduce a competition law regime more capable of dealing with the most important issues in this sector. The Authority takes part in this modernisation process, and aims to ensure that the EEA dimension therein is maintained.

The Authority referred two cases to the EFTA Court in 2003. The EFTA Court ruled in the first one, a case concerning Icelandic air passenger taxes, in December 2003. The Court concluded that a differentiation of taxes between national and international routes was contrary to Internal Market principles. This was in line with the Authority's submissions. The second case, concerning Norway's failure to notify draft technical regulations, is still pending. Two of the Authority's state aid decisions were challenged before the Court in 2003. In the *Snøhvit* case, the Court agreed with the Authority that the plaintiffs did not have *locus standi* and thus dismissed the case. The other case, concerning express buses, was subsequently withdrawn by the plaintiffs.

In the year ahead, the Authority will continue to participate in the process of modernisation of the EEA competition law regime, as well as the new guidelines for state aid. Both are important in ensuring the good function of the EEA Agreement after the enlargement of the EEA takes place. A regulatory package for electronic communications will also require increased resources from the Authority once it is implemented.

1 January 2004, Hannes Hafstein took over as President of the EFTA Surveillance Authority. Under his leadership, the Authority and its staff will continue its work dedicated to ensuring that the EEA Agreement fulfils its objective of creating a true Internal Market.

Einar M. Bull, *President 2003*

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Chapter 1
Introduction

The EEA Agreement entered into force on 1 January 1994 and has just celebrated its first ten years of existence. The objective of the Agreement is to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition.

To this end, the four fundamental freedoms of the Internal Market of the European Community, as well as a wide range of accompanying European Community rules and policies, are extended to the participating EFTA States[1], Iceland Liechtenstein and Norway.

The result is that citizens and undertakings in the EFTA countries have obtained access to the EU market in basically the same way as persons and undertakings in the EC, just as the latter has gained access to the markets in Iceland, Liechtenstein and Norway.

The EEA Agreement contains basic provisions, which are drafted in terms resembling as closely as possible the corresponding provisions of the EC Treaty, on the free movement of goods, persons, services and capital, on competition and on other common rules, such as those relating to state aid and public procurement.
The Agreement also contains provisions on a number of European Community policies relevant to the four freedoms.[2]
The Agreement further provides for close co-operation between contracting parties to the Agreement[3] in certain fields not related to the four freedoms.

The European Economic Area and the EEA Agreement

A dynamic Agreement

Secondary European Community legislation in areas covered by the EEA Agreement is brought into the EEA by means of direct references in the Agreement to the relevant European Community acts. The Agreement thus implies that two separate legal systems are applied in parallel within the EEA. On one side, the EEA Agreement applies to relations between the EFTA and European Community sides, and to relations between the EFTA

States themselves. On the other side, European Community law applies to relations between the EU Member States. This being the case, for the EEA to be homogeneous the two legal systems must develop in parallel and be applied and enforced in a uniform manner. The Agreement thus includes decision-making procedures for the integration into the EEA of new secondary European Community legislation. It also provides a surveillance mechanism to ensure the fulfilment of obligations under the Agreement and uniform interpretation and application of its provisions.

The task of ensuring that new European Community legislation is extended to the EEA in a timely manner rests, in the first instance, with the EEA Joint Committee, a committee composed of representatives of the contracting parties to the EEA Agreement.

While the introduction of new legislation within the EEA is entrusted to a joint body, the surveillance mechanism is arranged in the form of a two-pillar structure, with two independent bodies. The implementation and application of the EEA Agreement within the EFTA pillar is monitored by the EFTA Surveillance Authority. The European Commission carries out the same task within the European Community. In order to ensure uniform surveillance throughout the EEA, the two bodies co-operate, exchange information and consult each other on surveillance policy issues and individual cases.

Judicial protection

The two-pillar structure also applies to the judicial control mechanism. The EFTA Court exercises competences similar to those of the Court of Justice of the European Communities and the Court of First Instance of the European Communities with regard to, inter alia, the surveillance procedure regarding the EFTA States and appeals concerning decisions taken by the Authority.

In 2003, both the European Court of Justice and the EFTA Court have had occasion to underline that one of the main objectives of the Agreement is to create a homogeneous European Economic Area. The two Courts moreover emphasised the need to ensure uniform interpretation of those rules of the EEA Agreement and the EC Treaty that are identical in substance. In the case before the European Court of Justice, the quest for homogeneity led this Court to hold that the rights and obligations of EFTA citizens to invest in EU States should be decided on the basis of the EEA Agreement and not on the basis of the EC Treaty's rules on capital movement in relation to third countries. This implied that EFTA citizens were accorded basically the same rights *vis-à-vis* EU Member States as EU citizens.[4] In the case before the EFTA Court, the same search for homogeneity led the EFTA Court to closely follow the case law of the European Court of Justice concerning the free movement of services.[5]

In the past year, the EFTA Court has rendered a significant judgment on the importance of fundamental rights. Fundamental human rights have had an increasing influence on the national legal order of the EEA States and the question has therefore been raised as to whether, and to what extent fundamental rights form part of EEA law. In its judgment of 12 December 2003, the EFTA Court confirmed that the EEA Agreement is to be interpreted in the light of fundamental rights. It also held that the provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.[6]

What is the EFTA Surveillance Authority?

> General surveillance

A central task of the Authority is to ensure that the EFTA States fulfil their obligations under the EEA Agreement[7]. In general terms, this means that the Authority is to ensure that the provisions of the Agreement, including its Protocols and the acts referred to in the Annexes to the Agreement (the EEA rules), are properly implemented into the national legal orders of the EFTA States and correctly applied by their national authorities. This task is commonly referred to as general surveillance. General surveillance cases are either initiated by the Authority itself or arise as a result of a complaint.[8]

If the Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement, it may initiate formal infringement proceedings under Article 31 of the Surveillance and Court Agreement. However, before

1. Liechtenstein became party to the EEA Agreement on 1 May 1995. Switzerland is a member of EFTA, but not a party to the EEA Agreement.
2. Referred to in this Annual Report as horizontal areas, such as labour law, health and safety at work, environment, consumer protection and company law.
3. The contracting parties to the EEA Agreement are Iceland, Liechtenstein, Norway, the 15 EU Member States, the European Economic Community and the European Coal and Steel Community.
4. Case C-452/01, *Ospelt*, judgment of 23.9.2003.
5. Case E-1/03, *EFTA Surveillance Authority* v. *Iceland*, judgment of 12.12.03.
6. Case E-2/03 *Ákæruvaldið (The Public Prosecutor) against Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, judgment of 12.12.2003.
7. In addition the EFTA States have entrusted the Authority with the power to monitor the application of the EEA Agreement by the other contracting parties to the Agreement. The Authority can however only take formal action against the three EFTA States.
8. Information explaining the proceedings for non-compliance with EEA law are available on the Authority's website: www.eftasurv.int/procedures/infringement/

infringement proceedings are initiated, the Authority tries to ensure compliance by the EFTA State with the Agreement by other means. In practise, the overwhelming majority of problems identified by the Authority are solved as a result of informal exchanges of information and discussions between the Authority's staff and representatives of the EFTA States.

Where appropriate, before concluding the informal phase - and although the Authority itself has not taken a formal position on the matter – the Directorate concerned may decide to send an informal letter to the EFTA State in question (pre-article 31 letter) inviting it to adopt the measures necessary to comply with EEA law or to provide the Authority with supplementary information on the matter under examination. If formal infringement proceedings are initiated, the Authority, as a first step, notifies the EFTA State Government concerned, in a letter of formal notice, of its opinion that an infringement has taken place and invites the Government to submit its observations on the matter. If the Authority is not satisfied with the Government's answer to the letter, or if no answer is received, the Authority delivers a reasoned opinion, in which it defines its final position on the matter, states the reasons on which that position has been based, and requests that the Government take the measures necessary to bring the infringement to an end. Should the Government fail to comply with the reasoned opinion, the Authority may bring the matter before the EFTA Court, whose judgment is binding on the State concerned.

In 2003, the Authority brought two actions before the EFTA Court. The first case concerned an Icelandic law on airport taxes, the other Norway's failure to notify the Authority of a technical regulation concerning lottery machines.[9]

> Competition

The single market objectives of the EEA Agreement are also upheld through the application of the EEA competition rules. The work of the Authority in the field of competition distinguishes itself from other fields as it mainly concerns the application of the EEA Agreement directly to individual economic operators. The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty and prohibit, among other things, restrictive practices between businesses and abuses of dominant positions.

The Authority can initiate proceedings against market players which may result in a decision imposing heavy fines for anticompetitive behaviour. However, in practice, the majority of cases are resolved informally, as competition concerns identified by the Authority are often remedied without the need for formal proceedings. This represents an efficient use of resources.

The EC merger control rules extend to the entire European Economic Area through the application of the EEA Agreement. The Authority provides comments and information on mergers handled by the European Commission in cases where EFTA markets are particularly affected.

The Authority may take action in cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EFTA States. In such cases action may be taken not only directly against the undertakings, but also against the State if they have taken measures leading to the anticompetitive behaviour.

> State aid

The aim of the state aid provisions of the EEA Agreement is to ensure that conditions of competition for enterprises are equal and not distorted by State measures. At the outset state aid is prohibited, but there are several possibilities for exemption.

State aid measures must be notified to the Authority prior to implementation and not be put into effect before the Authority has decided upon the case. The Authority assesses whether a measure constitutes state aid and, if it does, examines whether it is eligible for exemption. The Authority can, after a preliminary examination, decide that a measure does not contain aid, decide not to raise objections to the measure, or to open a formal investigation procedure.

After an investigation procedure is initiated a final decision can be positive (approving the aid), negative (prohibiting the aid), or conditional (approving the aid subject to conditions). If the Authority concludes that aid has been granted without the Authority's approval, and that the aid is incompatible with the EEA Agreement, the Authority will, as a rule, order the EFTA State to reclaim the aid from the recipient.

Apart from deciding on all national plans to grant or alter aid, the Authority is also obliged to keep all systems of existing aid in the EFTA States under constant review. It can thus also open a case on its own initiative, or after having received a complaint. ■

9. Case E-1/03, *EFTA Surveillance Authority* v. *The Republic of Iceland*, and Case E-3/03, *EFTA Surveillance Authority* v. *Kingdom of Norway*. In the first case, the EFTA Court in a judgment of 12.12.2003 held in favour of the Authority. The second case is still pending.

Organisation

College

The EFTA Surveillance Authority is led by a College, made up of three Members. The Members are appointed by common accord of the Governments of the EFTA States for a renewable period of four years. A President is appointed from among the Members, also by common accord of the Governments, for a period of two years. The Members are completely independent in the performance of their duties. They must not seek or take instructions from any Government or other body, and refrain from any action incompatible with their duties.

During 2003, the composition of the College was:
- Einar M. Bull, *President*
- Hannes Hafstein
- Bernd Hammermann

Departments

The Authority's work is organised through four departments; Competition & State Aid Directorate, Internal Market Affairs Directorate, Legal & Executive Affairs and Administration. The distribution of functions between the departments during 2003 is outlined on the Authority's website[1].

Personnel

In 2003, in addition to the three College Members, the Authority had a staff of 50, representing 14 different nationalities. A majority of the staff members come from the EFTA States. The Authority finds it valuable to also recruit from non EFTA States as the diversity of cultures and skills has proven beneficial to the Authority's work. Moreover, as in previous years, recruiting staff from the three EFTA States has proved difficult throughout 2003. In addition to its normal staff the Authority also recruits a number of temporary officers, national experts and trainees for short time periods. These constitute a supplement to the regular staff.

The general personnel situation of the Authority remains difficult in terms of number of positions. Although the Authority has been through a period of organisational growth the general workload remains high and new tasks are regularly added to the Authority's field of responsibilities. This, in turn, creates new challenges on the organisation.

Staff turnover in the organisation is high due to the employment practice of the Authority of awarding employment contracts of three years, renewable once. This leads to an employment horizon of six years. In 2003, eight staff members left the Authority's service and 12 new staff members were recruited. With such a high turnover rate of core staff it remains a challenge to the Authority to retain and further develop core competencies. Despite this turnover rate, the Authority enjoys a high level of staff competence and efficiency.

In order to compensate for limited human resources the Authority endeavours to develop its staff, run an efficient organisation and utilise modern information management systems. The Authority has, during 2003, increased its focus on being a learning organisation and organisational productivity. Most staff have participated in external training within their respective fields of work. Staff training remains a high priority.

Information management

Throughout 2003, the Authority has invested resources, both human and capital, in developing an information management system in order to better utilise and exploit our information legacy and staff competencies. This is expected to further increase organisational productivity and the quality of the Authority's output. New working principles, which have involved the entire organisation, have been adopted. The benefits of these steps are expected to materialise in 2004. ■

1. www.eftasurv.int/about/dbaFile3778.html

Chapter 2
Internal Market

Surveillance of Internal Market rules

The EEA Agreement extends the Internal Market of the EU to the EFTA States. It comprises an area where free movement of goods, persons, services and capital should be ensured and limited only by directly or indirectly applicable provisions of the Agreement.

A "real" Internal Market means that trade can take place as easily between two States as within a single State. For that to happen within the areas covered by the EEA Agreement, the Contracting Parties have the duty to correctly and, in a timely fashion, to implement EEA rules and ensure that national authorities apply their legislation in conformity with their EEA obligations.

A delay in implementation or incorrect implementation or application of EEA provisions lead to a fragmented legal framework within the EEA market and can lead to lost benefits and opportunities by individuals and economic operators. In a worst case scenario it can affect the rights of stakeholders and harm the competitiveness of companies.

The aim of a homogeneous EEA with common rules will not be achieved without uniform implementation, application and interpretation of the rules. The role of the EFTA Surveillance Authority, in cooperation with the European Commission, is to ensure this with regard to the EFTA States. ■

Main categories of work

Work on monitoring the rules of the Internal Market can be divided into six main categories.

1. Notification and incorporation control and conformity assessment

The basic objective is to ensure that EEA rules are correctly and punctually implemented and applied by the EFTA States. Firstly, it is ascertained that the rules are in place and secondly, depending on available resources, the conformity of the national legislation is checked. At the end of 2003, it was concluded that at least 34.5% of legislation notified by the EFTA States was actually in conformity with the relevant EEA provisions, compared to 33% in 2002.

2. Notification procedures

Notification procedures relate to draft technical regulations, alert systems regarding food safety and dangerous products, and safeguard measures. The aim is to facilitate the free flow of safe goods to consumers and prevent unjustified barriers to trade.

3. Food safety inspections

The Authority carries out inspections in the EFTA States in order to make sure that the EEA legislation relating to veterinary issues, foodstuffs and feedingstuffs applicable to these States is correctly applied.[1]

4. The functioning of the EEA Agreement

The Authority carries out various tasks relating to the administration of the EEA Agreement with the aim to ensure its good functioning. These are called management or reporting tasks. The handling of applications from the EFTA States for exemptions, receipt of reports or other information from the EFTA States and the issue of recommendations to the EFTA States are examples of management tasks. Reporting tasks are those in which the Authority has a duty, laid down in an act, to make a report on the functioning of EEA rules in a given field.

5. Case handling

Case handling is the role whereby various types of cases are opened in order to determine possible infringements of EEA rules, either based on complaints or the Authority's own findings, are carried out.

6. Cooperation and information

The Authority's role in cooperation and information covers miscellaneous types of cases. These include cooperation with the European Commission and the EFTA States and provision of information to the public upon request or on the Authority's own initiative, e.g. on its website or in the Annual Report.

Furthermore, for the first time, the Authority publishes on its website, as an annex to this Report, a list of open cases handled by the Internal Market Directorate and a list of cases that were closed during 2003.[2]

Dialogue and future issues

In its work the Authority cooperates with and consults the European Commission on operational tasks or issues of interpretative nature. It also aims at maintaining a constructive dialogue with the EFTA States. In fact, most cases that the Authority examines concerning Internal Market rules are solved at an early and informal stage.

In the near future, the Authority will need to pay attention to the implementation of the Internal Market Strategy[3] of the EU, which will surely affect the Internal Market legislative framework and might also influence approaches to work. Furthermore, the establishment of new EU agencies (e.g. a Food Safety Authority, a Maritime Agency and an Aviation Agency) will demand attention and might also bring new or increased tasks.

1. There are differences between the EFTA States with respect to food safety issues. While all the EC regulation is applicable to Norway, only legislation regarding fish products (including shellfish), disease control and border control under veterinary issues is applicable to Iceland. Liechtenstein has a permanent derogation from these EEA rules.
2. www.eftasurv.int/information/annualreports/dbaFile4919.html
3. http://europa.eu.int/comm/internal_market/en/update/strategy/

> Statistics concerning case handling in the Internal Market and implementation of acts

The statistics below illustrate how the EFTA States performed in the implementation and transposition of acts into their national legal order in 2003. They also demonstrate how the Authority's work monitoring the Internal Market has evolved in 2003.

Implementation of acts by the EFTA States

> All directives

The total number of directives[1] which the EFTA States must implement into their national legal order on or before 31 December 2003 was *1,511*.[2] Of these, Iceland had fully notified 98.1%, Liechtenstein 97.6% and Norway 98.8% by this date. Compared to 2002, all three EFTA States had decreased their transposition deficit, *i.e.* the proportion of *all* Internal Market directives applicable to the EFTA States that have not been transposed into their national legal order on time. The latest Scoreboard figures reveal that, of the 18 EEA States, Norway ranks second after Denmark as regards percentage of transposed acts, while Iceland and Liechtenstein rank as numbers four and five.

> The Internal Market Scoreboard

Information regarding the EFTA States' implementation of EEA legislation is found in the publication of the EFTA States' Internal Market Scoreboard and in the Authority's Implementation Database. See the Authority's homepage.[1]

The Scoreboard contains information about the implementation by the EFTA States of the Internal Market directives that are part of the EEA Agreement. It is published in parallel with the European Community's Internal Market Scoreboard, thereby providing the possibility of comparing the implementation of the Internal Market rules in all 18 EEA States.[2] The latest Internal Market Scoreboard was published in January 2004, the next are being scheduled for July 2004.

1. www.eftasurv.int/information/implementationstatus/
2. The number of directives reported in the Internal Market Scoreboard may vary from the number referred to in the Annual Report. This is due to the fact that some directives in the EEA Agreement do not fall within the Scoreboard's definition of Internal Market directives.

> Acts to be complied with in 2003

Figure 1
Implementation status of all directives to be implemented during 2003
(directives with compliance date in 2003)

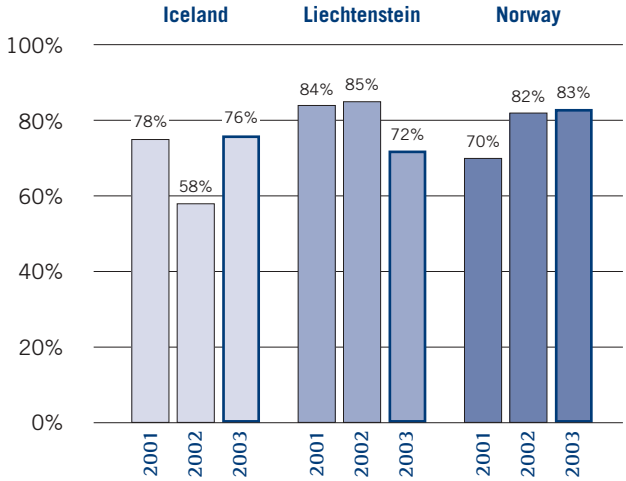
	Iceland	Liechtenstein	Norway
Total number of directives	98	98	98
- Directives with effective transition periods	5	5	0
- Directives where no measures are necessary	17	25	12
Net total directives	**76**	**68**	**86**
Status			
- Full implementation notified	58	49	71
- Partial implementation	0	0	2
- Non-implementation / non-notification	18	19	13
In percentages			
- Full implementation notified	76.3%	72.1%	82.6%
- Full or partial implementation notified	76.3%	72.1%	84.9%

In order to avoid accumulation of non-implemented acts, the EFTA States should notify their national implementing measures to the Authority as quickly as possible. *Figure 2* shows the EFTA States' record in this respect. It reveals a satisfactory performance regarding acts added to the EEA Agreement each year. Iceland improved its position considerably compared to 2002. Liechtenstein, on the other hand, was not able to keep up its performance from 2002. Norway remained more or less on the same level as the previous year. In total 98 acts had a compliance date *during 2003*.

1. *Directives* leave the EFTA States free to choose the form and method of implementation, while *regulations* are made part of the various national legal orders as such (incorporated word for word). The Authority's implementation control therefore mainly concentrates on directives.
2. Unless a transitional period has been granted or no implementing measures are appropriate.

Figure 2

New acts for which full implementation was notified *(2001-2003)*



The Authority's work[3]

> Case handling, management tasks and reporting obligations

Figures 3 and *4* illustrate the total number of *complaints and own-initiative cases* registered during the years 1999 to 2003 in the main sectors covered by the EEA Agreement. Whereas the number of new complaints and own-initiative cases averaged between 120 and 160 per year in this period, they were reduced to 96 in 2003. This reflects the improvement in implementation of EEA acts by the EFTA States. However, while the number of new cases diminished, the complexity of those cases initiated during 2003 increased substantially.

> Complaints

Of the cases opened in 2003, 54% were complaints. In 2002, complaints represented 31% of open cases. The difference between the sectors when it comes to percentage of cases that were based on complaints and own initiative, is illustrated by *figure 5*.

3. This section relates to the Authority's general surveillance of the Internal Market. Information on the Authority's work with competition and state aid is found in chapters 3 and 4.

Figure 3

Own-initiative cases registered *(1999 - 2003)*

Sector	1999	2000	2001	2002	2003	Total open cases 31/12/03
- Free movement of goods	25	56	39	64	19	**36**
- Free movement of persons	2	0	12	9	4	**16**
- Free provision of services	31	30	14	14	6	**24**
- Free movement of capital	3	0	1	1	3	**6**
- Horizontal areas	37	39	17	13	6	**22**
- Public procurement	4	6	1	0	6	**4**
Total	**102**	**131**	**84**	**101**	**44**	**108**

Figure 4

Complaints registered *(1999 - 2003)*

Sector	1999	2000	2001	2002	2003	Total open cases 31/12/03
- Free movement of goods	7	3	11	7	11	**33**
- Free movement of persons	9	10	13	9	13	**33**
- Free provision of services	10	7	2	8	5	**20**
- Free movement of capital	0	1	1	3	4	**5**
- Horizontal areas	5	2	3	1	2	**2**
- Public procurement	8	10	13	17	16	**28**
Total	**39**	**33**	**43**	**45**	**51**	**121**

Figure 5

Comparison of own-initiative cases and complaints by sector *(2003)*

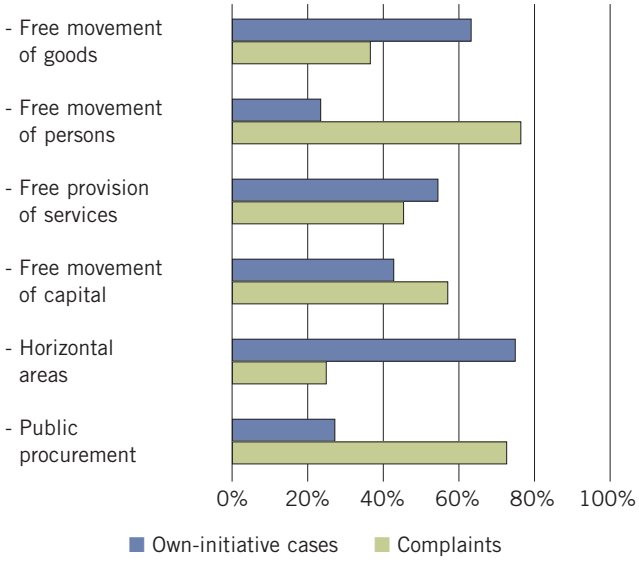


Figure 6
Comparison of own-initiative cases and complaints
(1999 - 2003)

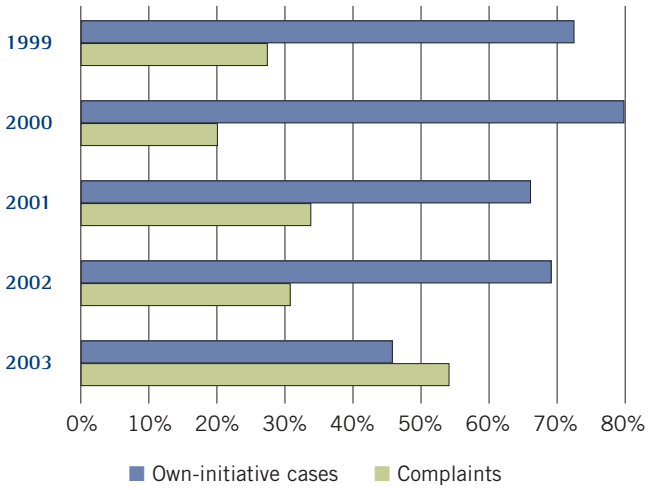


Figure 6 shows the allocation of complaints and own-initiative cases over the last five years. The general trend for new cases is that the number of complaints is expanding while there is a decline in the number of own-initiative cases.

An increased awareness among the public of their rights under the EEA agreement and of the possibility to complain if these rights are not reflected in the legislation and actions of the three EFTA States, is certainly one major reason why the number of complaints has steadily increased over the years. At the end of 2003, there were 122 cases opened on the basis of complaints. 52 of these were opened in 2003, an increase of 15% from 2002. Processing of these cases normally requires considerable time and resources. *Figure 4* illustrates the increase in number of complaints during the last five years. As in previous years, most complaints concern public procurement procedures. However, the fields of free movement of goods and free movement of persons experienced a major increase in the number of complaints in 2003.

In recent years, the vast majority of complaints have related to Norway. *Figure 7* shows that 88% of the cases registered in 2003 concerned that country. This reflects a trend over a five years perspective as seen in *figure 8*.

Figure 7
Complaints for 2003 by EFTA State

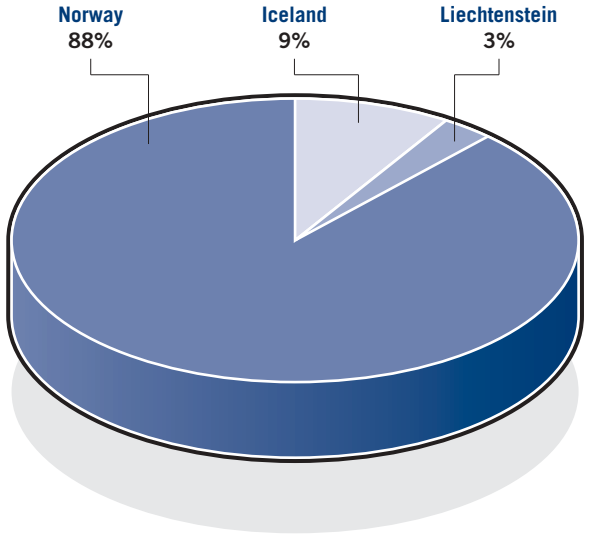
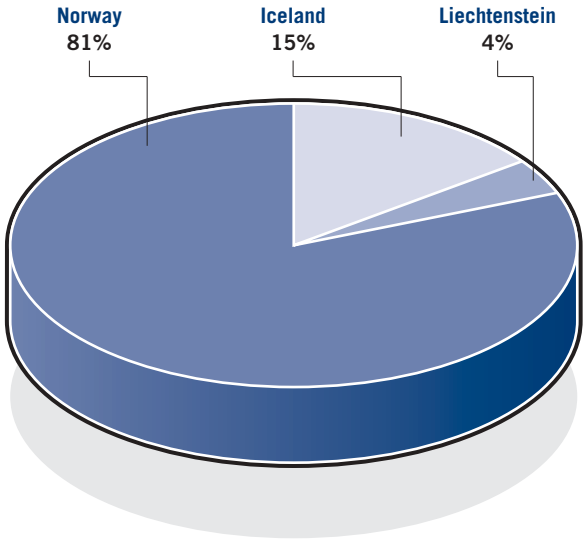


Figure 8
Complaints registered 1999-2003 by EFTA State



> Own-initiative cases

At the end of 2003, there were 109 *open own-initiative cases*, 44 of which were opened in the course of the year. The reduction in own-initiative cases opened from 2002 to 2003 concerned all sectors except public procurement and the free movement of capital. Improved implementation by the EFTA States, as well as the increased number of complaints and management tasks, including reporting tasks, explain this decline in number of own-initiative cases. A big turnover of staff during the year also contributed. *Figure 3* illustrates how the own-initiative cases opened during the last five years have been divided between sectors.

The distribution of cases between countries shows that 20% of the *own-initiative cases* opened in 2003 concerned Iceland *(Figure 9)*. This is a reduction from the previous year when the percentage was 56%. The improved notification ratio by that State may partly explain this improvement. The distribution of cases between countries is shown in *figure 10*.

Figure 9
Own-initiative cases registered in 2003 by EFTA State

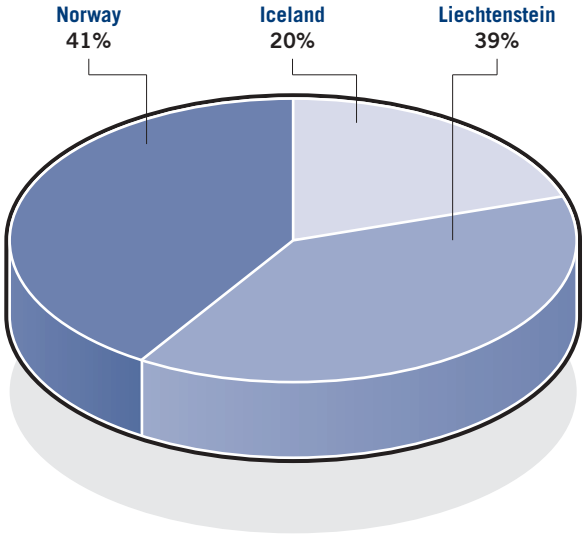
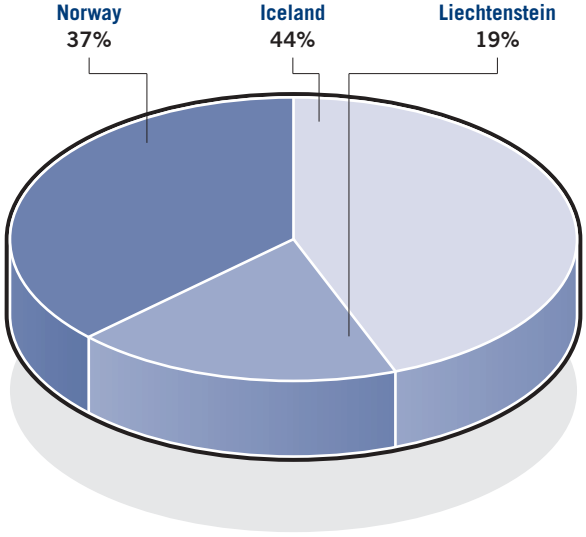


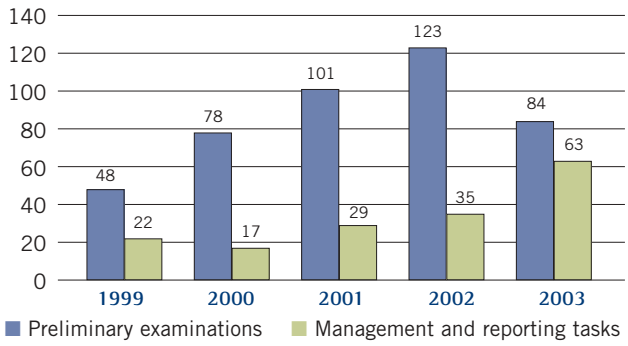
Figure 10
Own-initiative cases registered 1999-2003 by EFTA State



In addition to complaints and own-initiative cases, a case can also be opened for *preliminary examination*. During 2003, 84 such cases were opened *(Figure 11)*, a decrease of 32% on 2003. The reduction is mostly explained by the same reasons as those outlined above.

Management tasks and reporting obligations carried out by the Authority have seen a sharp increase since 2000. 63 management and reporting tasks were registered in 2003 *(Figure 11)*. Management tasks include, *inter alia*, the operation of certain procedures, and are generally work-intensive. One example of such a management task is the notifications concerning transport safety that the Authority handled in 2003.[4]

Figure 11
Preliminary examinations and management/reporting tasks registered *(1999-2003)*



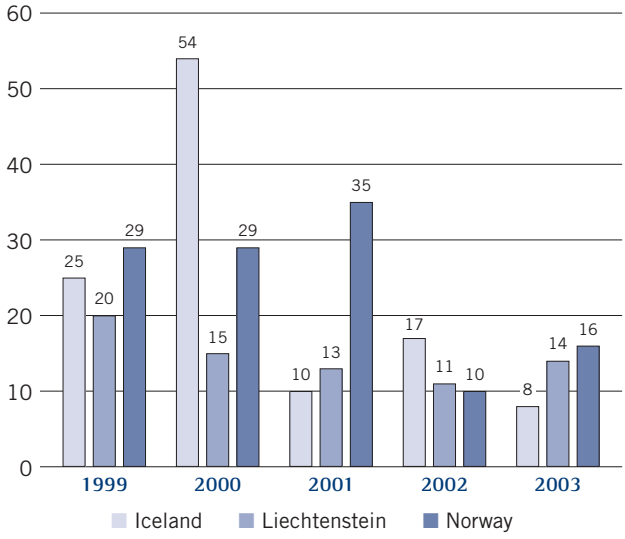
4. See page 28.

> Infringement cases

When the investigation of a complaint or own-initiative case leads the Authority to conclude that there is a breach of EEA rules, it can initiate formal infringement proceedings by sending a *letter of formal notice* to the EFTA State concerned. The case then becomes an *infringement case*.

Figure 12 shows the development in the number of letters of formal notice sent by the Authority over the last five years. The development shows a decrease in 2002 and 2003 compared to previous years. This is partly explained by a better performance by the EFTA States in notification of national measures, and also by the fact that an increasing number of cases are resolved by discussions between the Authority and the EFTA States at an earlier stage.

Figure 12
***Letters of formal notice issued** (1999-2003)*

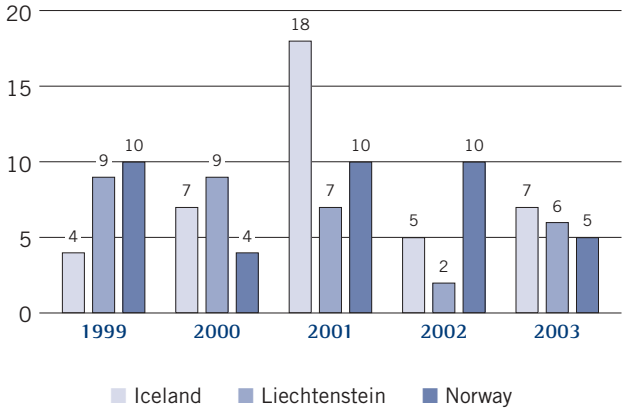


Divided by country, the number of letters of formal notice received by Iceland has decreased from 17 to 8, those sent to Norway have increased from 10 to 16, and to Liechtenstein from 11 to 14. However, over the last five-year period, the distribution of such cases between the three EFTA States is fairly even, with a slightly lower proportion received by Liechtenstein.

Despite sending fewer letters of formal notice, the number of *reasoned opinions* delivered by the Authority increased by 19 from 2002 to 2003 *(Figure 13)*. Norway had received the bulk of the reasoned opinions in 2002.

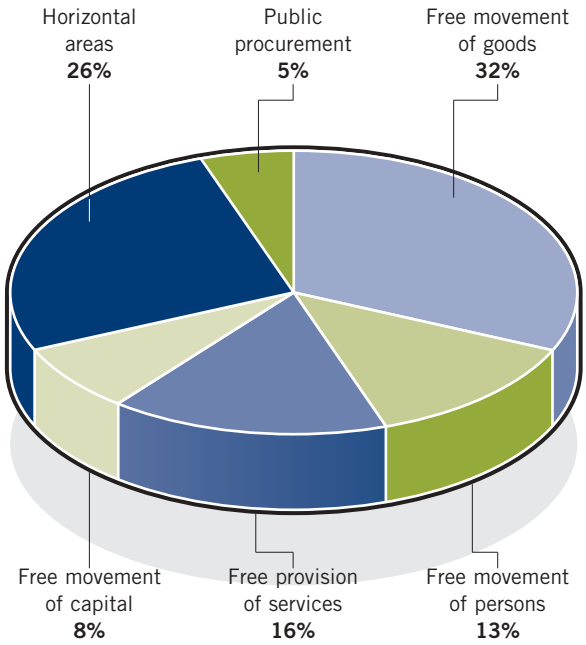
However, the numbers were more evenly distributed between the EFTA States in 2003 and more or less reflected the trend regarding letters of formal notice issued to the same countries in the previous year. Over the five-year period, the number of reasoned opinions has also been allocated quite evenly between the EFTA States.

Figure 13
***Reasoned opinions delivered by EFTA State** (1999-2003)*



Figures 14 and *15* show how the letters of formal notice and reasoned opinions are distributed between the various sectors for 2003.

Figure 14
Letters of formal notice issued 2003 by sector



> References to the EFTA Court

The Authority referred two cases to the EFTA Court in 2003. One case was lodged against Iceland and concerned air passenger taxes. The other case concerned Norway and arose from that State's failure to comply with the procedure on draft technical regulations. *Figure 16* shows the cases referred to the EFTA Court between 1999 and 2003.

> Cases closed

Figure 17 shows that the number of own-initiative cases closed during 2003 remained at the same level as in 2002. It also confirms the shift of emphasis in the work of the Authority away from non-transposition cases and towards more complicated cases concerning partial implementation and application of EEA acts and complaints. Likewise, *figure 18* shows that also the number of complaint cases closed during the year remained stable. ■

Figure 16
***Referrals to the EFTA Court** (1999-2003)*

	1999	2000	2001	2002	2003	Total 1999-2003
Iceland	0	0	0	0	1	**1**
Liechtenstein	0	0	1	0	0	**1**
Norway	1	2	0	1	1	**5**
Total	**1**	**2**	**1**	**1**	**2**	**7**

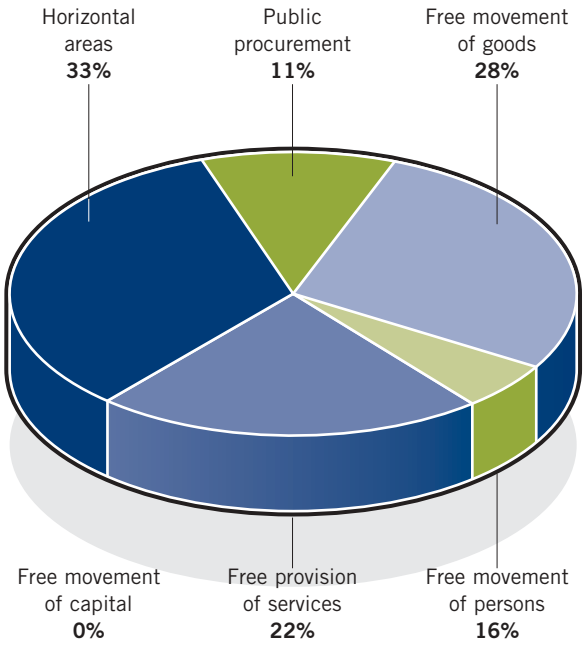
Figure 17
***Own-initiative cases closed** (1999 - 2003)*

Sector	1999	2000	2001	2002	2003
- Free movement of goods	32	32	83	27	39
- Free movement of persons	7	5	5	9	5
- Free provision of services	21	32	29	12	13
- Free movement of capital	0	1	0	3	0
- Horizontal areas	12	32	45	28	22
- Public procurement	12	3	7	2	2
- Other sectors	0	0	1	0	0
Total	**84**	**105**	**170**	**81**	**81**

Figure 18
***Complaints closed** (1999 - 2003)*

Sector	1999	2000	2001	2002	2003
- Free movement of goods	8	11	4	9	7
- Free movement of persons	5	0	17	12	9
- Free provision of services	0	1	8	3	11
- Free movement of capital	0	0	0	0	4
- Horizontal areas	3	1	5	3	6
- Public procurement	9	9	9	15	10
- Other sectors	0	1	0	7	1
Total	**25**	**23**	**43**	**49**	**48**

Figure 15
Reasoned opinions delivered 2003 by sector



>Reasoned opinions in 2003

The EFTA Surveillance Authority initiates formal infringement procedures against EFTA States by sending a letter of formal notice to the EFTA State concerned, requesting it to submit its observations on an alleged breach of the EEA Agreement by a specified date.

In light of the reply to the letter of formal notice, or in the absence of a reply, the Authority may decide to deliver a reasoned opinion to the EFTA State in which it presents its final view on the matter. The Authority will also require the EFTA State to take the measures necessary to bring the infringement to an end within a specified time period. This is normally two months. The purpose of a reasoned opinion is to give the EFTA State in question a last chance to take corrective measures before the Authority decides whether to bring the matter before the EFTA Court.

Some of the 19 reasoned opinions delivered in 2003 are presented in more detail in the following Chapters. In addition to these, the Authority delivered reasoned opinions in the following matters.

Iceland misses out on food safety legislation

During spring 2003, the Authority delivered four reasoned opinions to Iceland regarding incomplete or non-implementation of the *Directive on animal health conditions related to placing on the market of aquaculture animals and products,* as amended (Directive 91/67/EEC). Proper notification of the Icelandic measures implementing the Directive, as amended, was still awaited by the Authority at the end of 2003.

Iceland also received a reasoned opinion regarding the UMTS Decision. This arose from Iceland's failure to put in place a scheme for licensing third generation mobile communications systems and to allow the deployment of such systems from the beginning of 2002.

Rules on labour law and audiovisual services are not in place in Liechtenstein

EEA acts in the audiovisual sector apply to Liechtenstein even though no broadcasting activities take place in that country. Following the failure by Liechtenstein to fully implement the *Television without Frontiers Directive*[1], the Authority commenced formal infringement procedures in July 2003. A reasoned opinion arising from the partial non-implementation of the Act, as amended, was delivered in December 2003.[2]

In July 2003, the Authority also delivered a reasoned opinion to Liechtenstein arising from its non-implementation of the *Conditional Access Directive*.[3] This step was taken after that State had persistently failed to meet its transposition forecasts in relation to this Act.

In December 2003, Liechtenstein received two reasoned opinions in the field of labour law, owing to that country's failure to ensure full compliance with the *Working Time Directive* (93/104/EC) and the *Protection of Young People at Work Directive* (94/33/EC). Liechtenstein also received a reasoned opinion in November due to its failure to notify implementing measures concerning the *End-of Life of Vehicles Directive* (2000/53/EC).

In Norway, financial services legislation has been amended

In April 2003, the Authority delivered a reasoned opinion to Norway due to the wrongful implementation of the *Investor-Compensation Schemes Directive* (97/9/EC). The Act requires the EEA States to ensure that investor compensation schemes provide cover of not less than EUR 20,000 for each investor. The Authority considered the Norwegian implementing legislation containing a limitation provision, according to which the total amount of available compensation could be limited to NOK 25 million (approx. EUR 3 million), to be contrary to the Act. Following the Authority's reasoned opinion, amendments to the Norwegian legislation were made. The amendment entered into force on 1 January 2004. ■

1. Directive 89/552/EEC as amended by directive 97/36/EC. This Directive is further described on page 43.
2. The infringement procedures concern failure to fully implement the amending directive, i.e. Directive 97/36/EC.
3. The Conditional Access Directive (98/84(EC) seeks to combat the use of illicit devices that are providing unauthorised access to encrypted audiovisual services, such as for example pay-TV services, in order to protect the legitimate rights of the broadcasters to receive compensation for their content.

>Reports on the functioning of the EEA

The EFTA Surveillance Authority adopted and issued three reports in 2003 on the implementation and application by the EFTA States of certain EEA Acts. These Reports are published on the Authority's website.[1]

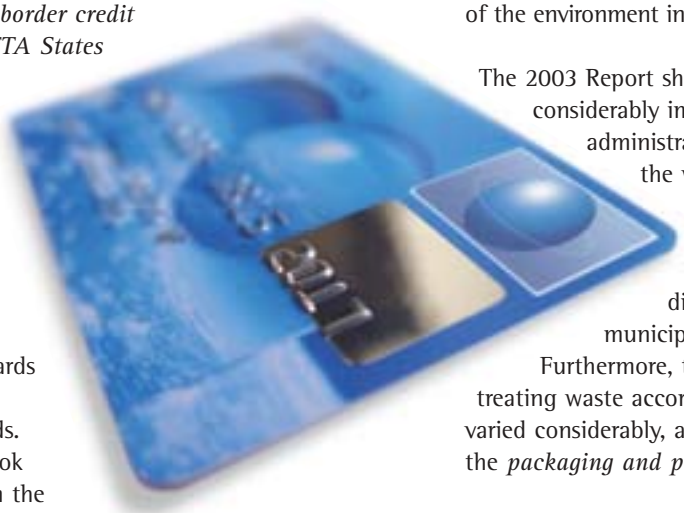
Right of residence

The free movement of persons is one of the fundamental freedoms enshrined in the EEA Agreement. It includes the right of EEA nationals to enter, move within, reside and, where appropriate, remain in an EEA State, other than the State of which that EEA national is a citizen. The Authority's Report gives an overview of the transposition and practical application in the EFTA States of three acts on right of residence.[2] These acts extend the right of residence to retired persons, other economically non-active persons and students, and to the family members of these groups.

The main conclusion of the Report is that the EFTA States have, to a large extent, correctly implemented the acts in question. Remaining problems relate mainly to the practical application of the acts in administrative practise.

Credit transfer and card transactions

The Report concerns the application of the *Directive on cross-border credit transfers in the EFTA States* (Directive 97/5/EC). It is based on a study by the Authority, carried out between April and November 2002, on cross-border credit transfers, cash withdrawals with cards from ATMs and purchases with cards. The transactions took place both between the EFTA States and between these States and three EU Member States. The focus of the study was on various cross-border transfers of small amounts of money by ordinary consumers.



The purpose of Directive 97/5/EC is to improve cross-border credit transfer services by making them faster, more reliable and less expensive. The Report examines, in particular, application of the time limits for credit transfer set forth in Article 6(1) of the Act. It concludes that the EFTA States have properly implemented Directive 97/5/EC into their national legal orders, and that the problems identified in the study are, therefore, due to misapplication of national legislation and possible lack of supervision.

Waste legislation

During 2003, the Authority adopted its second summary report on the practical implementation of EEA environmental waste legislation in the EFTA States, covering the period 1998-2000.[3]

The purpose of the Report from 2003 is to assess the progress made by the EFTA States in practical implementation of the framework *Directive on waste* (75/442/EEC, as amended) and certain acts concerning specific categories of waste streams, namely *sewage and sludge* (86/278/EEC) and *waste oils* (75/439/EEC, as amended). For the first time, the Report includes information on the implementation of provisions on *hazardous waste* (Directive 91/689/EEC, as amended) and *packaging and packaging waste* (Directive 94/62/EC). The Report also aims at providing the general public with information on the state of the environment in the EFTA States.

The 2003 Report shows that the EFTA States have considerably improved their legislative and administrative implementation of the Acts in the waste sector. However, difficulties in comparing and interpreting reported quantities of waste persisted. This was due to the EFTA States' different ways of categorising waste as municipal, hazardous or other waste. Furthermore, the success of the EFTA States in treating waste according to the hierarchy set by the Acts varied considerably, as did the fulfilment of targets set by the *packaging and packaging waste Directive*. ■

1. www.eftasurv.int/information/reportsdocuments/
2. Directives 90/364/EEC, 90/365/EEC and 93/96/EEC.
3. The first Report, adopted in 2002, covered the period 1995-1997. The next reporting period is for the years 2001-2003.

>Food safety in the EEA

Focus on food safety in the EEA has increased enormously over the last decade, not least due to a number of food-related problems such as mad cow disease and the discovery of dioxins and other toxins in foodstuffs. The EFTA Surveillance Authority's work in the field of food safety includes control of implementation and application of EEA law relating to all elements of the food chain, from primary production to ready to eat foodstuffs. This includes feedingstuffs, animal health and animal welfare related to food production.

Inspections were carried out in all three EFTA States in 2003

It follows from the EEA Agreement and the Surveillance and Court Agreement that, in order to ensure uniform surveillance throughout the EEA, the Authority and the European Commission shall co-operate, exchange information and consult each other on surveillance policy issues and on individual cases. In the field of food safety inspections, this is achieved, *inter alia*, by joint inspections by these institutions within the EEA. Inspectors from the Commission's Food and Veterinary Office (FVO) participate as observers during the Authority's inspections in the EFTA States. The Authority's inspectors participate as observers during inspections by FVO in the EU Member States.

The Authority carried out its first inspection in Liechtenstein in 2003. This was within the scope of the *Directives on official food control* (89/397/EEC and 93/99/EEC) and the *Directive on food hygiene* (93/43/EEC).

A fresh meat inspection was carried out in Norway, which included some aspects of the traceability of meat. Certain deficiencies were observed during that inspection that will be followed-up in a traceability inspection that will take place in early 2004.

At the end of the year, the Authority performed its first inspection in Norway in the field of animal welfare during transport and slaughter. Aspects of animal welfare had previously been taken into consideration in the course of fresh meat inspections in Norway. The animal welfare inspection revealed deficiencies, in particular, with regard to the stunning and housing of animals in slaughterhouses.

The Authority also performed an inspection in Norway in the field of the *Directive on residues of certain substances in live animals and animal products* (96/23/EC). For the first time a national expert from another EEA State participated during a mission to an EFTA State. The participation of national experts is common for inspections carried out by the European Commission's FVO, in particular in the fields of bivalve molluscs and residues (Directive 91/492/EEC), where designated national laboratories play an important role in the official control.

During the inspection particular focus was placed on the Norwegian national residue control plan, the functionality of the national reference laboratories, the competent authority's follow-up of positive results and the control of distribution of veterinary medicinal products.

The inspection reports from 2003 are published on the Authority's website[1], together with comments received from the EFTA States.

The Authority's inspectors participated in an animal welfare inspection, a residue inspection and an animal nutrition inspection in EU Member States during 2003.

1. www.eftasurv.int/information/reportsdocuments/vetcontrolmatters/

New inspections are being planned

During 2003, the Authority's Internal Market Affairs Directorate up-dated its procedures for planning of inspections to be carried out in the EFTA States. According to these procedures, the Authority's services will, in October each year, decide on the inspection programme for the forthcoming year. The programme comprises the inspection fields and the scheduled time and place of the inspections. The inspection programme for 2004, as decided in October 2003, is published on the Authority's website.[2]

Veterinary safeguard measures protect against the spread of diseases

Safeguard decisions taken by the European Commission in the veterinary field (decisions adopted due to an outbreak of a serious contagious disease within the EEA or in third countries) are forwarded by the Authority to the EFTA States. This is because these decisions normally require immediate action. Based on the EEA Agreement, the Commission submits these decisions to the Authority immediately after they have been adopted.

The procedures to be followed by the EFTA States in such cases are laid down in the EEA Agreement. The majority of these safeguard decisions also contain notification obligations. During 2003, the EFTA States have improved their procedures for implementation and notification to the Authority of the measures adopted as a result of these decisions.

The Authority issued two recommendations on food control

The Authority issued two Recommendations on food control to the EFTA States in 2003. These are:

- Recommendation of the EFTA Surveillance Authority of 19 June 2003 concerning a coordinated monitoring programme for 2003 to ensure compliance with maximum levels of pesticide residues in and on cereals and certain other products of plant origin; and
- Recommendation of the EFTA Surveillance Authority of 19 June 2003 concerning a coordinated programme for the official control of foodstuffs for 2003.

The Recommendations were published in the Official Journal of the European Union L 227, 11.9.2003 and simultaneously in Icelandic and Norwegian in the EEA Supplement to the Official Journal of the European Union No 45. The Authority's recommended programmes are based on corresponding recommendations issued by the European Commission and directed to the EU Member States. It is up to the EEA States to decide to what extent they participate in the recommended programmes.

Reports regarding food safety

The EFTA States are obliged to report their monitoring plans and results from the official control of foodstuffs and analysis of residues of pesticides and certain contaminants in foodstuffs to the Authority. The official control reports received in 2003 contain data on the national programmes laying down the nature and frequency of inspections in 2002 and include data on participation in the co-ordinated control programme for the same year. These reports were forwarded by the Authority to the European Commission for further evaluation as a part of the process of evaluating official control results from the EEA States.

Reports received on pesticide residues contain the results of the EFTA States' monitoring of pesticides in 2002 and of their participation in the Authority's Recommendation on a coordinated monitoring programme for 2002. The monitoring results were forwarded to the European Commission for inclusion in an annual report on the monitoring of pesticide residues in the EEA. The EFTA States also sent their plans for monitoring pesticide residues in 2004 to the Authority.

Two of the EFTA States also reported their results from monitoring of nitrate residues in lettuce and spinach. These results were forwarded to the European Commission for inclusion in a report on the monitoring of nitrate residues in the EEA in 2002.

A number of acts on veterinary issues contain the requirement that the EFTA States submit information on, for example, the animal health status and the outcome of official controls carried out to the Authority. Although improvements were seen during 2003, the deadlines for submitting these reports were not always respected.

In the feedingstuffs sector, the EFTA States are also obliged to send reports to the Authority on the application of EEA legislation. The reports received from the EFTA States on the official control of feedingstuffs in 2002 were forwarded to the European Commission for further evaluation. This is the same procedure as used for the reports on the official control of foodstuffs.

2. www.eftasurv.int/fieldsofwork/fieldgoods/foodvet/dbaFile4722.html

Rapid Alert System for Food and Feed (RASFF)

The *Food Law Regulation* (178/2002/EC) establishes a rapid alert system for the notification of direct or indirect risk to human health deriving from food or feed. However, since Regulation 178/2002/EC is not currently a part of the EEA Agreement, the EFTA States' food notification procedures are governed by the emergency procedure in the *General Product Safety Directive* (92/59/EEC). That legal basis will continue to apply to the EFTA States until Regulation 178/2002/EC has been incorporated into the EEA agreement.

All notifications were uploaded at CIRCA (Communication and Information Resource Centre Administrator), a restricted website-based Exchange of Information System open to the Authority and the EFTA States. A new, more specific system for the transmission of notifications within RASFF is expected to be in place in the course of 2004. The Authority has contributed to a pilot phase launched in October 2003.

The RASFF notifications are either alert or non-alert, depending on the risk related to the case notified.

The notification procedure

	1999	2000	2001	2002	2003
EFTA notifications					
Alert	6	18	35	21	12
Non-alert	0	29	21	35	68
Total	**6**	**47**	**56**	**56**	**80**
EC notifications					
Alert	97	133	302	434	454
Non-alert	263	340	406	1,092	1,856
Total	**360**	**473**	**708**	**1,526**	**2,310**

Use of unauthorised food additive

The Authority sent a letter of formal notice to Norway at the end of 2003 regarding non-compliance with two Acts, the *Directive on food additives* (89/107/EEC) and the *Directive on the use of food additives, other than colours and sweeteners* (95/2/EC). The case concerns the use of carbon monoxide (CO) as a packaging gas for meat products. That food additive was approved in Norway until a provisional authorisation on the use of the additive came to an end in October 2000.

Norway applied to the European Commission for approval of CO and inclusion of the additive in the list of approved food additives. In a reply to Norway in August 2000, the Commission informed that State that the provisional authorisation could not be prolonged. Furthermore, in April 2002, the Commission informed Norway that it would not propose acceptance of the use of CO since the Commission services were of the opinion that the additive could mislead the consumer, as regards the freshness of meat, by maintaining the red colour of the product. Consequently, the general criteria on the use of food additives were not fulfilled.

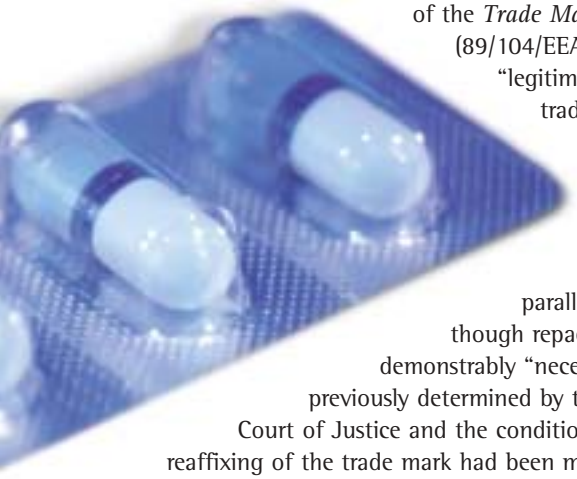
It has been established that, since October 2000, CO has been used as a food additive in Norway without approval. Furthermore, as from October 2001, when the *Directive on the use of food additives, other than colours and sweeteners* (95/2/EC) became applicable to Norway, the use of the additives has not been in compliance with that Act. In 2003, Norway informed the Authority that the Norwegian meat industry should comply and discontinue the use of CO at the end of June 2004. ■

> Pharmaceutical products

Parallel trade and its effect on the EEA market

Parallel trade in pharmaceutical products is the subject of much debate by manufacturers, traders and national authorities concerning the relative benefits of potentially reduced prices for pharmaceuticals caused by parallel trade and the rights of manufacturers to protect their products and their markets.

In 2003, the EFTA Surveillance Authority intervened in a case referred to the EFTA Court by the Supreme Court of Norway concerning one such conflict.[1] The dispute, which pitted parallel traders *Paranova* against pharmaceutical manufacturers *Merck*, arose from the use by Paranova of its own packaging design when it repackaged Merck's products, adding Merck's trademark to the package.



The Norwegian Supreme Court asked whether the provisions of Article 7(2) of the *Trade Mark Directive* (89/104/EEA) provided "legitimate reasons" for a trade mark holder to object to the design of repackaging used for its products by a parallel trader even though repackaging was demonstrably "necessary", as previously determined by the European Court of Justice and the conditions concerning reaffixing of the trade mark had been met.

The EFTA Court concluded that, as it was proven necessary for Paranova to repackage the products in order to market them, Merck could not require Paranova to effectively prove necessity a second time when discussing whether Merck had "legitimate reasons", as provided in Article 7(2) of the *Trade Mark Directive*, to object to the packaging. This would constitute a disproportionate restriction on the free movement of goods. The EFTA Court did, however, conclude that "legitimate reasons" for such opposition could exist within Article 7(2) if, on the basis of the relevant facts, the national court were to conclude that the use of coloured stripes along the edges of repackaged products was liable to damage the reputation of the trade mark.

The authorisation of generic products

The circumstances in which generic pharmaceutical products can be authorised in accordance with EEA law, and the relative rights of producers of innovative products is also a topic of increasing concern. In the case of *AstraZenica* v. *Lægemiddelstyrelsen* (ex parte Generics)[2], in which the Authority intervened, the European Court of Justice was called on to determine when an innovative medicinal product was to be considered to be "marketed" within point 8(a)(iii) of the third paragraph of Article 4 of the *Marketing Authorisation Directive* (Directive 65/65).[3] This provision permits a generic producer, following expiry of the relevant data protection period, to rely on data from another manufacturers for an abridged authorisation procedure. The Court concluded that the innovative product must have been authorised in the relevant EU Member State when the application for generic authorisation was made. It was not, however, necessary that such an authorisation remained in force when authorisation of the generic product was granted.

Supplementary Protection Certificates

Supplementary Protection Certificates (SPCs) provide an important extension to the patent protection of a medicinal product to take account of the delays that can occur between grant of a patent and the marketing authorisation of the product. The duration of the SPC is calculated as the time between grant of the patent and grant of the first marketing authorisation for a product in the EEA minus five years. Two cases currently pending before the European Court of Justice, in which the Authority has intervened, concern the circumstances in which the first marketing authorisation in the EEA should be said to be granted. The cases revolve around the question whether the automatic recognition of Swiss marketing authorisations in Liechtenstein, arising from the Customs Union and Patent Union between Liechtenstein and Switzerland, constitute an EEA marketing authorisation on which application for an SPC within the definition of the *SPC Regulation* (Regulation 1768/92) can be made. ■

1. Case E-3/02 *Paranova AS* v. *Merck & Co., Inc. and Others*, judgment of 8 July 2003, not yet published.
2. Case C-223/01 *AstraZenica* v. *Lægemiddelstyrelsen (ex parte Generics)*, judgment of 16 October 2003, not yet published.
3. Since repealed and replaced by Directive 2001/83/EC, Article 10.

> Monitoring alcohol legislation

The EEA Agreement has implications for the alcohol policy and regulations of the EFTA States. This contentious issue has raised differences of opinion between the Authority and the States, particularly Norway. Several complaints have been lodged with the Authority concerning this issue.

The Norwegian licensing system

The alcohol licensing and wholesaling system in Norway has been the subject of a number of complaints to the Authority. In a letter of formal notice in 1998, the Authority concluded that the relevant Norwegian measures imposed substantial additional costs on the import of alcoholic beverages from other EEA States and were thus contrary to Article 11 of the EEA Agreement. The Authority also held that the fact that restaurants serving alcoholic beverages were required to hold both a serving and a wholesaling licence if they wanted to import alcoholic beverages themselves constituted a breach of Article 11. In 2002, the Authority raised additional concerns regarding the fact that importers of alcoholic beverages in Norway were faced with a double set of requirements and controls performed both by the Norwegian alcohol supervisory authorities and the Norwegian customs administration.

During this process, the Norwegian Government has made several amendments to its alcohol legislation. First, the level of the annual licence fees has been lowered. Second, restaurants have been granted the right to both import and produce alcohol on the basis of their serving licence alone.

During 2003, these issues were the subject both of several informal and formal discussions and of correspondence between Norway and the Authority. Towards the end of the year, the Norwegian Government tabled a legislative proposal which would result in substantial amendments to the alcohol legislation. The proposal to abolish the current licensing system for wholesalers is a central element of the proposal. The Authority will assess the above mentioned issues once the proposed changes enter into force.

Serving requirements

In 2002, in the so-called *Alcopops*[1] case, the EFTA Court found, *inter alia*, that the Norwegian legislation was in breach of Article 11 of the EEA Agreement when applying more lenient conditions to the serving of beer with an alcohol content of between 2.5% and 4.75% alcohol by volume as compared to other alcoholic beverages with the same alcohol content.

In January 2003, the Authority received a complaint alleging that Norway was infringing the EEA Agreement by applying more restrictive measures regarding licences to serve beverages with an alcohol content above 4.75% alcohol by volume, defined as spirits by the Norwegian alcohol legislation, compared to wine or beer with the same alcoholic strength. It appears that the reasoning of the EFTA Court in the *Alcopops* judgment is equally valid for beverages with alcohol content above 4.75% by volume. The law proposal referred to above addresses this issue by introducing a general categorisation system in the

1. Case E-9/00, *The EFTA Surveillance Authority* v. *Norway* [2002] EFTA Court Report 72.

> The principle of free movement of goods and its effect on alcohol products

One of the fundamental principles of the EEA Agreement is the free movement of goods, which is provided for in Article 11 of the EEA Agreement. Article 11 EEA is to be interpreted as prohibiting all restrictions to the free movement of goods between the EEA States. Alcoholic beverages falling within the product coverage of the EEA Agreement are among the goods protected by these principles.

Licensing systems in EEA States for importers and producers of alcohol constitute a restriction to the free movement of alcoholic beverages from other EEA States. They result in the imposition of additional charges on these beverages, such as intermediary costs, payment of charges and fees for the grant of a licence, and costs arising from the obligation of maintaining storage capacity in a foreign country. Restrictions on the right to free movement of goods can only be allowed if they are justified on the grounds laid down in Article 13 of the EEA Agreement, notably for reasons relating to the protection of human health.

In a number of cases, the EFTA Court and the European Court of Justice have examined the balance to be struck between the principle on the free movement of goods on the one hand and the right of each State to impose restrictions on the other. This assessment is also the essence of the cases that are being considered by the EFTA Surveillance Authority in this area.

alcohol legislation, by which all alcoholic beverages are classified solely on grounds of their alcoholic strength and not on grounds of their organic alcohol base.

Alcohol advertising

The ruling in *Gourmet*[2] prompted Sweden to change its legislation imposing extensive restrictions on advertising of alcohol. In February 2003, the Authority received a complaint regarding similar Norwegian alcohol-adverting restrictions. Replying to a request for information sent to Norway in March 2003, the Norwegian Government informed the Authority that this issue was being assessed in connection with the revision of the alcohol legislation. The legislative proposal referred to above does not, however, contain any changes to the Norwegian legislation regarding alcohol advertising. The Authority will address this issue in 2004.

Alcohol taxation

In July 2003, the Authority received a complaint regarding the intention of the Norwegian Government to change its legislation governing taxation of alcoholic beverages. After 1 January 2004, all spirit-based alcohol beverages will fall within the same tax category. This is in contrast to the previous tax scheme which placed spirit-based beverages with an alcohol content of less than 4.76% alcohol by volume in the same category as beer and wine with the same alcohol strength. The complainant argues that the new taxation scheme is contrary to Article 14 of the EEA Agreement as it discriminates between spirit based *alcopops,* which are mainly produced abroad, and domestically produced beer. The matter will be pursued in 2004. ■

2. Case C-405/98, *Konsumentombudsmannen* v. *Gourmet International Products Aktiebolag* [2001] ECR I-1795.

Internal Market Affairs Directorate

Behind from left to right: Frank Büchel, Ragnhild Behringer, Hallvard Gorseth, Erik A. Mathisen, Eeva Kolehmainen, Paulina Dejmek, Jón Gislason, Anders Flock Bachmann, Ketil Rykhus, Ólafur Valsson, Anne Katrine Flornes, Gunnar Thór Pétursson, Mia Sahlborn.

In front from left to right: Nicola Britta Holsten, Patricia González Gálvez, Andrea Weiß, Erik Jønsson Eidem, Margrét Gunnarsdóttir, Director Jónas Fr. Jónsson, Inger-Lise Thorkildsen, Adinda Batsleer, Einar Hannesson.

Not present: Tuula Nieminen.

EFTA SURVEILLANCE AUTHORITY

>The Authority monitors transport safety

> Managing the Internal Market is a new focal point for the Authority

Along with its general surveillance functions, the EFTA Surveillance Authority performs an increasingly wide range of administrative tasks, which match those carried out by the European Commission within the European Community. Generally speaking, these tasks relate to EEA rules, the proper application of which is not only subject to the general surveillance function, but to more direct control by the Authority. The tasks often imply that the Authority, under procedures presupposing an exchange of information between the EFTA and European Community sides, is to take measures having effect throughout the entire EEA. Management tasks constitute a considerable part of the Authority's work and occupy an increasing proportion of its resources.

Examples of management tasks are:

- handling applications from EFTA States for exemption from or derogation from an EEA act or specific provisions;
- handling information on precautionary or safeguard measures taken by an EFTA State;
- issuing recommendations;
- monitoring the EFTA States' reporting obligations; and
- reviewing certain draft decisions by the EFTA States.

Although the Authority undertakes these kinds of tasks in most fields of activity, they are of particular importance in the sector of free movement of goods, notably in relation to technical regulations, standards, testing and certification, and animal health.[1]

New management tasks for the Authority

The electronic communications package to be incorporated into the EEA Agreement in 2004 foresees a mechanism whereby the Authority will review a large number of decisions taken by the EFTA countries' electronic communications regulatory authorities.

One area within which the Authority has been particularly busy in 2003, is that of transport safety.

1. For further information on some of these tasks, see the Chapters of this Report on food safety, on product safety and on draft technical regulations.

Transport safety

According to some EEA acts governing safety, especially in the maritime sector, EEA States may, on certain conditions and often based upon local circumstances, apply stricter or more moderate safety standards than those prescribed in the legislation. Whenever the EEA States wish to apply such derogations they are obliged to follow specific procedures. The Authority is informed of the planned derogation and assesses its contents as notified by the EFTA State. Where the Authority is not in agreement with the measures taken or proposed by the national authorities, a committee procedure, of which representatives from the EFTA States are members and which is managed by the Authority, is launched in order to reach a final decision on the matter.

During 2003, the Authority processed nine such cases in the maritime sector. One of these was related to Iceland, which applied for derogation from the safety measures laid down in the *Directive on safety rules and standards for passenger ships* (98/18/EC). The remaining eight cases were initiated by Norway and concerned derogations from the *Directive on registration of persons on board passenger ships* (98/41/EC). That Directive provides that EEA States may exempt passenger ships, *inter alia*, from the obligation to communicate the number of persons on board to the shore-based services of the ships' owner. ■

> Product safety

The *General Product Safety Directive* (92/59/EEC) is aimed at ensuring that consumer products placed on the EEA market are safe. The Directive obliges the EEA States to take the measures necessary to enforce the safety requirements for which it provides and to notify any such measures taken. To that effect, the Directive sets up a system for rapid exchange of information (RAPEX) concerning products posing a serious risk to consumers. Any measures or actions taken by the EFTA States are notified to and examined by the EFTA Surveillance Authority.

In addition, certain sector-specific acts oblige the EEA States to restrict or forbid the placing on the market of dangerous products which already bear a CE marking. Any such safeguard measures taken by the EFTA States must be notified to the Authority immediately.

General product safety

The existing General Product Safety Directive is to be repealed by a new *General Product Safety Directive* (2001/95/EC) which will be applicable within the EEA, and form the legal basis for RAPEX notifications from the EFTA States, from 1 March 2004.

Directive 2001/95/EC contains the same obligations and procedures for information exchange on *non-food* products posing a serious risk to consumers as the existing Directive. Consequently, the RAPEX emergency procedure laid down in Article 8 of Directive 92/59/EEC will according to Article 12 of the revised Directive continue to apply. The general safeguard procedure under Article 7 of Directive 92/59/EEC will also continue under Article 11 of the revised Directive. However, the exchange of information provided for by these Articles will take place in the framework of a new Internet-based database.

The emergency procedure

	1999	2000	2001	2002	2003
EFTA notifications *(non-food)*					
Alert	3	3	2	-	-
Non-alert	-	1	-	-	2
Total	**3**	**4**	**2**	**-**	**2**
EC notifications *(non-food)*					
Alert	103	93	76	84	67
Non-alert	14	38	60	64	59
Total	**117**	**131**	**136**	**148**	**126**

Each New Approach act[1] includes a safeguard clause obliging the EEA States to restrict or either forbid the placing on the market and putting into service of dangerous or otherwise non-compliant products, or to have these withdrawn from the market.

As a general rule, the safeguard clause procedure is restricted to products which are covered by New Approach acts, are CE marked, and have been ascertained by an EEA State to present a substantial hazard even if the products are correctly constructed, installed and maintained, and used according to their intended purpose.

An EFTA State must notify the Authority immediately after having invoked a safeguard clause. Thereafter, the Authority enters into consultation with the interested parties, with the aim of establishing whether or not the measures taken under the safeguard clause are justified. ■

> Safeguard measures accepted

In late autumn 2002, Norway notified safeguard measures regarding two different types of remote controls, one of German origin and one of Swedish origin, under the *Radio equipment and telecommunications terminal equipment directive* (1999/5/EC). According to the Norwegian authorities, both of these products failed to satisfy the requirements of the relevant harmonised standards when tested. The Norwegian test results were not disputed by the manufacturers. Having assessed the submitted documentation and consulted the interested parties and the EFTA Telecommunications Equipment Committee, the Authority decided, on 14 May 2003, to consider both measures justified.

1. Through New Approach acts, harmonisation is limited to essential requirements. Only products fulfilling the essential requirements may be placed on the EEA market. If a product conforms to harmonised standards it is presumed to conform to the corresponding essential requirement. However, manufacturers are free to choose any technical solution that provides compliance with the essential requirement.

> Preventing new technical barriers to trade

As one of the main instruments for safeguarding the Internal Market and the free movement of goods, the *Draft Technical Regulations Directive* (98/34/EC), as adapted for the purpose of the EEA Agreement, establishes a notification procedure on draft technical regulations. In 2001, the notification procedure was extended by an amendment (Directive 98/48/EC) to cover draft rules on Information Society services. The procedure aims at providing transparency and to prevent the creation of the new, unjustified barriers to trade which can arise from the adoption of diverging national technical regulations.

Statistics

In 2003, the EFTA Surveillance Authority received notification of 29 draft technical regulations from the EFTA States. Of these, 25 came from Norway, three from Iceland and one from Liechtenstein. In one case, the emergency procedure was invoked, which meant that no standstill period applied. Five of these notifications prompted the Authority to issue comments. The European Commission commented upon 11 of the notifications.

> Good functioning of EEA: New technical rules must be notified

According to the Draft Technical Regulation Procedure, the EFTA States shall notify technical regulations in draft form concerning products and provisions relating to the Information Society services to the Authority. Such a notification generally triggers a three months standstill period during which the notifying EFTA State is obliged to postpone the adoption of the regulation. This period gives the Authority, the European Commission and other EEA States time to examine the regulation in order to establish whether it contains provisions which might create barriers to trade and/or whether it complies with EEA secondary legislation. Where the draft regulation contains provisions which are considered contrary to the EEA Agreement comments will be sent to the notifying EFTA State. Once the draft regulation has been adopted, the EFTA States must communicate the definitive text of the regulation to the Authority.

The Authority received 486 notifications from the EU Member States which were forwarded by the European Commission. None of these led the Authority to send comments in the form of a single coordinated communication. A single coordinated communication is prepared by the Authority in cases where comments are made by the EFTA States in relation to notifications from an EU Member State.

Draft technical regulations

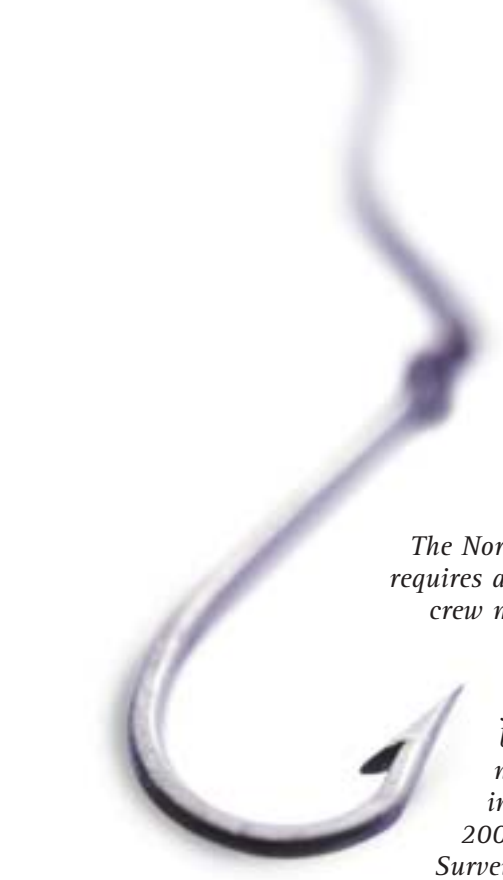
	EFTA notifications	Comments from the Authority	EFTA notifications	Single coordinated communications
1999	18	4	591	2*
2000	19	3	751	0
2001	22	5	530	1
2002	49	4	508	1
2003	29	5	486	0

* Transmitted in 2000.

Infringement cases – referral to court

During 2003, the Authority initiated infringement proceedings against Norway and Liechtenstein for incorrect implementation of the *Draft Technical Regulations Directive,* as amended. The measures chosen for implementing the EEA Acts, an administrative circular and an internal instruction respectively, were not considered by the Authority to be sufficient. Letters of formal notice were sent to the two States in December 2003. The Authority expects the responses of the Governments in March 2004.

Following receipt of a complaint, the Authority brought a case against Norway before the EFTA Court in December 2003. The case concerned the obligation to notify a technical regulation at its draft stage. In 1998, Norway adopted a national regulation regarding type-approval for gaming machines without notifying it to the Authority at its draft stage. Despite having received both a letter of formal notice and a reasoned opinion during 2003, wherein it was concluded that Norway had failed to fulfil its obligation under the *Draft Technical Regulations Directive* as amended, Norway did not rectify the situation. The Authority thus decided to bring the case before the EFTA Court. At the end of 2003, the case was pending before the Court. ■



> Free movement of workers, including fishermen

The Norwegian Fisheries Act[1] *requires at least 50% of the crew members or sharesmen on vessels fishing inside the Norwegian fisheries boundaries to be of Norwegian nationality or resident in Norway. In January 2002, the EFTA Surveillance Authority received a complaint against Norway concerning this provision.*

In July 2003, the Authority sent a letter of formal notice to Norway, concluding that the Norwegian Fisheries Act was in breach of Article 28 of the EEA Agreement and Articles 1 and 4 of Regulation 1612/68 on the free movement of workers.

"Worker" is an EEA concept

It has been established in the case law of the European Court of Justice that the definition of a "worker" is a matter for EEA law. Otherwise, individual states could modify the meaning of the term "worker" and thereby prevent certain categories of persons from benefiting from the rules on free movement. According to EEA law, a "worker" is any person who, for a certain period of time, performs services for and under the direction of another person, in return of which he receives remuneration.

The European Court of Justice has held that "(...) the sole fact that a person is paid a "share" and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker."[2]

The free movement for workers is a fundamental freedom

The freedom of movement for workers entails the abolition of any discrimination, direct or indirect, based on nationality between workers of the EEA States as regards employment, remuneration and other conditions of work and employment. Under Article 1 of Regulation 1612/68, any EEA national, irrespective of his place of residence, has the right to take up an activity as an employed person, and to pursue such activity, within the territory of another EEA State. Article 4 of the same Regulation provides that rules restricting, by number or percentage, the employment of foreign nationals in any undertaking, branch, activity or region, or at a national level, shall not apply to nationals of other EEA States.

The European Court of Justice has held that France breached its obligations under the EC Treaty and Regulation 1612/68 by maintaining national measures according to which a certain proportion of a crew of a ship had to be of French nationality.[3]

Fishery policy and free movement of workers

Although fishery policy as such falls outside the scope of the EEA Agreement, the Authority considers that the rules on free movement apply to EEA workers in the fishery sector. Annexes VIII and XII to the EEA Agreement permit Norway to apply certain restrictions on establishment of non-nationals in fishing operations and ownership by non-nationals of fishing vessels. However, there is no similar provisions deviating from Annex V to the EEA Agreement concerning the free movement of workers.

> Direct discrimination

Direct discrimination entails differentiating between workers by reason of their nationality. For example, requiring that a certain proportion of workers must be of specific nationality amounts to direct discrimination. Rules that make access to employment or the enjoyment of a benefit conditional upon residence are more easily fulfilled by nationals of the country concerned than by non-nationals and can therefore be indirectly discriminatory.

1. Act No. 19 of 17 June 1966 *(Lov 1966-06-17 nr 19 Norges fiskerigrense og om forbud mot at utlendinger driver fiske m.v. innenfor fiskerigrense)*, section 3(2).
2. Case C-3/87 the *Queen* v. *Ministry of Agriculture, fisheries and food, ex parte Agegate Ltd*, [1989] ECR 4459, paragraph 36.
3. Case 167/77 *Commission* V. *French Republic* [1974] ECR 359.

Ongoing Issue

In light of all this, the Authority considers that EEA rules on free movement of workers apply to fishermen on board Norwegian fishing vessels, in Norwegian territorial waters and in the Norwegian Exclusive Economic Zone, insofar as those fishermen are workers in the sense of the EEA law definition of the concept.[4]

The Norwegian Government does not concur with the Authority's analysis and conclusion laid out in the letter of formal notice. The Authority will examine the case further in 2004. ■

4. According to the case law by the European Court of Justice, provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community. Case C-214/94 *Boukhalfa* v. *Bundesrepublik Deutschland* [1996] ECR I-2253, paragraph 15. See also e.g. Case 237/83 *Prodest* v. *Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153 and Case 9/88 *Lopes da Veiga* v. *Staatssecretaris van Justitie* [1989] ECR 2989.

> Entitlement to regional family allowances

Coordination of social security

The *Social Security Regulation* (1408/71/EEC) applies to all family allowances, granted without any individual or discretionary assessment of personal needs and on the basis of a legally defined position. Furthermore, the Regulation applies to regional social security benefits unless they are expressly exempted.

According to the Regulation, a migrant worker shall be entitled to family allowances as if his family members were residing in the State of employment.

> Social Security Regulation (1408/71/EEC)

National social security rules can constitute obstacles to the free movement of workers, for example by basing rights on nationality or residence. The *Social Security Regulation* (1408/71/EEC) makes the right to free movement effective by removing such obstacles.

The Regulation is based on four principles:

- EEA nationals shall be treated equally as regards national social security legislation;
- only one national legislation shall be applicable in order to avoid double social security coverage or no coverage at all. This is normally the legislation of the State of employment;
- acquired social security rights and rights in the course of acquisition shall be maintained even if a person moves to another EEA State; and
- benefits shall be paid wherever the person stays or resides within the EEA.

Migrant workers' social advantages

The *Freedom of Movement of Workers Regulation* (1612/68/EEC) lays down the principle of equal treatment of migrant workers with national workers as regards social advantages. The concept of social advantages is wider than the concept of social security benefits in the Social Security Regulation. Not only is discrimination by reason of nationality prohibited, indirect forms of discrimination, such as a national or regional residence requirement affecting migrant workers more than national workers, are also contrary to the Regulation.

Both Regulations apply only where there is a cross-border element involved. In comparable situations, the European Court of Justice has accepted that migrant workers be treated more favourably than national workers. This should be equally valid in the EEA.

Norway grants a regional supplement to family allowances for children of families residing in the northernmost county of Finnmark or in parts of the neighbouring county of Troms. In 1999, the EFTA Surveillance Authority received a complaint from a frontier worker employed in Finnmark, but residing with her child across the border in Finland. She had been granted family allowances in accordance with the Social Security Regulation, but her application for the regional supplement had been rejected because her child did not reside in Finnmark.

Letters of formal notice sent by the authority

In a letter of formal notice of October 2000, and in a supplementary letter of formal notice of December 2003, the Authority concluded that, according to the Social

Security Regulation, the complainant should be covered by Norwegian social security legislation even if she resided in Finland, and that she was entitled to family allowances, including the regional supplement, as if she was living with her child at her place of work.

In the supplementary letter of formal notice of December 2003, the Authority expanded its reasoning to argue that the regional residence requirement also constituted indirect discrimination against migrant workers contrary to the Freedom of Movement of Workers Regulation. ■

> Free movement of health care services

The European Court of Justice addresses health care services

The question of reimbursement of medical expenses incurred in another EU Member State has been addressed by the European Court of Justice on several occasions over the last years. In three sets of judgments[1] the Court has clarified that, although the management of social security systems lies within the competence of EU Member States, national authorities must respect Community law when exercising these powers. This applies to both medical products and medical activities (including activities exercised in a hospital). The Court has also held that rules which make the reimbursement of medical expenses incurred in another State subject to prior authorisation constitute a barrier to the provision of services, both for insured persons and service providers.[2]

However, the European Court of Justice accepts that the risk of seriously undermining the financial balance of the social security system may, in certain circumstances, constitute an overriding reason in the general interest capable of justifying restrictions such as those mentioned above. Restrictions on the freedom to provide services may also be permitted on grounds of public health. In this respect, the Court has drawn a distinction between hospital and non-hospital services, indicating that, in case of non-hospital services, a system of prior authorisation constitutes an unjustified obstacle to the cross-border provision of services.[3]

Questions to the EFTA States

Provisions of the EEA Agreement and the Surveillance and Court Agreement provide that pertinent decisions of the European Court of Justice shall be relevant in the interpretation of EEA obligations.

Having received several complaints concerning the free movement of health care services in Norway, the EFTA Surveillance Authority initiated a general review of the EFTA States' legislation in this field in spring 2003. The aim is to ascertain whether, in light of the recent developments in the case law described above, national provisions are in compliance with Articles 11 and 36 of the EEA Agreement. In a questionnaire sent to the EFTA States in May 2003, the Authority focused, in particular, on the structure, scope and functioning of any system of prior administrative authorisation for access to health care services. Furthermore, the EFTA States were asked whether there were any agreements between health authorities regarding the treatment of patients coming from other EEA States. They were also asked to provide statistics on the extent of cross-border activity as regards health care services. The Authority expects to publish a report on its findings following this consultation during 2004.

A similar consultation procedure, carried out by the European Commission in 2002, revealed that the interpretation of the jurisprudence of the European Court of Justice differs between the EU Member States. A report prepared by the Commission[4] shows that only a few EU Member States have recognised the right, laid down by the Court, to reimbursement for certain non-hospital services in the absence of prior authorisation. ■

1. The three sets of judgments are:
   - Case C-158/96 *Raymond Kohll* [1998] ECR I-1931, and case C-120/95 *Nicolas Decker* [1998] ECR I-1831;
   - Case C-157/99 *B.S.M. Geraets-Smits and H.T.M. Peerbooms* [2001] I-5473, and case C-157/99 Abdon Vanbraekel [2001] I-5363; and
   - Case C-385/99 *V.G. Müller-Fauré and E.E.M. van Riet* [2003] I-4509.
2. Case C-157/99 *Smits and Peerbooms*, at paragraph 69.
3. Case C-385/99 *Müller-Fauré/van Riet*, at paragraph 93-98.
4. Commission Staff Working Paper, Report on the Application of Internal Market Rules to Health Services, Implementation by the Member States of the Court's Jurisprudence, 28 July 2003, SEC(2003) 900.

> Ensuring labour rights in the EEA

Labour law acts in the EEA Agreement provide important minimum rights for workers. Therefore, their timely implementation by the EFTA States is important.

Annex XVIII to the EEA Agreement comprises three acts that were adopted in order to put into effect a cross-industry framework agreement between the social partners at European level. These framework agreements lay down sets of minimum requirements for labour rights throughout Europe. The EFTA States must ensure that the rights set forth in the acts apply to all workers regardless of whether they are covered by a collective agreement or not.

> The essence of certain labour rights

The main purpose of the *Framework agreement on fixed-term work* (Directive 1999/70/EC), is to improve the quality of fixed-term work. This is done by ensuring the application of the principle of non-discrimination and by establishing a framework to prevent the abuse arising from the use of successive fixed term employment contracts. Similarly, the *Agreement on part-time work* (Directive 97/81/EC) aims at removing discrimination against part-time workers and to improve the quality of part-time work. The *Agreement on parental leave* (Directive 96/34/EC) provides that workers, both men and women, have an individual right to parental leave, connected to the birth or adoption of a child, which enables them to take care of that child for at least three months. The leave may be taken any time until the child has reached a given age of up to eight years (to be defined by EFTA States and/or management and labour).

Deadlines for implementation

It is imperative for the functioning of the EEA Agreement that acts are implemented into national law on time. The implementation deadline for the *Fixed-term work Directive* was 10 July 2001, while the *Part-time work Directive* had to be implemented by 20 January 2000 and the *Parental leave Directive* had to be implemented by 1 July 2000. All Acts permitted the use of one additional year for their implementation to meet specific difficulties or implementation by a collective agreement. Iceland notified the use of this possibility regarding the *Part-time Directive* and Liechtenstein concerning the *Parental Leave Directive*. In spite of having had an extra year available, Iceland failed to implement the *Fixed-term work Directive* and the *Part-time work Directive* on time, and Liechtenstein failed to implement the *Parental Leave Directive*.

Formal action is necessary to ensure implementation

In 2003, the Authority delivered a reasoned opinion against Iceland concerning the *Part-time work Directive* and one against Liechtenstein concerning the *Parental leave Directive*, due to non-implementation. Furthermore, formal infringement proceedings against Iceland were initiated due to non-implementation of the *Fixed-term work Directive*.

In December 2003, the Authority was notified that Iceland had fully implemented the *Fixed-term work Directive*. Likewise, Liechtenstein notified that it had fully implemented the *Parental leave Directive*.

As for the *Part-time work Directive*, at the end of the year, Iceland notified partial implementation of the Directive, referring to the collective agreement concluded by the private sector social partners in November 2002. According to Iceland, this agreement also covers non-unionised private sector workers. The national legislation was, however, not in force in regard to the public sector, although a bill was pending in the Parliament. ■

> Discriminatory rules on survivors' pensions in Norway

The EEA Agreement contains a number of provisions on equal treatment between men and women, including the right to equal pay for equal work. In 2001, the EFTA Surveillance Authority received a complaint against Norway concerning alleged discriminatory rules on survivors' pension found in Section 34(3) of the Public Pension Act.[1]

Norwegian rules concerning the calculation of survivors' pensions

Under Section 34 of the Public Pension Act, widowers and widows, who were born before 1950 and whose spouses became members of the Public Pension Fund before 1 July 2000, receive survivors' pension amounting to, at the most, 39.6% of the deceased spouse's accrued pension base.

According to the contested Section 34(3), widows whose deceased spouses became members of the Public Pension Fund before 1 October 1976, are entitled to full survivors' pensions, irrespective of their current income situation. By contrast, the survivors' pensions of widowers whose spouses became members of the Public Pension Fund before the same date may, in identical situations, be subject to curtailment in accordance with Sections 35 to 36 of the Public Pension Act. In other words, widowers are treated less favourably than widows in the same situation.

The relevant EEA rules have retroactive effect

The *Equal Treatment in Occupational Social Security Schemes Directive*[2] implementing the principle of equal treatment for men and women in occupational social security schemes states that there shall be no discrimination on the basis of sex as regards the calculation of benefits. Furthermore, Article 6(1)(e) prohibits the setting of different conditions for the granting of benefits to workers of one or other gender.[3]

In the wake of the *Barber* judgment and other case law[4] of the European Court of Justice, which dealt with the issue of retroactivity in relation to pensions, the Act amending the *Equal Treatment in Occupational Social Security Schemes Directive* (96/97/EC), was given retroactive effect. In the EFTA States, this means that equal treatment as to survivors' pensions can be claimed retroactively only in relation to the deceased spouse's periods of employment subsequent to the date of entry into force of the EEA Agreement.[5] With regard to payments linked to periods of service prior to that date, EEA law imposes no obligations which would justify a retroactive reduction in the advantages enjoyed by women.

The Authority believes that the Norwegian rules are contrary to the *Equal Treatment in Occupational Social Security Schemes Directive,* and, therefore, initiated formal infringement proceedings against Norway in September 2003. ■

> What does "pay" mean?

Article 69(1) of the EEA Agreement provides that EFTA States must ensure and maintain the application of the principle that men and women should receive equal pay for equal work. Furthermore, it states that "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives from his employer, directly or indirectly, in respect of his employment. This concept covers, inter alia, survivors' pensions.[1]

1. The concept of pay has been given a wide interpretation by the European Court of Justice. It has held that the fact that a survivors' pension, by definition, is not paid to the employee but to the employee's survivor does not hinder it from being covered by the concept of pay. See, e.g. Case C-109/91 *Ten Oever* v. *Stichting Bedrijfspensioenfonds voor de Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879; Case C-200/91 *Coloroll* v. *Russell and Others* [1994] ECR I-4389 and Case C-147/95 *DEI* v. *Efthimios Evrenopoulos* [1997] ECR I-2057.

1. *Lov 1949-07-28 nr. 26 om Statens Pensjonskasse.*
2. Directive 86/378/EEC, as amended by Directive 96/97/EC.
3. Articles 5 and 6(1)(e) of Directive 86/378/EEC, as amended by Directive 96/97/EC.
4. See *inter alia* Case 262/88 *Barber* v. *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 and Case C-200/91 *Coloroll* v. *Russell and Others* [1994] ECR I-4389.
5. 1 January 1994 (1 May 1995 for Liechtenstein).

> Public Procurement: Driving licences and school transportation tenders breach EEA law

In 2003, the EFTA Surveillance Authority examined more than 50 cases relating to public procurement. The Authority sent two reasoned opinions, both of which involved Norway. In both cases Norway accepted that its procedures had not been carried out in accordance with the EEA procurement rules.

Incomplete bid

The first case concerned the Norwegian Road Administration which, in 2001, had awarded a contract for the printing of driving licences to a company which had submitted an incomplete bid. In a letter of formal notice, sent to the Norwegian Government in March 2003, the Authority concluded that this was a breach of the procurement rules. The Norwegian Government initially denied any wrongdoing. It argued that the missing information was of no consequence to the evaluation of the bid. The Authority disagreed and issued a reasoned opinion in the matter in July 2003. It concluded that the Norwegian Road Administration had no discretion to lawfully waive the requirement that all elements of a call for tender must be submitted[1] in a bid. In October 2003, the Norwegian Government and the Norwegian Road Administration accepted the findings of the Authority and acknowledged the infringement.

> Amendments to existing contracts

The European Court of Justice is currently addressing the circumstances in which an amendment to a public supply contract falling within the *Public Supplies Directive* (Directive 93/36/EEC) should be considered "material", thus requiring an additional tender procedure (Case C-50/03 *Simrad*). The Authority has intervened in this case, submitting that material changes to an existing contract should give rise to a new procedure when these are considered substantial. The Authority further argued that it should be the implications of such changes for the totality of a contract, rather than the extent of the changes themselves, that should be determinant when deciding whether these should be considered "material".

Misleading contract notice

The second infringement proceeding concerned an award procedure initiated in 2002 by Buskerud County Municipality for the purchase of transportation services for children with special needs. The contract notice, published in the Official Journal of the European Union, indicated that the contract would be reserved for bus or coach operators. The tender documents and notices published in the local press indicated, however, that others, e.g. taxi operators were also eligible to tender for the contract. The Authority took the view that the tender notice was misleading and discriminated against potential tenderers who should be entitled to rely on the accuracy of the tender notice and that did not have access to local press or the documents related to the tender. The Authority issued a letter of formal notice concerning the case in February 2003. The Norwegian Government, while accepting the facts of the case, considered that the omission did not amount to a breach of the principle of non-discrimination or any provision of the *Service Directive* (92/50/EEC, as amended by 97/52/EC). In July 2003, the Authority issued a reasoned opinion in the matter. It stated that the obligation on contracting authorities to publish a full and accurate tender notice was a key element of the Single Market rules in public procurement permitting economic operators from all EEA States to be fully informed about public contracts all over the EEA. The Authority concluded that, by failing to provide correct information in the contract notice, the contracting authority had failed to respect the obligation to ensure that there is no discrimination between bidders, provided for in Article 3(2) of the Act.

In December 2003, following a dialogue with the Authority, the Norwegian Government accepted the Authority's conclusions in the matter and thus avoided a referral to the EFTA Court. ■

1. As a result, Article 3(1) and Article 3(2) of the *Service Directive* (92/50/EEC, as amended by 97/52/EC) were infringed.

> Allocation of aquaculture licences

In 1999 and 2002, the Authority received two complaints against Norway concerning the allocation of licences for the cultivation of trout and salmon in the northern regions of Norway.

The main legal issue

When deciding on allocation priorities among equally qualified applicants, the Norwegian Aquaculture Act[1] provides that particular importance should be given to the fact that "the ownership interest of the fish farm has a local connection to the extent possible". According to administrative practice, this "local ownership" criterion in both the Act and the Regulations specifying the conditions for the allocation round in 1999, was met if the applicant was registered in the region where the licence was to be allocated or if it was partly owned by locals. It was the degree of local ownership, for example the percentage of shares held by local residents in the applying company, which was decisive for the allocation of licences.

Actions in the first complaint

This situation prompted the Authority to initiate infringement proceedings against Norway in 2001. In its reasoned opinion, the Authority concluded that Norway was in breach of the rules on freedom of establishment and free movement of capital prescribed by the EEA Agreement.

Rectifying the breach

Norway undertook to amend the Aquaculture Act and, as an interim measure, to ensure that the administrative practice in dispute would be discontinued. In order to achieve its objectives related to regional development, weight should be given to "the applicant's existing or planned business activities in the region, including how activities will be integrated with other business activities through, for example, co-operation with other operators" in future allocation procedures. While accepting regional development considerations, within the limits of EEA law, the Authority expressed concerns about the vague wording of the new provision, entailing a risk of discrimination of foreign competitors.

The second complaint

The application by the Norwegian authorities of the new criterion when allocating licences in 2002 triggered a second complaint. In this round, the Norwegian authorities had given preference to applicants with a 'local link'. This included, *inter alia*, considerations of 'local ownership' in line with previous practice, or the applicant's commitments to local employment or purchase of local goods and services. The Authority concluded that this administrative practice constituted various breaches of the principles of free movement guaranteed by the EEA Agreement and started infringement proceedings against Norway in 2003.

Although Norway has taken measures to rectify the breaches of EEA law in both complaint cases, the Authority will continue to monitor the amendment of the Norwegian Aquaculture Act in 2004. ■

> The concept of discrimination

The EEA Agreement does not forbid only overt discrimination on grounds of nationality. It covers all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. The EFTA Court and the European Court of Justice have consistently held that national rules which draw a distinction on the basis of residence are liable to operate mainly to the detriment of nationals or companies of other EEA States, as non-residents are, in the majority of cases, foreigners.

1. Act No. 68 of 14 June 1985 on the breeding of fish, shellfish and others.

> Evolution of financial services and capital markets

The Internal Market for financial services, which allows for cross-border provision of financial services, is a key priority for the EEA, as it is considered to be essential for the development of a prosperous European economy. The sector has been high on the legislative agenda within the European Union following the European Commission's Financial Services Action Plan. The EFTA Surveillance Authority has emphasised this focus by initiating a general review of the financial sector.

In 2001, the Authority's services initiated a general, horizontal review of the legislation in the financial sector in Norway. Corresponding reviews were initiated in Liechtenstein in 2002 and in Iceland in 2003. Initially, the Authority identified issues and raised some questions regarding more than twenty issues in the Norwegian legislation and between five and 10 issues in the Liechtenstein and Icelandic legislation. Following explanations and, in some cases, legislative amendments, only a few issues are still outstanding. There is an on-going dialogue between the Authority and the EFTA States concerning these matters.

> The right of establishment Residence requirement for board members of Liechtenstein banks

One of the basic principles of EEA law is the principle of non-discrimination with regard to nationality. It is established case law that a residence requirement can be considered to constitute indirectly discrimination, since a State's nationals are more likely to be resident in its territory than are non-nationals. The Authority has identified a provision of this nature in the Liechtenstein Banking Act. According to the Liechtenstein rule, at least one member of the management board and of the executive management of a bank must be resident in Liechtenstein. It is the Authority's opinion that this is a restriction to the freedom of establishment contrary to Article 31 of the EEA Agreement. A letter of formal notice was sent to Liechtenstein in July 2003. Since Liechtenstein maintained its view that the provision was compatible with EEA law, the Authority delivered a reasoned opinion in the matter in December 2003. The Liechtenstein reply was still outstanding at the end of the reporting period.

Ownership restrictions

In October 2001, the Authority delivered a reasoned opinion to Norway with regard to the so-called 10%-rule contained in its national legislation concerning financial institutions (including insurance companies). According to the Norwegian rules, no shareholder could, without an explicit exemption from the Ministry of Finance, own more than 10% of the shares in a financial institution. It was the Authority's opinion that this was an unjustified restriction on the free movement of capital. The Norwegian Government has now abolished and replaced it by an authorisation procedure, similar to that in place in several EU Member States. The legislative amendments entered into force on 1 January 2004.

Similar rules restricting ownership and voting rights have also been identified in the Norwegian legislation concerning ownership in stock exchanges, clearing houses and securities depositories. A letter of formal notice was sent to Norway concerning these matters in July 2003.

Life insurance contracts

Another pending issue concerns the Norwegian requirement of up-front payment of completion costs related to life insurance contracts. According to the Norwegian rules, costs which accrue when a life insurance contract is entered into must be paid by the policyholder separately and no later than the first premium payment. The dual aim behind that requirement is to promote transparency with regard to the level of completion costs to be charged, and to facilitate any subsequent changes by consumers to insurance suppliers that operate with more favourable terms. The latter is said to promote competition in the market. In July 2003, the Authority sent a reasoned opinion to Norway, in which it took the view that this provision infringed Article 28 of the *Third Life Assurance Directive* (92/96/EC). The objective of that provision is to give consumers access to the widest possible range of insurance products available in the EEA in order for the consumers to choose the product which is best suited to their needs. The Norwegian requirement of up-front payment of completion costs excludes the availability of insurance products where the completion costs are distributed over a period of time. It is, therefore, the

Authority's view that the provision constitutes a restriction on the free provision of insurance services. Such national restrictions can only be justified if they pursue legitimate interests and are objectively necessary and proportionate thereto. The Authority considers that the aims behind the disputed Norwegian provision can be fulfilled by less restrictive measures, such as ensuring that consumers receive sufficient information about insurance products in general and, in particular, the relative economic consequences of paying the completion cost up-front or over a longer period of time. It is also the Authority's view that competition in the market should be ensured by providing market access to the widest possible range of insurance products available in the EEA. The Authority received a reply from Norway to the reasoned opinion in December 2003, in which it was maintained that the provision did not conflict with EEA law. Following that reply, the Authority will now consider whether to bring the matter before the EFTA Court. ■

> Agricultural land and free movement of capital

The liberalisation of capital movements is an important step towards a completed EEA Internal Market. Consequently, EEA States may neither restrict nor render cross-border capital movements more costly or burdensome than domestic financial transactions. Capital movements include, *inter alia*, currency transactions, trading and investment in shares and other securities and investment in immovable property. The European Court of Justice has on several recent occasions dealt with cases concerning restrictions to the free movement of capital. Several of these cases concerned restrictions to acquisition of land, including prior authorisation procedures.

The EFTA Surveillance Authority has also examined the EFTA States' land legislation. This assessment stemmed in part from complaints received with regard to all three States. As regards Iceland, a letter of formal notice was issued in 2001, in which the Authority questioned the proportionality of a double authorisation procedure and the requirement of two years prior agricultural practise in Iceland as a condition of entitlement to acquisition of agricultural land. Amendments to the Icelandic legislation were expected at the end of the reporting period.

The Authority has been involved in a dialogue with the Norwegian authorities with regard to the land legislation in Norway since 2001. The Authority has also received several complaints against Norway concerning different aspects of this legislation. The main issue under investigation is the obligation for the acquirer to reside on the acquired land. A new Concession Act was adopted by the Norwegian Parliament in November 2003. At the end of the reporting period, the Authority was examining this new legislation.

As with Iceland, Liechtenstein land legislation contains a general authorisation requirement. The Authority started an examination of this legislation in 2001. In autumn 2003, the Authority also received a complaint concerning the Liechtenstein Land Act which it is currently addressing. ■

> EEA and agricultural land

In September 2003, an important judgment involving Liechtenstein was delivered by the European Court of Justice. The dispute in the *Ospelt case*[1] arose from the attempted transfer of ownership in Austrian agricultural and forestry land by a Liechtenstein national to a Liechtenstein Foundation. In this case, the European Court of Justice has provided direction as to the limits that an EEA State may impose on such transactions. The Court repeated that measures such as those in dispute, which entailed, by their very purpose, a restriction on the free movement of capital, may, nevertheless, be permitted provided that they pursue an objective in the public interest in a non-discriminatory way, by means that are appropriate and proportionate. Such measures included preservation of agricultural communities, maintaining a system of land ownership that permits development of viable farms and the sympathetic management of green spaces, and encouragement of reasonable use of available land. The European Court of Justice concluded that prior authorisation procedures for acquisition of agricultural land were not necessarily precluded. However, refusal of an application for prior authorisation in every case in which the acquirer did not himself reside on the land and did not farm it was precluded.

1. Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, judgment of 23 September 2003, not yet published.

> National tax rules must be in compliance with EEA law

During 2003, the Authority examined a number of cases concerning taxation. The cases concern a range of taxation issues, including pension contributions, lottery prizes and depreciation principles.[1]

Pension contributions

An important issue regarding pensions concerns whether an EEA State may grant a fiscal advantage, in the form of deduction of premiums, which varies depending on whether the pension insurance at issue is taken out with assurance companies established in that State or outside it. Such a rule has been identified in the Norwegian legislation and is under examination by the Authority.

That issue was considered by the European Court of Justice in case C-422/01 *Försäkringsaktiebolaget Skandia (publ), Ole Ramstedt* v. *Riksskatteverket*.[2] This case concerned Swedish provisions which granted insurance policy holders a right to deduct pension premiums from their tax liability provided that the insurance company was established in Sweden. Premiums paid to foreign-established insurance companies were subject to less favourable deduction rules. Agreeing with the position adopted by the Authority, the Court stated that the Swedish provisions constituted a restriction on the freedom to provide services since such rules were liable both to dissuade Swedish employers from taking out occupational pension insurances with institutions established in other Member States and to dissuade those institutions from offering their services on the Swedish market. The Court further held that the restriction could not be justified by the need to ensure fiscal cohesion and effective fiscal controls. Neither the need to preserve the tax base, nor the need to ensure competitive neutrality in the market could serve to uphold the difference in treatment. The judgment must be assumed to have consequences for the EFTA States that have similar provisions in their national tax legislations.

Lottery prizes

Until recently, only prizes won in Norwegian lotteries could be tax exempted under Norwegian tax law. These rules have been under examination by the Authority since 1999. A reasoned opinion was delivered in the matter in August 2002. In autumn 2003, the Norwegian legislation was amended. As a result of this amendment, prizes won in lotteries in other EEA States will now be exempted from tax to the same extent as prizes won in Norwegian lotteries. The amendment entered into force on 1 January 2004.

1. A case concerning Icelandic air passenger taxes is discussed on page 42.
2. Case C-422/01 *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt* v. *Riksskatteverket* [2003] ECR I-6817.

Administration

Behind from left to right:
Kåre Antonsen,
Torbjørn Strand Rødvik,
Jenny Davidsdóttir,
Anne Valkvae.

In front from left to right:
Claudia Candeago,
Jurg Malm Jacobsen,
Anne Günther.

Not present:
Director Thomas Langeland.

EFTA SURVEILLANCE AUTHORITY

A corresponding Icelandic rule was amended with effect as of 1 January 2003.

A similar issue in Swedish tax law was addressed by the European Court of Justice in Case C-42/02 *Diana Elisabeth Lindman*.[3] The Authority intervened in this case. The European Court of Justice concluded that where foreign lottery prices were taxed differently and at a disadvantage to national lottery prizes, the fact that national gaming providers were subject to tax as organisers of gambling did not rid the relevant national law of its manifestly discriminatory character. Where States seek to justify such discriminatory national provisions their claims must be accompanied by an analysis of the appropriateness of the restrictive measure adopted by the State.

Contributions to charities

Liechtenstein and Norway have tax rules that limit the right to deduct donations to charitable/non-profit organisations from taxable income to cases in which the recipient organisations have their seat in Liechtenstein/Switzerland and Norway respectively. The Authority considers these rules to be indirectly discriminatory against migrant workers and an obstacle to the free movement of capital. This is because the rules are liable to discourage donations to entities that are established in another EEA State. As a result, letters of formal notice were sent to Liechtenstein and Norway in December 2003.

> Tax rules and the EEA: A question of consistency of the Agreement

The tax systems of the EFTA States are not, as a general rule, covered by the EEA Agreement. It is within the national competence of the EFTA States to establish levels of taxation and related procedural provisions. The EFTA States must, however, exercise their taxation power consistently with EEA law. In other words, taxes may not be levied so that they create a discriminatory effect contrary to the four fundamental freedoms of EEA law or have a negative effect on the application of the EEA rules on state aid. National taxation rules are, typically, based on the fiscal principle of territoriality. The rules, therefore, often distinguish between resident and non-resident tax payers. The fundamental freedoms of EEA law may, nevertheless, require that residents and non-residents that are subject to tax and are in objectively comparable situations be treated equally for tax purposes. The European Court of Justice has addressed an increasing number of cases related to tax issues in recent years. The EFTA Surveillance Authority has also received increasing numbers of complaints.

> Taxation and the state aid rules

The exercise of taxation power must also be consistent with the EEA rules on state aid. Cases and problems concerning state aid and taxation are presented in the state aid chapter of this Report.

Dividends

In the course of 2003, the Authority received two complaints with regard to the Norwegian rules on taxation of dividends. According to the Norwegian rules, the tax due from a Norwegian parent company is calculated differently depending on whether the subsidiary that pays out the dividends is located in Norway or abroad. These cases were still under examination at the end of the reporting period.

Deduction of "stand-by" costs and depreciation

Norwegian legislation concerning taxation of service providers who are established in other EEA States is currently being examined by the Authority. Based on, *inter alia*, the principles laid down in the *Schumacker*[4] judgment, the Authority is assessing whether the national taxation rules regarding calculation of deductible costs and the rules on depreciation of equipment are consistent with EEA law. This question is being examined particularly as regards operators of foreign-registered vessels providing services in Norwegian waters, who are denied deductions of so-called "stand-by" costs (non-operating costs) incurred in periods when their vessels are at quay awaiting new orders.

Car taxes

The Authority has, in recent years, received a number of complaints regarding taxation of cars. These relate in particular to tax levied on the permanent or temporary import of second hand vehicles into EEA States. The Authority is presently examining the national legislation of the EFTA States from two angles; one in light of Article 14 of the EEA Agreement, which prohibits discriminatory internal taxation, and the other under the EEA Agreement's provisions governing free movement of persons and services. ■

3. Case C-42/02 *Diana Elisabeth Lindman*, judgment of 13 November 2003, not yet published.
4. Case C-279/93 *Schumacker* [1995] ECR I-225.

> The EFTA Court Decision on Icelandic passenger taxes

Both the EFTA Court and the European Court of Justice have had occasion to confirm that, as a general rule, the tax systems of EEA States are not covered by the EEA Agreement. However, the EEA States must exercise their taxation power consistently with EEA law.[1] This view was emphasised by the EFTA Court in a decision of 12 December 2003 in an action by the Authority against Iceland.[2] This case concerned the imposition by the Icelandic authorities on international air passengers of a passenger tax that was substantially higher than that imposed on passengers on domestic flights.

In a decision supporting the position adopted by the Authority, the EFTA Court recalled that a measure that is liable to prohibit or otherwise impede the provision of services between EEA States when compared to the provision of services purely within one EEA State constitutes a restriction contrary to Article 36 of the EEA Agreement. It further repeated that Article 36 of the EEA Agreement and the *Regulation on access by Community air carriers to intra-Community air routes* (Council Regulation (EEC) No 2408/92) aimed at securing the freedom to provide services within the Single Market envisaged by the EEA Agreement.

Rejecting Iceland's claim that domestic and international flights cannot be compared, the Court stated that comparability within the context of the freedom to provide services does not call for a market definition as developed in competition matters. Moreover, factors such as geographic distance do not affect the nature of the services.

The EFTA Court concluded that the fact that the tax levied per passenger on international flights was more than seven times higher than the tax levied per passenger on domestic flights clearly constituted a restriction on the freedom to provide services. Examining the possible existence of a justification for the tax, the Court recalled that, in Iceland's own submissions, the purpose of the contested legislation was to secure a special source of revenue for construction and maintenance of airports and airport facilities for air services in Iceland. Furthermore, Iceland failed to demonstrate that the differentiated air passenger tax was a necessary means to achieve public interest goals.

The EFTA Court finally highlighted the fact that, while either the *Regulation on access by Community air carriers to intra-Community air routes* (Council Regulation (EEC) No 2408/92) or the EEA state aid rules may have permitted the system in dispute, they were both immaterial in the present case given that no application had been made by Iceland under either provision. ■

1. See, for example, Case E-6/98 *The Kingdom of Norway* v. *The EFTA Surveillance Authority* [1999] EFTA Court Report 74, paragraph 34; Case C-279/93 *Finanzamt Köln - Altstadt* v. *Roland Schumacker* [1995] ECR I-225, paragraph 21.
2. Case E-1/03 *EFTA Surveillance Authority* v. *The Republic of Iceland*, 12 December 2003, not yet published.

> Audiovisual services: Permissible restrictions of cross-border broadcasts to protect minors

The protection of minors from harmful TV content is an ongoing general concern and was of prominent importance for the EFTA Surveillance Authority in 2003. In July, Norway notified the Authority of a ban it had imposed on the retransmission of certain TV programmes with adult content originating from Sweden. The Authority concluded in October that, in the present case, the measures notified by Norway were compatible with EEA law.

Norwegian ban on certain cross-border TV broadcasts with adult content held compatible with EEA law

The *Television without Frontiers Directive* (the *TVwF directive*)[1] is the cornerstone of the regulatory framework on audiovisual services within the EEA. The Act requires the EEA States to ensure freedom of reception and not to restrict retransmission on their territory of television broadcasts emanating from other EEA States. The Act further introduces the principle of home state control, *i.e.* broadcasters must comply with the laws of the EEA State in which they are established.

Article 2a(2) of the *TVwF Directive* provides for an exception to these principles, however, where a television broadcast from another EEA State "might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence." The alleged violation must be manifest, serious and grave. Several other conditions must also be fulfilled before any such derogating measures may be taken by the receiving state. The Act requires the Authority to evaluate the compatibility with EEA law of measures taken by an EFTA State under this safeguard provision.

On 25 June 2003, the Norwegian Mass Media Authority *("Statens medieforvaltning")* decided to prohibit retransmission of pornographic programmes on the Swedish television channels Canal+ Gul, Canal+ Blå and TV1000 in Norwegian digital cable TV networks. These programmes were judged to be in contravention of Section 204 of the General Civil Penal Code. Norway notified the transmitting State, Sweden, and the Authority of the decision taken by the Mass Media Authority in July 2003. Consultations held between the parties prior to the Decision had not resulted in an amicable settlement.

In its Decision of 8 October 2003, the Authority concluded that the measures taken by Norway were compatible with EEA law since they did not discriminate on grounds of nationality, were proportionate to the objective of protecting minors and were, although limited in their effectiveness, not unsuitable for the purpose of achieving the desired aim.

The Authority acknowledged that an EEA State disposes of a wide, although not unfettered, discretion to restrict broadcast on its territory of programmes that collide with its national moral standards and that might thereby seriously impair the physical, mental or moral development of minors. It concluded that the programmes prohibited by Norway did not fall outside the application of Article 22(1) of the Directive and that the prohibition had, therefore, to be deemed, in the present case, to be within the discretion that Norway enjoyed in this regard.

Furthermore, the Authority accepted in principle that an EEA State could lay down in abstract terms, in the present case in the Penal Code, which types of content it deemed to have detrimental effect on the development of minors, as long as the programmes prohibited thereby fell within Article 22(1) of the Directive. ■

1. Directive 89/552/EEC as amended by Directive 97/36/EC.

Chapter 3
Competition

2003: preparing for change

2003 saw the Authority active on three main fronts in the field of competition:

- preparing for a modified EEA competition regime to come into effect in 2004;
- working on its high priority individual competition cases; and
- continued involvement in the European Commission's handling of mixed cases under the EEA competition rules.

The Authority's caseload in the field of competition rose slightly in 2003. The majority of its own cases continue to concern complaints relating to markets in Norway. In 2003, the Authority continued to deploy its strong powers of investigation, as in its inspections of Norwegian undertakings involved in the markets for deep-sea maritime tanker services. It also completed its case concerning the so-called film rental agreements in Norway.

The resources of the Authority's Competition & State Aid Directorate were also focused on the in-depth examination of a number of other complex high priority competition cases involving companies active in the EFTA States. Several of these cases remain pending at the end of the reporting period. Finally the Authority paid specific attention to the electronic communications sector in the EFTA States due to a number of important developments in that field.

Prospects for 2004 include the need to develop a more pro-active approach to the detection and prosecution of infringements of the EEA competition rules. This action will, in part, be based on the benefits and stronger powers which will become available to the Authority when the modified competition regime comes into effect in the EEA.

> A modified EEA competition regime will come into effect in 2004

The EEA competition rules have undergone a number of changes since 1994 and continue to evolve to reflect developments in Community legislation. They will change again in 2004 as a result of the new provisions that have been adopted on the EU side prior to the enlargement of the European Union. In 2003, a high proportion of resources were dedicated to the preparation of the modified EEA competition regime that will come into effect in 2004.

Since 1994, the EEA competition rules have extended to the entire European Economic Area. These include:

- a prohibition on agreements or practices that distort or restrict competition (Article 53 of the EEA Agreement);
- a prohibition on the abuse of a dominant position by market players (Article 54 EEA);
- the requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- restrictions on certain State measures that may result in the infringement of Articles 53 and/or 54 EEA (Article 59 EEA).

The above provisions mirror Articles 81 and 82 of the EC Treaty, the *EC Merger Regulation* and Article 86 EC respectively. In 2003, the Authority took part in further discussions on the two major reform projects initiated by the European Commission, namely the modernisation of the rules implementing Articles 81 and 82 of the EC Treaty and the review of the *EC Merger Regulation*, both of which are to apply in the EU from May 2004. As the new rules must be extended to the EEA legal framework in a timely manner, in 2003 the Authority has focused on the impact their transposition will have on the proper functioning of the EEA Agreement. ■

> Modernisation of the EC/EEA competition rules

EC Council Regulation 1/2003 was adopted in December 2002. In 2003, the European Commission launched consultations on what is referred to as the "modernisation package" concerning the rules implementing Articles 81 and 82 of the EC Treaty.

The modernisation package, to be finalised and adopted by the European Commission prior to the application of Regulation 1/2003 from 1 May 2004, consists of proposals for an Implementing Regulation and six explanatory notices dealing with the following aspects of the new regime:

- the handling of complaints;
- co-operation within the EU network of competition authorities;
- informal guidance that can be sought from the Commission;
- the effect on trade criterion;
- the application of Article 81(3) EC; and
- co-operation between the Commission and national courts of the EU Member States.

The Authority was involved in numerous aspects of this reform process in 2003, including discussions with the EFTA States concerning the need for adaptations to the EEA Agreement and to the Surveillance and Court Agreement.

The Authority is intent on securing a clear legal framework for the proper and consistent functioning of the modernisation reform in the European Economic Area.

Another objective is to maintain high level co-operation and the necessary exchange of information with the Commission in all cases that affect markets in both EFTA States and EU Member States.

Under the EEA legal framework, adjustments to existing EEA acts are required to reflect the changes to the EU rules and extend these to the application of Articles 53 and 54 of the EEA Agreement as relevant:

- An EEA Joint Committee Decision must incorporate Regulation 1/2003 into the EEA Agreement. The decision, which will amend Annex XIV and Protocols 21 and 23 to the EEA Agreement, remained under discussion in 2003 but should be adopted by the Contracting Parties to the EEA Agreement in 2004.
- Protocol 4 to the Surveillance and Court Agreement, which contains the procedural rules relevant to the Authority when applying Articles 53 and 54 EEA, must be changed to reflect Regulation 1/2003 and the Implementing Regulation.
- The Authority must also, in due course, adopt notices similar to those issued by the Commission.

Once incorporated into the EEA legal framework, the modernisation provisions will bring about important changes in the EFTA pillar. The Authority will continue to have an important part to play in the application of the EEA competition rules. This is so even though, like the European Commission, it will no longer receive notifications concerning the application of Articles 53 or 54 EEA. The Authority will rely increasingly on complaints and own initiative investigations to ensure the correct application of EEA competition provisions in the EFTA States.

In the EFTA States, the Authority will have new enforcement powers equivalent to those of the Commission and so will be able to:

- issue decisions finding that an agreement or practice does not infringe Articles 53 or 54 EEA;
- close proceedings subject to commitments assumed by undertakings and binding on them;
- impose structural remedies to deal with competition concerns;
- enjoy increased powers while on inspections; and
- impose higher fines when procedural rules have not been complied with. ■

Competition & State Aid Directorate

Behind from left to right:
Hrafnkell Óskarsson, Kjersti Bjerkebo, Dessy Choumelova, Per Kristian Bryng, Tormod Sverre Johansen, Cécile Odello, Annette Kliemann, Claus Koren, Diane Tanenbaum, Maria J. Segura Catalán.

In front from left to right:
Rolf-Egil Tønnessen, Director Amund Utne, Anny Tubbs.

Not present:
Jørgen Lønø, Beatrice Dankertsen and Espen Bakken.

EFTA SURVEILLANCE AUTHORITY

> Review of the EC/EEA merger control rules

Work on reviewing the *EC Merger Regulation* also continued in 2003. Political agreement on a new text was reached at EU level in November 2003. Discussions on the incorporation of the new Regulation (Council Regulation (EC) No. 139/2004) into the EEA Agreement were initiated shortly thereafter and must continue as a matter of priority in 2004.

The Authority also took part in Advisory Committee consultations following which the Commission adopted guidelines on the appraisal of horisontal mergers. ■

> The competition rules of the EEA Agreement

The application of the EEA competition rules contributes to upholding the Single Market objectives of the EEA Agreement. However whereas most of the Authority's activities involve dealings with the EFTA States, the competition rules contained in Articles 53 to 58 and 60 of the EEA Agreement concern individual economic operators.

The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty and prohibit, among other things, restrictive practices between businesses and abuses of dominant positions. The EC merger control rules extend to the entire European Economic Area through the application of the EEA Agreement. There is also scope for action in cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EFTA States.

Together the Authority and the European Commission apply the EEA competition rules to enforce a level playing field for the commercial activities of companies present in the European Economic Area, a territory currently covering 18 States and soon 28 States, i.e. an enlarged Internal Market of some 455 million consumers. The two authorities' powers to apply these rules to territories extending beyond single EEA States' national boundaries are vital for combating illegal behaviour by companies with increasingly geographically widespread economic activities.

Article 58 EEA requires that the Authority and the European Commission co-operate, in accordance with Protocols 23 and 24 EEA, to develop and maintain uniform surveillance throughout the European Economic Area in the field of competition and to promote homogeneous implementation, application and interpretation of the provisions of the EEA Agreement.

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

The EEA Agreement is a "dynamic" agreement. Its Annexes and Protocols have in particular been adapted over time to incorporate Community acquis in the field of competition. The decision to incorporate a new act is taken by the EEA Joint Committee. Secondary acts relevant to competition are listed in Annex XIV to the EEA Agreement. The Protocols to the EEA Agreement, in particular Protocols 21 to 25, provide further rules for the application of the EEA Agreement in the field of competition.

Non-binding acts in the field of competition, such as guidelines and notices, are adopted by decision of the EFTA Surveillance Authority for application to the EFTA pillar.

The Authority's website provides a comprehensive overview of and links to applicable legal acts in the field of competition, together with further information on the Authority's formal comments at various stages of the reform process, see: www.eftasurv.int/fieldsofwork/fieldcompetition/

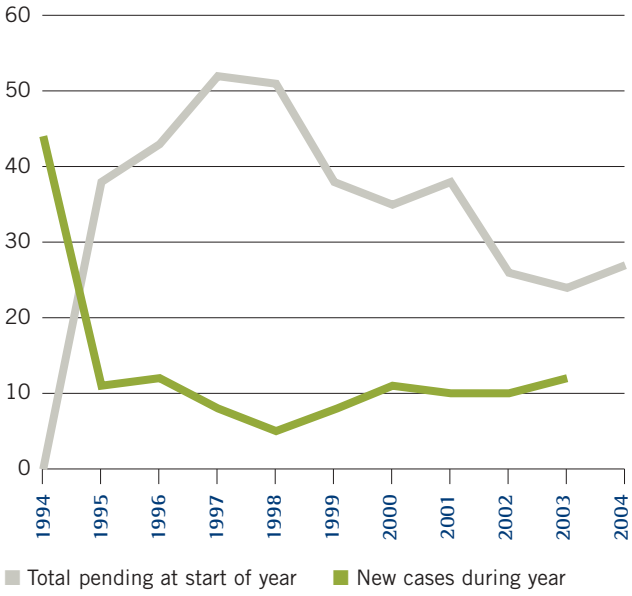
> The Authority's caseload rose slightly in 2003

There were 24 competition cases, concerning the activities of market players in the EFTA States, pending before the Authority at the start of 2003. During the reporting period, the Authority opened 12 new cases concerning the application of the EEA competition rules to undertakings, as well as three cases based on the potential application of State measures in contravention of the EEA competition rules. Over the same period nine cases were closed.

The number of own cases pending at the end of 2003 stood at 27. These figures represent a slight rise in the number of the Authority's own cases from 2003.

Overall, the number of new cases opened by the Authority has remained broadly constant since 1994 (see graph covering cases from 1994 to date, excluding those concerning Austria, Finland or Sweden and other cases transferred to the European Commission following the accession of these States to the EU).

Competition cases handled by the Authority 1994-2003

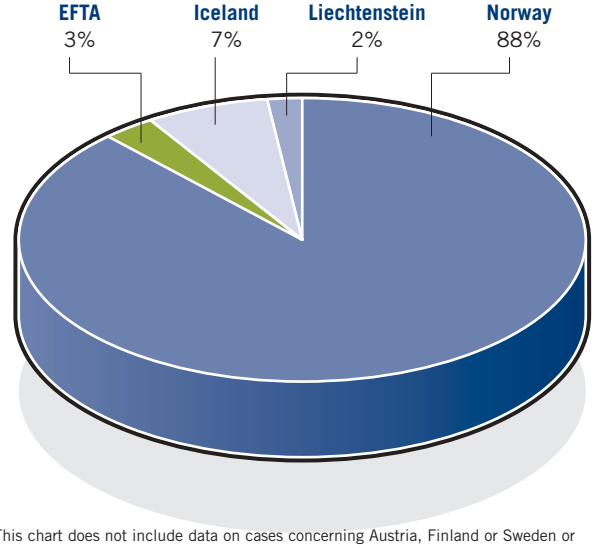


> The majority of cases concern market conditions in Norway

The Authority's caseload continues primarily to involve undertakings active in Norway. Of the 21 cases open under Art 53 and 54 EEA at the end of 2003, 16 cases (excluding the Authority's sector inquiries, which cover all three EFTA States) relate to Norway.

This spread is very much in line with the structure of the Authority's caseload over the last nine years, as illustrated by the figure.

The Authority's Article 53/54 EEA cases 1994-2003



This chart does not include data on cases concerning Austria, Finland or Sweden or other cases transferred to the European Commission following the accession of these States to the EU.

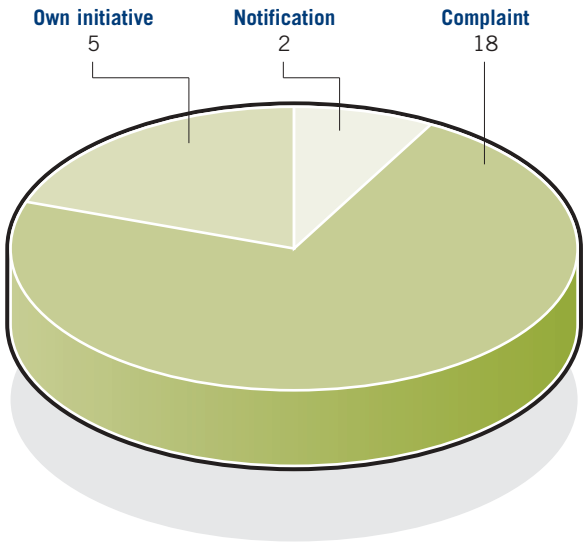
> Complaints constitute a major source of cases

Continuing the trend of the last few years the majority of cases originate from complaints lodged with the Authority.

While the removal, as from 2000, of the requirement to notify vertical agreements had a direct impact on the number of notifications received, the forthcoming modernisation package will do away with notifications in all cases, with the exception of merger cases. The gradual end to notifications, anticipated somewhat in 2003, increases the need to facilitate the instigation of antitrust cases through complaints (formal and informal), leniency programmes and the Authority's own initiative.

The Authority's tasks in 2003 included the need to raise and maintain awareness within the business and legal communities of the EFTA States of the EEA competition rules and procedures. Likewise the successful deployment of the Authority's resources in own-initiative cases remains dependent on the ability to detect and gather sufficient evidence concerning competition cases under the EEA Agreement.

Origin of pending cases end 2003



> Strong powers of investigation are essential

The investigative phase of a case, especially an own-initiative case, is often resource-intensive given the complexity of the underlying issues. Strong powers of investigation are essential in this context. The EEA Agreement provides for extensive liaison and assistance between the Authority and the European Commission in the investigation of competition cases.

On-the-spot inspections can be carried out by both authorities under the EEA competition rules. Targets are usually private undertakings. An inspection can be either announced or unannounced (a so-called "dawn raid").

Neither format implies that a company is guilty of anti-competitive behaviour: an inspection is a preliminary fact-finding step used where relevant information cannot easily be obtained by other means.

Information gathered by the Authority in past cases has played a key role in the successful application of the EEA competition rules combatting cartels.

> The Authority carries out inspections in the EFTA States

> The Steel Tubes case

The Steel Tubes case[1] involves consideration by the Court of First Instance of the EEA competition rules in a case where inspections were carried out in accordance with the provisions of the EEA Agreement.

In 1994, the Authority investigated possible anti-competitive practices in the market for carbon-steel tubes used for drilling and transporting operations in the Norwegian offshore industry. As the undertakings involved were established in several EU Member States, the Authority asked the European Commission to carry out inspections at their premises. The Commission did so relying on the competition rules both of the EEA Agreement and the EC Treaty.

The examination by the Authority of the materials forwarded by the European Commission revealed that the companies' practices had a significant effect on trade within the EU, such that the Commission was competent under Article 56 EEA to handle the case. The Authority transferred the case to the Commission by decision.

The European Commission found evidence of concerted practices contrary to Article 85 (now 81) of the EC Treaty. It issued a decision in 1999 imposing fines on several steel tubes producers (Commission press release IP/99/957). The parties challenged the Commission decision before the Court of First Instance. They argued that the Commission unlawfully relied on evidence it had gathered during the inspections. They claimed that Article 56 EEA precluded the Commission from gathering evidence by reference to the EC competition rules as it had been acting on behalf of the Authority and only became competent after the Authority transferred the case. In 2003, the Authority intervened before the Court of First Instance in support of the Commission. The Authority argued that the EEA Agreement did not prevent the Commission from investigating an infringement under the EC and EEA competition rules simultaneously. Judgement in the matter is still pending.

1. Joint cases T-44/00 et al., *Mannesmanröhren-Werke AG et al.* v. *Commission.*

Inspections must be carried out in accordance with jurisdictional specifications. The Authority can only undertake inspections in the EFTA pillar. In cases where the EEA competition rules apply it can ask the European Commission to undertake inspections at the premises of undertakings located in the EU Member States, as was the situation in the *Steel Tubes case* (see box). Likewise, when the Commission investigates a case it may ask the Authority to carry out inspections in the EFTA States.

In February 2003, the Authority carried out unannounced inspections in Norway, at the premises of Odfjell ASA and Jo Tankers AS.[1] The European Commission carried out simultaneous inspections at the premises of undertakings located in two EU Member States. The purpose of the inspections was to establish whether the companies had taken part in anti-competitive practices regarding *deep-sea maritime tanker services*. The Authority's inspections took place at the request of the Commission after the latter received information on the existence of such practices. The information obtained by the Authority in Bergen in 2003 was transferred to the Commission.

Several years may separate an inspection from the initiation of proceedings. Thus the European Commission's case involving deep-sea maritime tanker services is still pending, as is a case for which the Authority carried out an inspection concerning markets for reverse vending machines in 2001 at the premises of *Tomra ASA* in Norway. The Authority continues to be involved in both cases under the EEA co-operation rules. ■

1. See press release PR(03)02: Statement on EFTA Surveillance Authority inspections at operators of deep-sea maritime transport services.

> Cases on film distribution in Norway

In 2002, the Authority opened formal proceedings against Norske Filmbyråers Forening (the Norwegian Filmdistributors' Association) and Film&Kino, the national umbrella association for cinemas, following a complaint from Oslo Kinematografer, the largest cinema operator in Norway. The case was closed in 2003.[1] *In addition, the Authority cleared a new purchasing arrangement for smaller cinemas.*

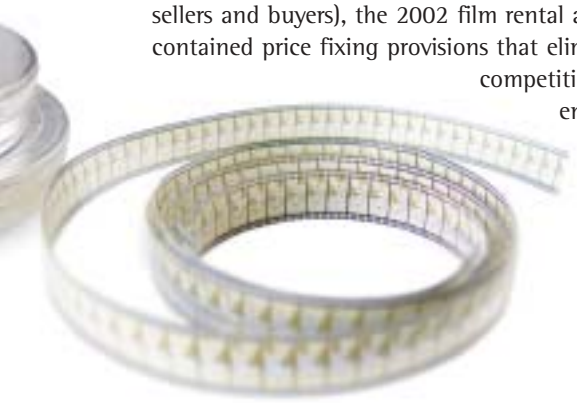
The agreements objected to by the Authority

The film rental agreements objected to by the Authority were entered into by *Norske Filmbyråers Forening* and *Film&Kino* in 2002. Similar agreements, covering all commercial distribution of films to cinemas in Norway, had been concluded between the two associations or their predecessors at regular intervals for more than 50 years.

The earlier agreements were, on one occasion, prohibited by the Norwegian Competition Authority under national law and granted a conditional exemption on another. However the Norwegian Ministry responsible for competition matters set aside both national decisions on appeal. It invoked cultural and regional policy benefits resulting from the agreements as special grounds for justifying unconditional exemptions under national law.

In applying Article 53 of the EEA Agreement, the Authority must weigh the anti-competitive elements of agreements against their alleged benefits. As a matter of law, no agreement is ineligible for exemption at the outset. However, price-fixing agreements will only be allowed in exceptional circumstances, given the vital importance of price competition.

Although they did not amount to a secret cartel (as they were concluded openly between representatives from both sellers and buyers), the 2002 film rental agreements contained price fixing provisions that eliminated price competition in virtually the entire Norwegian market for the distribution of films to cinemas.



Following its assessment of the 2002 film rental agreements, the Authority, therefore, concluded that the agreements infringed Article 53 EEA. The parties' comments to the Authority's formal statement of objections did not provide grounds for it to conclude otherwise.

Ultimately the Authority agreed to accept commitments offered by the parties that effectively ended the anti-competitive practices objected to:

- the parties discontinued the 2002 film rental agreements in October 2003;
- the Norwegian Filmdistributors' Association undertook not to engage in negotiations or consultations on behalf of its members concerning film rentals and to amend its statutes accordingly; and
- each active member of the Norwegian Filmdistributors' Association individually undertook not to engage in joint negotiations or consultations with other members of the association concerning film rentals. Each member agreed not to share information on the level or structure of film rentals or on the method of calculation of such rentals. The Norwegian film distributors may, however, exchange relevant information in cases of co-production or co-financing of particular films, or in other forms of co-operation that are in compliance with Article 53 EEA.

In light of the above, the Authority closed the case without adopting a formal decision.

The new purchasing arrangement

To cater for the specific needs of the many smaller cinemas in Norway, *Film&Kino* notified separate proposals for a new joint purchasing arrangement that would not involve price fixing practices among film distributors. *Film&Kino* further modified this arrangement, at the request of the Authority, to limit its application to cinemas with less than 130,000 visitors per year. This means that the 18 largest cinemas in Norway must negotiate film rental arrangements outside the auspices of *Film&Kino*.

The Authority cleared the notification under the EEA competition rules by means of an administrative letter. ■

1. See press release PR(03)33: EFTA Surveillance Authority accepts commitments in competition proceedings regarding distribution of films to cinemas in Norway and clears a new purchasing arrangement for smaller cinemas.

> Further investigation of complex competition cases

Cases handled in 2003 in respect of which work remains ongoing include the following.

Viasat/Canal Digital – TV2

The Authority continued its in-depth investigation of the agreement between Canal Digital and TV2 concerning the satellite distribution of the TV2 channel in Norway. The Authority was, in particular, concerned by the impact of the duration and scope of the exclusivity that bound TV2 to Canal Digital. As a result of the Authority's contacts with the parties, the agreement was modified and became non-exclusive from 1 October 2003. TV2 was thus given the opportunity to negotiate distribution rights running from that date with both Viasat and Canal Digital. TV2 ultimately concluded a new short term exclusive distribution arrangement with Canal Digital. The case continues as the impact of these developments is assessed under the EEA competition rules.

Conoco Jet Norge

The Authority continued to work on the case involving Conoco Jet's complaint that the major oil companies active on retail markets in Norway unjustifiably deny Conoco Jet access to the intermediate petrol depot storage facilities needed to supply service stations throughout Norway. Jet entered the Norwegian retail market for petrol in 1992 by establishing three service stations in the Oslo area. Today Jet's network of retail outlets consists of 36 unmanned petrol stations in the Eastern region, stretching from Hamar in the North to Larvik in the South. The introduction of unmanned outlets by Jet has benefited consumers in the Oslo area as price competition has increased where Jet entered the market. Jet argues that its expansion to other parts of Norway has been prevented because of the wholesale supply infrastructure. It states that attempts to secure access to the depots that are spread out along the Norwegian West coast have failed and that the costs associated with transporting petrol from Sweden effectively limit Jet's scope of establishment to Eastern Norway.

Norway Post

The Authority continued its review of three cases concerning Norway Post. The first two relate to the market for commercial parcels. The Authority is investigating first, whether Norway Post distorts competition by granting unlawful discounts to its customers and second, allegations that Norway Post seeks exclusive use of supermarkets, kiosks and petrol stations as counters for the delivery of parcels addressed to private consumers. The third case concerns allegations of anti-competitive practices by Norway Post in relation to cross-border mail entering Norway from elsewhere in the EEA.

Nittedal v. Hydro Fritzoe and Andoytorv

The Authority is considering alleged market sharing and other anti-competitive behaviour between firms selling peat moss-based products on the Norwegian market.

State measures

A proportion of the cases handled by the Authority under the EEA competition rules involve the possible application of Article 59 EEA in conjunction with Articles 53 and/or 54 EEA. Thus, in 2003, the Authority examined the impact of relevant EFTA State measures on competition in several cases. In a number of these the Authority chose to focus its attention more specifically on the behaviour of the undertakings concerned, where there was no element of State compulsion involved. ■

> Focus on the electronic communications sector

In 2003, a large part of the Authority's resources in the field of competition were, for several reasons, focused on the electronic communications sector:

- the electronic communications markets in Iceland, Liechtenstein and Norway are among the most technologically advanced in the EEA;
- rapid technological developments herald new commercial practices: pioneering arrangements in Norway include reciprocal mobile virtual network agreements (MVNOs) between Telenor and Tele2;
- cross-border markets are developing, especially throughout the Nordic region;
- the Authority and the European Commission have liaised extensively on how best to apply the EEA competition rules to this complex sector - as revealed by the Authorities' parallel sector inquiries to date (see box); and
- the application of the EU/EEA competition rules to these markets will further be affected, in the course of 2004, by the implementation of a new regulatory framework.

The Authority continued to work closely with the EFTA States' competition and regulatory authorities. It initiated a series of meetings with market players in Iceland and Norway to further develop expert knowledge of the relevant markets. The Authority continued its review of notifications and complaints received, particular attention being paid to the broadcasting sector in Norway. It monitored developments in Norway as regards the planned introduction of digital terrestrial television (DTT). It also contributed to a number of competition cases handled by the European Commission in the electronic communications sector.

> Sector inquiries in the EEA

In 1999 a sector inquiry was launched to secure information on the markets for *leased lines, international mobile roaming* and *unbundled access to the local loop*. The sector inquiries, conducted in parallel by the Authority and the European Commission, proved effective in gathering comparative information on market structures and trends and in identifying "worst offenders" on a consistent EEA-wide basis.

The information made public as a result of the 1999 sector inquiries was largely welcomed by market players, including the telecommunications operators of the EFTA States, particularly insofar as many of these are now active in more than one EEA State.

The uncovering, in 2003, of competition issues inherent to broadcasting and converging media services prompted the Authority to begin a new sector inquiry into potentially unfair practices in new media content distribution, including via third generation mobile communications. This sector inquiry will again be co-ordinated with that of the European Commission.

The Authority closed its leased line sector inquiry in 2003 after it was revealed that a good overall competitive situation existed in the EFTA States as compared to the EEA States as a whole. Certain aspects of the provision of leased lines in Iceland have, nevertheless, been investigated separately by the Authority since mid-2001. These include plans for a new submarine cable connection between Iceland and the Faroe Islands, for which developments were followed in 2003. The Authority kept its mobile roaming and local loop unbundling inquiries open in 2003 to monitor market developments further. The Authority also decided to open a follow-up case on international wholesale mobile roaming rates in Norway. ■

> Co-operation with the European Commission

In 2003, in co-operation with the Authority, the European Commission continued consistently to apply the EEA competition rules to its own cases, both in the field of antitrust and merger control.

The handling of competition cases by the Authority and the European Commission benefits from the EEA Agreement's specific provisions on co-operation in individual cases (Protocol 23 of the EEA Agreement for antitrust cases and Protocol 24 of the EEA Agreement for mergers). These support consistent application of the competition rules across the EEA as a whole.

Where the European Commission is competent to handle a case under the EEA Agreement (by virtue of Articles 56 or 57 of the EEA Agreement), the Authority has specific rights to be involved in what are defined in Protocols 23 or 24 EEA as "mixed cases".

It follows that, in 2003, in addition to its own cases, the Authority became involved in 11 new merger cases handled by the Commission.

Mixed merger cases notified in 2003

COMP/M.3255	Tetra Laval / Sidel – Art 14 procedure
COMP/M.2861	Siemens / Drägerwerk
COMP/M.3083	GE / Instrumentarium
COMP/M.3149	Procter & Gamble / Wella
COMP/M.3225	Alcan / Pechiney II
COMP/M.3304	GE / Amersham
COMP/M.3230	BP / Statoil / Sonatrach / In Salah JV
COMP/M.3291	Preem / Scandinavian Refinery
COMP/M.3284	Outokoumpo / Boliden
COMP/M.3287	AGCO / VALTRA
COMP/M.3004	Bravida / Semco / Prenad / Totalinstallatören

In the *Procter & Gamble/Wella* merger case, overlapping activities were identified in several product markets for hair care, fragrances and colour cosmetics in Europe. The Authority assisted the European Commission in gathering market information concerning the EFTA pillar. Competition concerns were identified in Norway. To address these concerns, *Procter & Gamble* ultimately agreed to license certain brands for five years to a third party to be approved by the Commission. The acquisition was cleared in July 2003.

The Authority was also involved in 24 new antitrust cases handled by the European Commission under the EC and EEA competition rules. In 2003, the Commission continued to give high priority to the investigation of secret cartels. A number of these cases qualified for co-operation with the Authority under the EEA co-operation rules. This included the Commission's cases and resulting decisions in respect of the *Sorbates, Carbon and graphite products, Organic Peroxides* and *Industrial Copper Tubes* cartels. Cartels are among the most serious violations of the EEA competition rules, ultimately leading to higher prices and less favourable terms for consumers. The Authority fully supports the Commission's action against cartels in the context of the enforcement of the EEA competition rules across the European Economic Area.

New and ongoing co-operation cases in the field of antitrust to which the European Commission made public reference in 2003 were as follows:

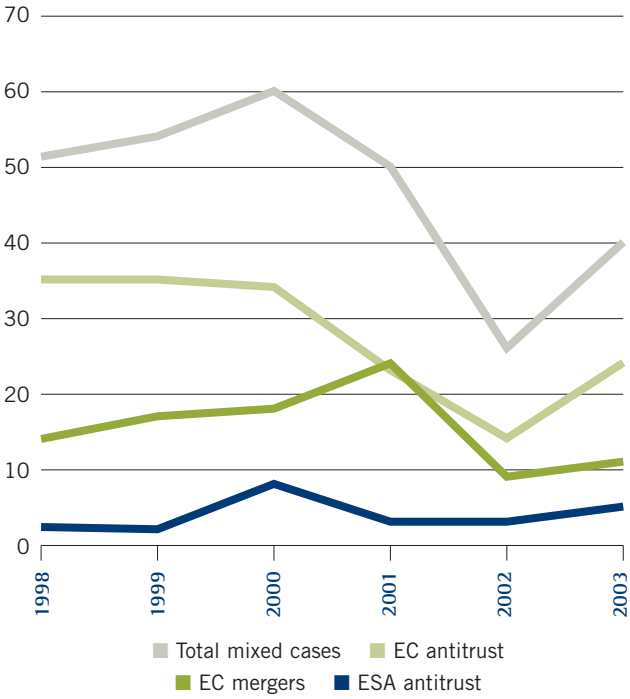
Mixed antitrust cases in 2003

COMP/35.470	A.R.A. (ex EFTA 0030)
COMP/35.473	Argev (ex EFTA 0042)
COMP/37.370	P/O Sorbates
COMP/37.398	UEFA
COMP/37.857	PO / Organic peroxide
COMP/37.975	PO / YAMAHA
COMP/38.170	REIMS II RENEWAL
COMP/38.287	Telenor + Canal+ + Canal Digital
COMP/38.359	PO / Electrical and mechanical carbon and graphite products
COMP/38.370	Network sharing UK
COMP/38.369	Network sharing Germany
COMP/35.587	PO / Video games
COMP/35.706	PO / Nintendo distribution
COMP/36.321	Omega / Nintendo
COMP/37.214	DFB
COMP/37.507	Generics / AstraZeneca
COMP/37.792	Microsoft / W2000
COMP/38.173	PO / The Football Association Premier League Limited
COMP/38.240	PO / Industrial Tubes
COMP/38.381	ALROSA + DBCAG + City and West East
COMP/38.624	PO / Deep-sea maritime transport of bulk liquids
COMP/38.772	Cannes Extension Agreement

Developments in the number of mixed cases opened since 1998 to some extent reflect the overall fluctuations of economic activity over the same period. After a significant drop in 2002, the number of new cases started to rise again in 2003, up more than 50% from 2002 but still some way off earlier levels.

By the end of 2003, the Authority remained involved in 50 pending antitrust cases and four pending merger cases. ■

EEA mixed cases 1998 - 2003



> Prospects for 2004

The Authority seeks to develop a more pro-active approach to the detection and prosecution of infringements of the EEA competition rules in anticipation of the forthcoming modified competition regime.

Despite the fact that a high proportion of cases dealt with by the Authority originate from formal complaints, the Authority considers that modernisation will imply that it must seek to achieve a more pro-active approach to the identification and handling of the most important infringements of the EEA competition rules. In 2004, the Authority will seek to give priority, as regards in-depth investigation, to cases where one or more of the following conditions are met:

- the Authority has sole jurisdiction (notably in competition cases involving the potential application of Article 59 EEA to an EFTA State);
- articles 53 and 54 EEA may resolve a competition concern where national rules differ from EEA provisions to such an extent that they could not achieve a similar result;
- a hardcore infringement of the EEA competition rules can be established;
- the economic impact of a violation is significant in the relevant market;
- a case raises new points of law which benefit from clarification.

In all cases, the Authority will aim to secure an efficient division of tasks between all competent EEA competition and regulatory authorities and consistent application of the EEA competition rules. The Authority places great importance on liaison and systematic dialogue on case allocation at the outset of proceedings (whether with the parties or other regulators). The aim of this approach is to avoid duplicate or successive proceedings. ■

Chapter 4
State aid

State aid rules

The basic principle of EEA state aid provisions is that EEA States are prohibited from granting economic benefits to selected undertakings where these result in trade and competition being distorted.

However, state aid may be in conformity with the EEA Agreement where it complies with certain conditions. Given that adverse effects on trade and competition are limited, aid to facilitate objectives such as the promotion of research and development, the protection of the environment, or regional development may be considered to comply with the EEA Agreement.

The role of the EFTA Surveillance Authority is to verify whether state aid measures envisaged or taken by the EFTA States are in compliance with the EEA Agreement. This role is similar to the role that the European Commission plays in relation to the EU Member States.

The state aid provisions laid down in the EEA Agreement and in the Surveillance and Court Agreement are described in further detail in the box on page 57. In addition to these rules, the Authority issues a series of Guidelines on how it interprets and applies the state aid rules. These Guidelines are mentioned briefly in the box on page 58. A full presentation can be found on the Authority's website.[1]

1. www.eftasurv.int/fieldsofwork/fieldstateaid/

> State aid provisions

Article 61(1) of the EEA Agreement lays down the general principle that state aid is prohibited save as otherwise provided in the EEA Agreement. Public support measures only fall within the general prohibition of state aid if the conditions laid down in Article 61(1) of the EEA Agreement are fulfilled. The conditions are:

The support must be granted by the State or through State resources in any form whatsoever, it must favour certain undertakings or the production of certain goods (the so-called "selectivity" criterion), it must distort or threaten to distort competition and it must affect trade between the Contracting Parties.

The EEA Agreement contains several exemption possibilities from general prohibition on staite aid, in particular in Article 61(2) and (3). The provision which plays the greatest role in the Authority's state aid practice is Article 61(3)(c) of the EEA Agreement regarding "aid to facilitate the development of certain economic activities or of certain economic areas". Article 61(3)(c) of the EEA Agreement covers not only sectoral and regional aid measures, but also measures which follow horizontal objectives (i.e., research and development, environment, etc.). The EEA Agreement contains further exemption possibilities with regard to compensation for the discharge of a public service obligation, where these concern undertakings entrusted with the operation of services of general economic interest, referred to in Article 59(2) of the EEA Agreement and, referred to in the field of transport, in Article 49 of the EEA Agreement.

The rules on state aid procedures are laid down in Protocol 3 to the Surveillance and Court Agreement. EFTA States are under an obligation to notify any plans to grant new aid to the Authority. The EFTA State concerned shall not put the aid into effect until the Authority has approved it. Incompatible aid, which has been paid out in breach of the notification obligation, shall be recovered from the aid beneficiary.

Protocol 3 to the Surveillance and Court Agreement was amended with effect from 28 August 2003 to incorporate provisions, which correspond to the state aid procedures established by *EC Council Regulation laying down detailed rules for the application of* [ex] *Article 93 of the EC Treaty* ("Procedural Regulation").[1]

As to secondary state aid legislation, in June 2003 the so-called group exemption regulation concerning state aid for employment (No (EC) 2204/2002) was incorporated into the EEA Agreement. The new rules entered into force on 21 June 2003.

The task of ensuring compliance with Article 61 of the EEA Agreement is, according to Article 62 of the EEA Agreement, divided between the Authority and the European Commission. The Authority is competent when aid is granted by an EFTA State. If aid is granted by an EU Member State, the Commission is competent. In fulfilling its tasks, the Authority is entrusted with powers and functions similar to those of the Commission.

The relevant provisions of the EEA Agreement and the Surveillance and Court Agreement governing state aid can be found in the state aid section of the Authority's website.[2]

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1. OJ L 83, 27.3.1999, p.1.
2. www.eftasurv.int/fieldsofwork/fieldstateaid/legaltexts

> State Aid Guidelines

In January 1994, the Authority adopted a consolidated document on Procedural and Substantive Rules in the Field of State Aid, also called the State Aid Guidelines.
The purpose of the Guidelines is to provide national administrations and enterprises with information on how the Authority interprets and applies the provisions of the EEA Agreement governing state aid and to ensure uniform implementation, application and interpretation of Articles 61 and 62 of the EEA Agreement.

The Guidelines have since been amended or supplemented more than 40 times to accord with the frameworks and guidelines issued by the European Commission in the field of state aid, as foreseen by Protocol 27 to the EEA Agreement. The Guidelines contain, *inter alia*, rules concerning horizontal aid (for example state aid and business taxation, aid for research and development, aid for environmental protection, and state guarantees), rules on aid to public enterprises, rules on sectoral aid and rules on regional aid.

In 2003, the State Aid Guidelines were amended three times. The first amendment concerned the introduction of a complaint form, which is intended to assist complainants by identifying the information necessary for the Authority to follow up complaints effectively in the area of state aid. The second amendment dealt with interest rates to be applied when aid granted unlawfully is being recovered. Chapters on training aid, employment aid, *de minimis* aid and aid to small and medium-sized enterprises were deleted from the Guidelines. The deletions reflect the incorporation of four block exemptions into the EEA Agreement covering the same areas. These block exemptions, which can be found in Annex XV to the EEA Agreement, replaced the previous guidelines.

The State Aid Guidelines are published on the website of the Authority.[1]

1. www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines/

> Increasing case load

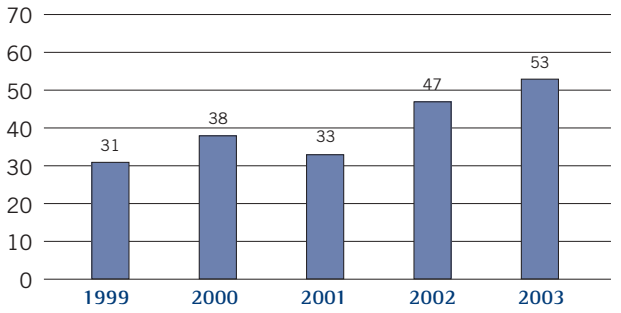
The last couple of years have seen an increase in the number of state aid cases.

By the end of 2001, 33 cases were being examined by the Authority. By the end of 2002, 47 cases were pending and by the end of 2003, the figure had risen to 53. In 2003, 28 new cases were opened and 22 cases were closed. Of the 28 new cases registered, 15 were notifications of new aid, nine were complaints and four were opening of formal investigation procedures. Copies of the College Decisions described below (as well as other decisions) can be found on the Authority's website.[1]

1. www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry/

State aid case load increasing

Number of state aid cases pending at the end of the year



> Investigation into a state guarantee in favour of deCODE Genetics Inc.

In July 2003, the Authority opened formal investigation proceedings concerning a notified guarantee which Iceland intended to give to deCODE Genetics Inc. (US) in relation to a bond amounting to USD 200 million.

The proceeds from the bond would be used by deCODE (Íslensk erfðagreining hf.) to establish a new drug development department in Reykjavik and to finance several drug development programmes in parallel during a period of five years.

The Authority considered that the state guarantee constituted state aid as it would allow deCODE to borrow money on the market at conditions more favourable than would have been the case without the proposed state guarantee. This would give deCODE a financial benefit and strengthen deCODE's position in relation to its competitors within the EEA.

The Authority assessed the case under its Guidelines on aid for research and development. It had doubts whether the guarantee could be justified according to these provisions. The main doubt stemmed from the fact that the proposed state aid was intended to be granted with respect to R&D projects which were not clearly identified. The Authority also questioned the exact number of R&D projects which could be regarded as eligible for state support. State aid not linked to a specific R&D project risks constituting operating aid, which is not acceptable under the Guidelines.

Furthermore, the Authority considered that the Icelandic authorities had not adequately identified the various cost elements that could be eligible for aid.

In addition, the Authority had doubts about whether the permissible aid ceilings for certain R&D activities were respected. The Guidelines permit aid in decreasing intensities the closer the research activity is to the market. The Guidelines establish three categories, i.e. fundamental research (aid intensity up to 100%), industrial research (50%) and pre-competitive research (25%). For some of the activities the Authority had doubts about whether, as suggested by Iceland, they could be qualified as "industrial research".

The decision was published in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto of 18 December 2003 to give interested parties the possibility to comment. A final decision in the matter is foreseen for 2004. ■

> Support for Alcoa's aluminium plant in Iceland

In March 2003, the Authority approved measures notified by the Icelandic authorities intended to facilitate investment by Alcoa Inc (US) in a new aluminium smelter in the Township of Fjarðabyggð in Eastern Iceland.

The Authority deemed the aid elements of the project, which were mostly in the form of tax relief, to be investment aid. According to the regional aid map for Iceland, the region where the aluminium plant will be located corresponds to a zone eligible for regional aid (on regional aid maps, see box on page 61) The estimated amount of aid would be well below the maximum allowed aid ceilings for this geographic area. Against this background the Authority decided not to raise objections to the notified arrangements.

The electricity for the aluminium smelter will be supplied by a new hydropower facility, to be constructed by the National Power Company, Landsvirkjun. Both the smelter and the power plant are scheduled to begin production in 2007.

During the construction period from 2003 to 2007, the smelter project is expected to involve about 2,300 person-years. The aluminium plant is expected to provide 455 jobs on a regular basis. To provide services etc, it is estimated that another 300 jobs will be created in the Eastern part of Iceland. ■

> Gradual phasing out of differentiation in social security contributions

According to a decision of the Authority in late 2003, preferential rates for employers' social security contributions in certain regions in Norway will be phased out in the course of a three-year period.

In 1999, the EFTA Court found that the Norwegian system of regionally differentiated social security contributions constituted state aid within the meaning of Article 61(1) of the EEA Agreement, since it favoured undertakings in certain regions. Later in the same year, the Authority granted a temporary exemption from the EEA provisions to the aid until 31 December 2003, implying that most of the previous differentiation continued. In December 2000, the European Commission took a decision prohibiting a system of reduced social security contributions in Sweden. Following discussions between Norway and the Authority, in March 2003, the Norwegian authorities notified a gradual phasing out of the main part of the system of differentiated contribution rates. At the same time, a new scheme on direct transport aid was notified, see next topic.

Social security contributions by employers in Norway are levied on gross salaries and have been differentiated according to geographical zones. The objective of the geographical differentiation is to stimulate the less favoured regions. The rates applicable until the end of 2003 are described in the table below. The table also contains the population coverage and the population density for each of the zones.

Rates until the end of 2003[1]

	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
Social security contribution rates (percentage)	14.1	10.6	6.4	5.1	0.0
Percentage of total population	76.6	9.4	2.6	9.4	2.0
Population density (inhabitants per square kilometre)	64.0	4.9	2.8	6.4	1.7

According to the notification of March 2003, the rate of social security contributions in Zone 2 would be increased to the full rate of 14.1% with effect as of 1 January 2004. For Zones 3 and 4, the Norwegian Government notified a transitional period of three years. The proposal implied that the rates would increase gradually from 2004 onwards until the full rate of 14.1% was reached in 2007. The Norwegian authorities argued that the economic effect of introducing full rates in Zones 3 and 4 from 2004 would create very serious difficulties for all firms concerned and thus, for the employment situation in these areas.

Concerning Zone 5, the EFTA States decided, by common accord and by reference to Article 1(2) of Part I of Protocol 3 to the Surveillance and Court Agreement, that continuation of a zero rate in Zone 5 was compatible with the EEA Agreement due to the exceptional circumstances in that zone.

Reduced social security contributions for employers in certain regions are a form of current operating aid. The state aid rules of the EEA Agreement and the Authority's Guidelines on regional state aid provide quite limited possibilities for granting operating aid. The Authority, therefore, expressed doubts as to whether a transitional period could be justified, and if it could be justified, for how long. Consequently, the Authority decided to open a formal investigation concerning the transitional arrangements in Zones 3 and 4.
The Authority did not address the EFTA States' decision concerning Zone 5.

The Authority informed interested parties of the matter by publication of the decision to open the investigation in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto. Ten Norwegian organisations and undertakings submitted comments. All of these supported the proposal from the Norwegian Government for a three-year transition period for the adjustment of the social security taxes.

In November 2003, the Authority decided to close the investigation procedure that was opened in July 2003, and to approve a gradual phasing out of the geographical differentiation until 1 January 2007. The Authority considered that a transition period would be necessary in order to dampen the shock effects that would follow from an immediate application of the full social security tax.

The Authority also considered that the Norwegian authorities had demonstrated that a three-year period would be

1. Zone 1 covers central areas. Zone 5 is made up of the very northernmost parts of the country. Zone 4 is the rest of North Norway, while Zone 3 covers various mountain and coastal regions in South/Middle Norway. Zone 2 is made up of other less central regions in South Norway.

appropriate, and that a period of this duration would not adversely affect trading conditions contrary to the common interests of the Parties to the EEA Agreement. ■

> A direct transport aid scheme

As a consequence of the case on social security contributions the Norwegian authorities notified a new scheme providing for direct transport aid to enterprises in certain regions.

The Authority decided in July 2003 to open a formal investigation procedure. This was because first, some of the municipalities covered by the notification were outside the notified regions on the existing regional aid map for Norway (on regional aid maps, see box on this page); and second, the Authority considered that the information provided did not adequately confirm that undertakings in all the regions concerned were subject to extra high transport costs, as required by the Guidelines on regional state aid.

The scheme was approved early in 2004 except for four municipalities outside the regional aid map. ■

> Regional aid maps

National regional aid can be granted by Iceland and Norway in certain geographic areas that have been notified and approved by the Authority (also called map of assisted areas). Liechtenstein has not notified any areas eligible for regional aid.

The Authority adopted new State Aid Guidelines on national regional aid in 1998 (Chapter 25 of the State Aid Guidelines). Similar Guidelines had been adopted by the European Commission. The new Guidelines obliged the EFTA States to notify the Authority of the geographic areas eligible for regional aid. In 1999, the Authority approved the regional aid map for Norway. The map covers some 25% of the Norwegian population and is valid until the end of 2006. In 2001, the map for Iceland was approved. The Icelandic map covers some 33% of the total population, and is also valid until the end of 2006.

The EFTA countries can grant state aid that fulfils the conditions set out in the Authority's State Aid Guidelines within the areas covered by the regional aid maps, but the aid (schemes or individual aid) must be approved by the Authority before it can be implemented.

The European Commission will probably adopt new regional aid guidelines in the course of 2005 that will apply from 2007 onwards. The Authority will, correspondingly, also adopt new guidelines that will apply from the same date.

> Aid for energy production from waste under scrutiny

A formal investigation was opened regarding an aid scheme notified by Norway for use of energy from final waste treatment plants.

At present, operators handling waste are subject to a tax that is graduated according to the amount of energy generated and used in waste treatment. In the future, it is foreseen that the tax differentiation will be abolished and a scheme of direct grants to waste incineration plants and landfill operators introduced. These grants will depend on the actual amount of energy produced and delivered for consumption. The objective of the scheme is to exploit unused potential for energy production from renewable energies and to compensate operators for the higher production costs which result from a change in the current waste treatment tax.

The proposed aid scheme was assessed according to the Authority's Guidelines on environmental aid. The Authority could not however, on the basis of available information, conclude that the scheme complied with the Environmental Guidelines. It, therefore, decided to open a formal investigation. The decision will be published in early 2004 in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto to give interested parties the possibility to comment on the case. ■

> Environmental tax derogations under continued examination

The Authority continued its investigation into several derogations from environmental taxes in Norway, namely from the tax on electricity consumption, the CO_2 tax and the SO_2 tax.

The Authority's decision to open a formal investigation into these matters was published in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto of 6 February 2003. The Authority received comments from interested parties. The case was still pending at the end of the reporting period and a decision is foreseen for early 2004. ■

> Law on state enterprises brought in line with the state aid rules

The Authority was able to close its investigation of the Norwegian Act on State Enterprises ("Lov om Statsforetak") which was brought into line with the Authority's proposal of December 2002 for appropriate measures.[1]

In 2002, the Authority proposed appropriate measures to Norway to abolish any incompatible aid resulting from the Act on State Enterprises. This Act foresaw that, for undertakings established under the Act, the Norwegian State would cover losses incurred by the enterprises if the obligations could not be covered by the enterprises' own funds. The Authority found that this implicit guarantee, without charge of an appropriate guarantee premium, constituted incompatible state aid and requested Norway to abolish the scheme with effect from 1 January 2003.

Norway subsequently amended the Act on State Enterprises in such a way that the Norwegian State's liability for claims against state enterprises corresponded to the owner's liability with respect to the claims of a limited liability company. The Authority further noted that Norway introduced a premium with respect to the continued State guarantee on existing loan obligations to the benefit of *Statkraft* (largest electricity producer in Norway) and *Statnett* (grid operator) as from 1 January 2003. This premium was determined on the basis of an assessment of the benefits resulting from the implicit State guarantee with respect to each individual loan. The guarantee premium was calculated as the difference between the interest actually paid and an estimate of the interest that the companies would have been charged had they obtained the loans without any implicit State guarantee.

As to the Authority's remaining concern in relation to existing obligations not linked to specific loans, the Norwegian Government proposed to abolish any such guarantee. This proposal was accepted by the Norwegian Parliament in late 2003. ■

1. See Annual Report 2002, 7.3.4.

> Conditional approval of aid to certain express bus operators in Norway

In July 2003, the Authority accepted that partial compensation for an autodiesel levy to certain express bus operators in Norway could be granted, subject to the arrangement being limited in time to 2006. Any possible overcompensation should be paid back to the State.

This decision involved, *inter alia*, complex questions concerning the conditions for compensating bus operators for so-called public service obligations. Compensation for public service obligations might not, under certain circumstances, amount to state aid at all or might be compatible with the state aid provisions.

The case originated from a complaint. The complainant alleged that certain express bus operators in Norway received illegal state aid under the so-called *"kompensasjonsordning for autodieselavgift"* (hereafter "the Scheme"). The Scheme compensated certain bus operators for the costs of the "autodiesel levy" that they had to pay. Following that complaint the Authority decided to initiate a formal investigation procedure against the Scheme in December 2000.

The Authority concluded that payments under the Scheme could not be regarded as compensation for the provision of public services. In the Authority's view, it was doubtful whether express bus operators providing regular passenger transport were subject to public service obligations which generated extra costs, compared to what these bus operators would have incurred in their own commercial interest. Additionally, the Authority was not satisfied that the compensation would be limited to any such extra costs. In the Authority's view, there was no clear link between the costs of the alleged public service obligation and the compensation received for it. Therefore, the inherent risk of possible overcompensation could not be excluded.

However, the Authority took the view that the Scheme could be regarded as necessary to offset losses of competitiveness by those providing regular passenger transport *vis-à-vis* the private car. The Authority's Guidelines on environmental aid, which took effect on 23 May 2001, required that projects such as the Scheme be limited in time and the aid to be limited to 50% of extra costs. The Authority concluded that these conditions were not fulfilled by the Scheme. Therefore, and in order to ensure full compliance with the Environmental Guidelines, the Authority decided to approve the Scheme only under the conditions that (1) the Scheme was limited in time until 22 May 2006 and that (2) compensation was limited to 50% of the extra costs due to the autodiesel levy. The Authority clarified that any amount exceeding this ceiling would have to be recovered from the aid recipients.

By letter dated 23 September 2003, the EFTA Court informed the Authority that an application for annulment of the Authority's decision had been lodged with the Court on 18 September 2003 by *"Transportbedriftenes Landforening"* (a Norwegian transport association) and an undertaking called *"Nor-Way Bussekspress AS"*. The applicants argued, *inter alia*, that the compensation involved no state aid, since it only covered the extra costs due to imposed public service obligations. The Authority submitted its defence to the EFTA Court on 21 November 2003. The applicants withdrew the case on 18 Februrary 2004. ■

> Inquiry into the sale of publicly owned apartments

A decision to launch a formal investigation procedure was made with regard to a notified sale of 1,744 rental apartments to a private enterprise by the Municipality of Oslo in Norway.

When the apartments were put up for sale in 2001, the Authority requested that the Norwegian authorities submit information so that it could be assessed whether the sale was in accordance with the state aid provisions of the EEA Agreement. After an exchange of information, the Norwegian Ministry of Trade and Industry informed the Authority that the County Governor of Oslo and Akershus had decided that the Municipality of Oslo could not lawfully transfer the right of ownership before the County Governor has made a final decision. The Authority was also informed that a new value assessment would be carried out.

In February 2003, the Norwegian authorities notified the sale to the Authority. The notified sales price was in accordance with the sales contract from 2001. Based on the information submitted and the arguments presented by the Norwegian Government, the Authority carried out a preliminary assessment of the sale at issue. It concluded that there were doubts as to whether the sales process had been conducted in accordance with the Authority's Guidelines on State Aid, and whether the agreed sales price (NOK 715 million) reflected the market value. The new value appraisal, carried out after the County Governor intervened, was NOK 1,055 million (approx. EUR 127 million).

The Authority informed interested parties by publication of the decision in the EEA Section of the Official Journal of the European Union and the EEA Supplement thereto. The Municipality of Oslo and the buyer of the apartments submitted comments. A final decision is foreseen in 2004.

> Private parties contest a state aid decision of the Authority

On 19 June 2003, the EFTA Court pronounced a judgment in which it clarified the locus standi requirements for private parties wishing to challenge state aid decisions of the Authority.[1]

State aid decisions are always addressed to the relevant EFTA States. Therefore, the question arose as to the conditions under which private parties would have standing *(locus standi)* to challenge state aid decisions, even though they are not the addressees of these decisions.

The case concerned an application for annulment of a state aid decision taken by the Authority regarding petroleum related activities in Norway. In May 2002, the Authority approved a proposal from the Norwegian authorities concerning amended depreciation rules of the *Petroleum Tax Act* for certain petroleum related activities in the northernmost region of Norway and the application of these rules to the *"Snøhvit"* project. The amendment implied that capital expenses for production facilities linked to large-scale plants for gas liquefaction and located in a specific region in the north of Norway were subject to a favourable depreciation regime. By referring to its Guidelines on Regional Aid, the Authority gave a green light to the new depreciation regime without opening a formal investigation procedure (so-called "decision not to raise objections"). It was this decision that was subject to the application for annulment before the EFTA Court.

The application for annulment was jointly brought by *"Bellona"*, a Norwegian environmental foundation, and *"Technologien Bau- und Wirtschaftsberatung GmbH"*, a German environmental consulting firm. The *"Bellona"*

1. Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH* and *Bellona Foundation* v. *EFTA Surveillance Authority* [2003] Report of the EFTA Court (not yet reported). The full text of the judgment is available on the EFTA Court's website (www.eftacourt.lu).

Foundation also lodged a complaint with the Authority, on the same matter, prior to the Court proceedings.

The EFTA Court decided that the application was inadmissible. This was because the contested decision was not of direct and individual concern to the Applicants, as required by Article 36(2) of the Surveillance and Court Agreement. Article 36(2) of the Surveillance and Court Agreement requires that any natural or legal person needs to demonstrate that a contested decision, although addressed to another person (as in the present case to the Norwegian State), is of direct and individual concern to it.

The EFTA Court's ruling was, *inter alia*, based on the fact that the applicants did not prove that the Authority's contested decision could adversely affect their legitimate economic interests and thus provide *locus standi*. The EFTA Court also held that the *"Bellona"* Foundation could not institute proceedings before the EFTA Court, either in a representative capacity on behalf of its members or on the grounds of its involvement in the administrative procedure before the Authority. Since the EFTA Court declared the application inadmissible, it did not address the substantive issues raised in the application.

In this judgment the EFTA Court followed the approach taken by the European Court of Justice and the European Court of First Instance in similar cases. The EFTA Court thereby ensured a homogenous interpretation within the European Economic Area of the *locus standi* requirements in state aid cases. ■

> Co-operation with the European Commission

Protocol 27 to the EEA Agreement lays down the various areas in which the European Commission and the Authority are to co-operate in order to ensure uniform application of the state aid rules. Information and views on general policy issues were exchanged between the two authorities in meetings held at different levels. Cross-representation of both authorities in multilateral meetings to discuss new guidelines for state aid continued in 2003, and the Authority submitted written comments, including comments from the EFTA States, on draft texts for new guidelines.

Furthermore, the Authority and the Commission informed each other of all state aid decisions. With regard to individual cases, further information was also provided on a case-by-case basis upon request by the relevant authority.

The co-operation between the two surveillance authorities in the field of state aid has worked well in practise. The close contacts and co-operation at different levels contributed to homogenous application of the state aid rules throughout the EEA. ■

Legal & Executive Affairs

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