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Statement
by
Ms Oda Helen Sletnes
President of the EFTA Surveillance Authority

Mr. Chairman,
Members of the Committee,
Ladies and Gentlemen,

Thank you for inviting me once again to address the EEA Consultative Committee to give an update of recent developments and the work being done in the EFTA Surveillance Authority.

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Let me start with a few comments regarding the ability of the EFTA States to implement new EEA legislation in a timely and correct manner, which is key to a well-functioning internal market. Contrary to the

development in the EU Member States, where transposition deficits have consistently gone down over the years, our Internal Market Scoreboard for the EFTA States has shown disappointing results, forcing the Authority to repeatedly urge the EFTA States to address the problem.

The Scoreboard published earlier this year showed a continuation of the unfortunate trend, with Iceland and Norway having the worst performance by far of all the 31 states in the EEA.

The most recent results, from May this year, will be published later this summer, and I am not able to share exact numbers with you at this time. The preliminary results seem to indicate, however, that Norway has been successful in its strategy for reducing the deficit. Iceland appears to move in the right direction, although the situation continues to be far from satisfactory.

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Earlier this week, the Authority decided to refer Liechtenstein to the EFTA Court for breaching the Services Directive and EEA rules on services and establishment (EEA Agreement art 31 and 36).

The Services Directive requires that administrative procedures and formalities are removed - if unjustified and disproportionate - to facilitate establishment of businesses and cross-border services. The Directive is seen as key to ensure a well-functioning single market.

In contrast to this, the Liechtenstein Trade Act requires foreign companies to notify the authorities and apply for a formal authorisation to be able to establish themselves and provide cross-border services on

the territory of Liechtenstein. The Authority has on several occasions tried to convince Liechtenstein's Government to modify the Trade Act, without success, and was in the end left with no other choice than referring the case to the EFTA Court.

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In the field of labour law the Authority is currently assessing the implementation in all the three EEA/EFTA States of the Directive on temporary agency work (2008/104/EC). The Authority is particularly looking into how the States have dealt with the Directive's obligation to review, together with the social partners, restrictions and prohibitions on the use of temporary agency work, whether laid down by law or by collective agreements.

As regards posting of workers, the Authority has received complaints from employers' organisations, as well as foreign service providers claiming that Norway fails to comply with the EEA Agreement on the freedom to provide services (art 36) and the Directive on posting of workers (96/71/EC). The Authority is currently looking into the application in Norway of the Directive also in view of recent case law.

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Let me turn to the field of state aid and allow me to draw your attention to some recent decisions concerning the transport sector.

In April, the Authority approved Norway's zero VAT rate on import, sale and leasing of electric cars. Other measures to stimulate demand for and use of electric cars were also approved.

Norway's fleet of electric cars is the largest per capita in the world. Last year, 12.5 % of new registrations in Norway were electric cars, compared to only 0.3 % in the EU. This clearly shows that the measures put in place by the Norwegian authorities have strengthen the demand for zero-emissions cars and by that contributes to a greener transport sector.

This market is, however, changing rapidly. Technological progress is accelerating and the price of electric cars is declining. As a consequence, the VAT measures were approved until 31 December 2017.

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Last month, the Authority concluded an in-depth investigation into the public transport sector in the Norwegian County of Aust-Agder. It revealed that several bus operators, lately also Nettbuss Sør, over a period of ten years have received payments for transport services that have ceased to operate or activities that could not be regarded as public service and eligible for compensation payments under the concession contract signed with the County. This over-compensation clearly constitutes unlawful state aid in breach of the EEA Agreement, and a substantial (app 80 million NOK) amount will have to be paid back to the County.

Our investigation revealed a serious lack of transparency and control of the public transport concession contracts. There is, unfortunately, no reason to believe this is the only example of its kind. The case should serve as a wake-up-call to public authorities in all the three EFTA States to make greater efforts to ensure transparency and sound use of taxpayer's money in the field of public transport.

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Aid to industrial investments in rural Iceland has been on the Authority's agenda for a long time. A German company, PCC BakkiSilicon, plans to establish a silicon metal plant near Husavík in the Northeast, and the Authority has approved state aid to this investment as well as to related harbour infrastructure.

Recently the Authority concluded that the new power and transmission contracts between PCC with Landsvirkjun, (the national power company in Iceland), and Landsnet, (the operator responsible for transmission of electricity) were concluded on market terms. These contracts had been renegotiated after the Authority had raised serious doubts as to whether this had been the case for the initial conctracts.

Both cases concern the application of state aid rules to measures taken by public undertakings. Under the EEA Agreement, public undertakings are free to participate in the market provided that they act as private operators would do. Where this can be established on the basis of objective factors, then no state aid is present. Conversely, if such contracts primarily respond to public policy interests rather than business needs, there will be a risk that they involve state aid. After renegotiation of the terms of previously concluded contracts, we were now able to conclude that the new contracts did not involve state aid.

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State aid decisions can have an important economic impact on the companies concerned, and it is inevitable that some of these cases end up in the EFTA Court. Although the actual decisions are addressed to one

of the EFTA States, other parties – mainly economic operators that benefit from the aid and their competitors – can have reason to be unhappy with them, and call on the EFTA Court for a legal review.

One question of great importance is who is ultimately allowed to appeal our decisions to the EFTA Court. Two recent EFTA Court judgments have clarified this.

In the case (E-8/13) *Abelia v ESA*, the applicant was a trade and employers association that is part of the Confederation of Norwegian Enterprise ("NHO"). In that case the EFTA Court stated that an undertaking which is not a direct competitor of the aid beneficiary can be categorised as an interested party, provided that it demonstrates that its interests could be negatively affected and seriously jeopardise its position on the market. In the Abelia case, the Court, however, held that the applicant had not shown that its members actually are in a relationship of rivalry with the beneficiaries of the alleged aid, which in this case were lessors of real estate. The conclusion was that Abelia lacked legal standing to challenge the decision.

In another case (E-19/13) *Konkurrenten.no AS v ESA* the EFTA Court confirmed that an action for annulment of a decision by the Authority not to open a formal investigation is admissible when the interested party seeks to safeguard its procedural rights. This covers not only direct competitors of the aid beneficiary. It is not ruled out that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid.

In turn, the threshold to challenge a decision in the EFTA Court by which the Authority closes a formal state aid investigation is higher. Here the applicant must demonstrate that their market position is substantially affected by the grant of the aid. It is not sufficient to rely on the status as a competitor. In addition, it has to show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, which is rare.

The EFTA Court has clarified that even if decision may have some impact on the competitive relationships on the relevant market, it does not mean that the applicant's competitive position is substantially affected. The applicant must also demonstrate more concretely the damage done to its market position.

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Thank you for your attention.