ORDER OF THE PRESIDENT
31 March 2017

(Intervention – Trade association)

In Case E-12/16,

Marine Harvest ASA, established in Bergen (Norway),

represented by Torben Foss and Kjetil Raknerud, advocates, acting as counsel, Advokatfirmaet PricewaterhouseCoopers AS,

applicant,

v

EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision in Case No 79116 of 27 July 2016 on the basis of a wrongful interpretation of the relevant sources of law and documented facts and further seeking a declaration that the EFTA Surveillance Authority has the competence and obligation to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement, and that the EFTA Surveillance Authority's refusal to do so constitutes an infringement of Article 62(1) of the EEA Agreement,

THE PRESIDENT

makes the following

Order

I Main proceedings

1 Marine Harvest ASA ("the applicant") is one of the largest seafood companies in the world, and the world's largest producer of Atlantic salmon. On 2 May 2016, the applicant lodged a formal complaint with the EFTA Surveillance Authority ("the defendant") alleging that unlawful State aid was granted to the Norwegian fisheries sector by means of levies imposed on fish exporters and exported fish products. The relevant Ministry imposes these levies based on the Act relating to the Regulation of Exports of Fish and Fish Products (*Lov om regulering av eksporten av fisk og fiskevarer*, LOV-1990-04-27-9). The proceeds from the levies cover the costs of the Norwegian Seafood Council, a public company owned by the Norwegian Ministry of Trade, Industry and Fisheries.

2 By letter dated 27 July 2016, the defendant closed the case stating that it lacked the competence to carry out surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

3 On 23 September 2016, the applicant lodged an application pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), requesting the Court to order as follows:

> *1. The EFTA Surveillance Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law, and is consequently void.*
>
> *2. The EFTA Surveillance Authority does have the competence and obligation to perform surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and is therefore obliged to assess the claims made by the Applicant through the formal complaint filed on 2 May 2016.*
>
> *3. The EFTA Surveillance Authority shall bear the costs of these proceedings.*

4 On 22 November 2016, the defendant lodged its statement of defence. The defendant asserts that the surveillance of State aid measures in the fisheries sector is not part of the EEA Agreement, and that the defendant is therefore not competent to handle the applicant's claims. The defendant requests the Court to:

> *1. Dismiss the Application as unfounded;*

2. Order the Applicant to pay the costs of the proceedings.

5 On 20 and 25 January 2017, the European Commission, and the Government of Iceland, respectively lodged written observations at the Court's Registry. Both invite the Court to dismiss the application as unfounded.

II Application to intervene

6 On 25 January 2017, the Federation of Norwegian Industries ("FNI") applied for leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court ("the Statute"). It supports the form of order sought by the applicant, namely, that the defendant's decision of 27 July 2016 in Case No 79116 should be declared void and declaring that the defendant is competent and obliged to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

7 FNI is an organisation that seeks to influence the conditions under which businesses can operate across many sectors and industries, including aquaculture, and aquaculture suppliers. It represents more than 2 400 member companies including the applicant and is the largest association within the Confederation of Norwegian Enterprise. FNI states that its most important task is to ensure that the authorities adopt a long-term fiscal policy and framework conditions that are conducive to a competitive Norwegian industry. This includes working towards equal conditions of competition both in Norway and abroad including within the Single Market.

8 FNI submits that it has an interest in the result of the case within the meaning of the second paragraph of Article 36 of the Statute (reference is made to the Order of the President of 30 May 2013 in Case E-4/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 1211 ("*DB Schenker IV*"), paragraph 19). In its view, the principle of procedural homogeneity should inform the finding of whether an applicant to intervene has established an interest in the result of the case, as Article 36 of the Statute is essentially identical to Article 40 of the Statute of the Court of Justice of the European Union ("ECJ") (reference is made to the Order of the President of 1 July 2013 in Case E-5/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 304 ("*DB Schenker V*"), paragraph 39).

9 FNI submits that it clearly has an interest in the outcome of the present case as it directly affects its members. Further, it has an interest of its own in ensuring that equal market conditions created by the EEA's two pillar system are enforced and protected. In addition, FNI contends that, before the European Union courts, representative associations are allowed to intervene in cases which raise questions of principle liable to affect their members (reference is made to the Order of the President of the General Court in *Poste Italiana SpA* v *Commission*, T-53/01 R,

EU:T:2001:143, paragraph 51 et seq.). Consequently, the request to intervene should be granted.

10 On 13 February 2017, the application to intervene was served on the parties in accordance with Article 89(2) of the Rules of Procedure ("RoP").

11 On 21 February 2017, the defendant submitted written observations on the application for leave to intervene. In its view, it is not readily apparent that FNI has substantiated a sufficient interest in the result of the case within the meaning of the second paragraph of Article 36 of the Statute, as required by Article 89(1)(f) RoP. The defendant contends that "an interest in the result of the case" has previously been defined in light of the actual subject matter of the dispute and understood as meaning a direct and existing interest in the ruling on the form or forms of order sought (reference is made to Order of the President in *DB Schenker IV*, paragraph 19; compare the Order of the President of the ECJ in *Schenker* v *Air France*, C-589/11 P(I), EU:C:2012:332, paragraph 10).

12 The defendant notes that the European Union courts have found it appropriate to ascertain whether an applicant to intervene is directly affected by the contested measure and whether its interest in the result of the case is established (compare the Order of the President of the ECJ in *An Post* v *Deutsche Post and Others*, C-130/06 P(I), EU:C:2006:248, paragraph 8. In addition, reference is made to the Order of the President of the ECJ in *National Power and PowerGen*, C-151/97 P(I) and C-157/97 P(I), EU:C:1997:307, paragraphs 51 to53 and 57).

13 The defendant contends that FNI's interest in the result of the case seems rather indirect, future and hypothetical, and does not comply with the legal test set out above. It acknowledges, however, that this is a matter for the Court to determine, on a case-by-case basis, bearing in mind any advantages in terms of informing the Court fully of the relevant context of the case, as well as any disadvantages in terms of procedural economy and the additional burdens placed on both the Court and the existing parties to the proceedings. Consequently, the defendant leaves it to the Court's discretion whether or not to grant FNI's application for leave to intervene.

14 On 28 February 2017, the applicant submitted written observations on the application for leave to intervene. It fully supports FNI's application for leave to intervene since, as a representative for a large number of Norwegian industries, FNI has a clear interest in the outcome of the case.

III Law

15 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 15 December 2016 in the EEA Section of the Official Journal

of the European Union. Accordingly, the time limit for submission of an application to intervene was 26 January 2017.

16 The present application to intervene was lodged at the Court's Registry on 25 January 2017, and is therefore timely.

17 Under the second paragraph of Article 36 of the Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case. The third paragraph of Article 36 of the Statute provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.

18 The assessment of whether an applicant for intervention has established an interest in the result of the case within the meaning of the Statute requires that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and, thus, in the ruling on the specific act whose annulment is sought (see the Order of the President of 24 March 2015 in Case E-22/14 *DB Schenker* v *ESA* [2015] EFTA Ct. Rep. 350, paragraph 31 and the case law cited).

19 Associations may be admitted to intervene to protect the interests of their members in cases raising matters of principle capable of affecting those interests (compare the Order of the President of the General Court of 7 July 2004 in *Autonomous Region of the Azores* v *Council*, T-37/04 R, EU:T:2004:215, paragraph 59, and the Order of the President of the ECJ of 28 September 1998 in *Pharos* v *Commission*, C-151/98 P EU:C:1998:440, paragraph 6, and the orders cited therein).

20 FNI is a trade association which represents many undertakings covering a large part of Norwegian industry, including aquaculture and aquaculture suppliers. The applicant is a member of FNI. FNI's main objective is to ensure that the authorities adopt a long-term fiscal policy and framework conditions that are conducive to a competitive Norwegian industry. This includes working towards equal conditions of competition both in Norway and abroad including within the Single Market.

21 As noted in the defence, it is ESA's long-standing and consistent decision-making practice not to perform State aid surveillance in the fisheries sector. ESA contends that the wording of the EEA Agreement and SCA is unambiguous in not conferring upon it the powers to carry out State aid surveillance in the fisheries sector. Consequently, the annulment of ESA's decision in Case No 79116 of 27 July 2016 and a declaration that ESA has the competence and obligation to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and that ESA's refusal to do so constitutes an infringement of Article 62(1) EEA would

have a direct, and potentially substantial, effect on fishing activities in the waters of EEA/EFTA States.

22 Therefore, while the scope of FNI's membership covers a wide and disparate range of sectors other than aquaculture and aquaculture suppliers, its activities are limited to Norwegian industry. Consequently, FNI's interests are neither too broad nor too general as not to be significantly affected by the outcome of the present proceedings (compare the Order of the President of the General Court in *Autonomous Region of the Azores* v *Council*, cited above, paragraphs 63 to 71).

23 In light of the above, the Federation of Norwegian Industries is granted leave to intervene in Case E-12/16 in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The Federation of Norwegian Industries is granted leave to intervene in Case E-12/16, in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg, 31 March 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President