# REPORT FOR THE HEARING

in Case E-12/16

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

**Marine Harvest ASA**,

supported by **the Federation of Norwegian Industries (*Norsk Industri*)**,

and

**EFTA Surveillance Authority**,

supported by **the Kingdom of Norway**,

seeking the annulment of a decision of 27 July 2016 concluding that the EFTA Surveillance Authority lacks the competence to carry out surveillance of State aid to the fisheries sector.

## I Legal background

*EEA law*

1. Article 1(1) and Article 1(2)(e) of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement") read:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*
>
> *2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:*
>
> *...*

*(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; …*

2. Article 8(3) EEA reads:

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

*(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*

*(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

3. Article 20 EEA reads:

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

4. Article 61 EEA reads:

*1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.*

*2. The following shall be compatible with the functioning of this Agreement:*

*(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;*

*(b) aid to make good the damage caused by natural disasters or exceptional occurrences;*

*(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.*

*3. The following may be considered to be compatible with the functioning of this Agreement:*

*(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;*

*(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;*

*(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*

*(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.*

5. Article 62 EEA reads:

*1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:*

*(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;*

*(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.*

*2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.*

6. Article 108(1) EEA reads:

*The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.*

7. Protocol 9 to the EEA Agreement relates to trade in fish and other marine products. Article 4 of Protocol 9 EEA reads:

*1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.*

2. *Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition.*

3. *The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties.*

8. Article 6 of Protocol 9 EEA reads:

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

9. Point 1 of the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9 EEA ("the Joint Declaration") reads:

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

10. Protocol 26 to the EEA Agreement relates to the powers and functions of the EFTA Surveillance Authority in the field of State aid. Article 1 of Protocol 26 EEA reads:

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

11. The first paragraph of Article 24 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

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

12. The first and second paragraphs of Article 36 SCA read:

> *The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.*
>
> *Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.*

## II Facts and pre-litigation procedure

13. On 2 May 2016, Marine Harvest ASA ("the applicant") and another company in the same group submitted a complaint to the EFTA Surveillance Authority ("ESA" or "the defendant") concerning alleged State aid distributed through the Norwegian Seafood Council. According to the complaint, a substantial portion of the proceeds from levies imposed on fish exporters and exported fish products is used to finance the activities of the Seafood Council. These activities cover the dissemination of information to the operators of the industry, their organisations and to the authorities. The Seafood Council may engage in marketing and export promoting activities, abroad and domestically. A considerable part of the levies is targeted at certain sectors. Moreover, the Seafood Council has discretionary powers to formulate specific projects targeted at aiding individual exporters' marketing efforts, thus relieving them from marketing expenses which otherwise would have been borne by their budgets. The complaint concluded that these measures constitute State aid incompatible with the EEA Agreement. The complaint also contended that ESA is competent to assess State aid in the fisheries sector, notwithstanding the finding to the contrary in Decision No 195/96/COL.[1]

[1] Decision No 195/96/COL of 30 October 1996.

14. On 10 June 2016, the complainants and ESA held a meeting to discuss the complaint, including ESA's competence to assess State aid to the fisheries sector.

15. On 13 June 2016, the Norwegian Government submitted observations on the complaint, contending that ESA lacked competence to perform State aid surveillance in the fisheries sector.

16. On 27 July 2016, in response to the complaint, ESA adopted a decision concluding that State aid to the fisheries sector is excluded from its competence, and that such State aid is to be assessed instead by the Contracting Parties ("the contested decision"). The conclusion reads as follows:

> *On the basis of the foregoing, and in line with the Authority's previous decisions on its competence to control state aid in the fisheries sector, the Authority finds that it lacks 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.*

## III Procedure and forms of order sought by the parties

17. The applicant lodged an application at the Court Registry on 20 September 2016 seeking a declaration that:

> *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.*
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> *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.*
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> *3. The EFTA Surveillance Authority shall bear the costs of these proceedings.*

18. On 22 November 2016, the defendant lodged its defence, requesting the Court to:

> *1. Dismiss the Application as unfounded.*
>
> *2. Order the Applicant to pay the costs of the proceedings.*

19. On 22 December 2016, the applicant submitted its reply. On 7 February 2017, the defendant submitted its rejoinder.

20. On 20 January 2017, the European Commission ("the Commission") submitted written observations. On 25 January 2017, the Government of Iceland submitted written observations.

21. On 25 January 2017, Norway and the Federation of Norwegian Industries ("Norwegian Industries") filed applications for intervention. On 21 and 28 February 2017, respectively, the defendant and the applicant submitted written observations on the applications. By orders of 31 March 2017, the President of the Court granted both Norway and Norwegian Industries leave to intervene.

22. On 2 May 2017, Norway and Norwegian Industries lodged their statements in intervention. Norwegian Industries requests the Court to rule in favour of the order sought by the applicant, whereas Norway requests the Court to declare the application unfounded.

23. On 18 May 2017, the defendant waived its right to reply to the statements in intervention. On 29 May 2017, the applicant submitted a reply to Norway's statement in intervention.

## IV Written procedure before the Court

24. Written arguments have been received from the parties and the interveners:

- The applicant, represented by Torben Foss and Kjetil Raknerud, advocates;

- The defendant, represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents;

- Norwegian Industries, represented by Tore M. Sellæg, advocate,;

- Norway, represented by Dag Sørlie Lund, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, advocate, Attorney General's Office (Civil Affairs), acting as Agents;

25. Pursuant to Article 20 of the Statute of the Court, written observations have been received from:

- the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, Haraldur Steinþórsson, Legal Officer, Ministry of Finance and Economic Affairs, and Erna Jónsdóttir, Legal

Officer, Ministry of Industries and Innovation, acting as Agents, and Lilja Ólafsdóttir, attorney-at-law;

- the Commission, represented by Viktor Bottka and Marketa Simerdova, members of its Legal Service, acting as Agents.

## V Summary of the arguments and observations submitted to the Court

*The applicant*

26. The applicant submits that, pursuant to Article 108 EEA, ESA is obliged to ensure that all the obligations in the EEA Agreement – including its protocols – are fulfilled by the EFTA States. Article 4 of Protocol 9 EEA contains a prohibition on State aid in the fisheries sector. The applicant also relies on Article 1 of Protocol 26 EEA, which refers, inter alia, to Article 1(2)(e) EEA, entailing the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected. In its view, there is nothing to suggest that the Contracting Parties wished to exclude fisheries and aquaculture products from this obligation. The starting point must therefore be that ESA is competent in all fields of the EEA Agreement, including the fisheries and aquaculture sectors.

27. On this basis, the applicant contends that any exception to ESA's general competence must be clearly specified. Such exceptions concerning the fisheries and aquaculture sectors are neither to be found in the EEA Agreement nor in any protocols or secondary law.

28. The applicant challenges the finding in the contested decision to the effect that State aid in the fisheries sector is excluded from ESA's competence on the basis that Article 1 of Protocol 26 EEA does not specifically mention the State aid rules in Article 4 of Protocol 9 EEA as part of the defendant's competence and powers. In the applicant's view, this exclusion is natural, as the two specific inclusions – transport and coal/steel sectors – have specific State aid regimes in both the EU and the EEA. No such specific regime exists for the fisheries and aquaculture sectors.

29. The applicant relies further on the Joint Declaration, which indicates that the EFTA States should align their aid systems in accordance with the State aid regulations of Articles 92 and 93 of the EEC Treaty. The applicant assumes the Contracting Parties to have meant that these aid rules should correspond with the aid rules in Article 4 of Protocol 9 EEA. A straightforward application of the definition of aid contained in Article 61(1) EEA and use of the discretionary powers of the two surveillance authorities outlined in Article 61(3) EEA is sufficient to give effect to these rules. On this basis, the applicant contends that the State aid rules pertaining to

fisheries and aquaculture correspond with the definition of aid contained in Article 61 EEA, thus making any specific mention in Protocol 26 redundant.

30. The applicant also notes that Protocol 26 EEA refers to Article 62 EEA, which obliges ESA to keep under constant review "[a]ll existing systems of State aid" in the territories of the EFTA States, as well as "any plans to grant or alter State aid". Thus, Protocol 26 EEA specifically provides ESA with the same tools to monitor and enforce State aid rules in the fisheries sector as the Commission has.

31. Relying on the Joint Declaration, the applicant argues further that the interpretation of Article 4(1) and (2) of Protocol 9 EEA should be made in the context of the basic State aid regulations of Articles 61 and 62 EEA. In its view, the reference to Article 93 of the EEC Treaty denotes that a system for constant State aid control in the fisheries sector of the EFTA States should be put in place. Moreover, both Articles 61 and 62 EEA effectively impose a ban on granting State aid to the fisheries sector and create a sole competence for the respective surveillance authority to conduct State aid control.[2]

32. The applicant notes that, in the period following the entry into force of the EEA Agreement, the Commission's Guidelines for the examination of State aid to fisheries and aquaculture were communicated in the Official Journal as a text with EEA relevance.[3] Hence, the Commission was aiming for the application of a two-pillar system for surveillance in the fisheries sector, which essentially would rest upon a set of identical material and procedural rules.

33. According to the applicant, there is little to support ESA's assessment that the Contracting Parties had reserved to themselves the function of reviewing the State aid provisions of Article 4 of Protocol 9 EEA. In the applicant's view, both the text of Protocol 9 EEA itself, as well as numerous references in the Declarations and Agreed Minutes to the Final Act, clearly show that Protocol 9 EEA is a snapshot of the status in negotiations that were in progress at the time of its signature, and that the Contracting Parties intended to continue their work on unresolved issues until the entry into force of the EEA Agreement.

34. In the applicant's view, there is nothing in the context of the negotiations on the institutional provisions of the EEA Agreement to support the defendant's view. The Contracting Parties have no institutional place in the EEA Agreement, except for holding seats in the EEA Council and the EEA Joint Committee. It was never the intention that these bodies should perform functions related to surveillance and judicial control.

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[2] Reference is made to Stefánsson, S.M., *The EEA Agreement and Fish and Other Marine Products*, Nordisk Råd for Forskning i Europæisk Integrationsret, Fiskeripolitikken i EU/EØS, 1996.

[3] Reference is made to OJ 1994 C 260.

35. The applicant argues that Protocol 9 EEA is not a comprehensive trade system for the fisheries sector. This is supported by several ESA decisions[4] which, in the applicant's view, make it clear that Article 20 EEA, being set in Part II on the free movement of goods and dealing exclusively with trade in fish and other marine products, in no way excludes the fisheries sector from the application of relevant rules in other parts of the Agreement. In the applicant's view, Protocol 9 EEA neither specifies the aid concept used in its Article 4(1), nor does it establish a specific system for constant review. For both issues one has to turn to the Joint Declaration.

36. The applicant points out that fish and other marine products are treated basically in the same manner as industrial goods. Fish products have their place of origin determined in accordance with Protocol 4 EEA and are subject to the same provisions with regard to documentation and customs clearance as industrial goods.

37. The applicant questions the value of ESA's previous practice. Decision No 195/96/COL is, in the applicant's view, one-sided and only aimed at justifying a decision from 1994 which had been annulled by the Court.[5] Subsequent decisions routinely refer to Decision No 195/96/COL as a precedent for closing the complaints. The applicant therefore finds it doubtful whether ESA's practice can be said to be consistent enough to be cited as a source of law capable of creating a precedent.

38. According to the applicant, ESA's contention that the possibility for anti-dumping and/or countervailing proceedings to offset possible distorting State aid prevents ESA from exercising a concurrent competence must be based on a misunderstanding. No support for ESA's allegation can be found in the history of the negotiations, or in the wording of Article 4(3) of Protocol 9 EEA. In the applicant's view, investigation into the existence of possible countervailing subsidies is something different from the constant surveillance of State aid in the context of the EEA Agreement, both in terms of substance and procedure. The inability of the Contracting Parties to extend the scope of Article 26 EEA to the trade in fish and other marine resources entails that the EU may be faced with countervailing actions from the EFTA side. In addition, throughout the period of the EEA's existence, the Commission has continued to apply its competences vis-à-vis the EU Member States without any restrictions in the State aid field.

39. The applicant is further of the view that general policy considerations support the declaration sought before the Court. According to the applicant, it does not make sense that the Contracting Parties included a specific provision on State aid in the fisheries sector that was never meant to be enforced.

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[4] Decision No 337/01/COL of 15 November 2001, Decision No 66/04/COL of 2 April 2004, Decision No 186/12/COL of 11 July 2012, and a letter of 18 October 2016 in Case No 79122.

[5] Reference is made to Case E-2/94 *Scottish Salmon Growers Association* [1994-1995] EFTA Ct. Rep. 59.

40. As regards Norway's argument that the starting point for interpretation should be the customary rules of interpretation of public international law, as reflected in the Vienna Convention on the Law of Treaties ("the Vienna Convention"), the applicant submits that the EEA Agreement envisages the achievement of a long series of objectives which go far beyond a traditional treaty under international law. In addition, there is no dispute over the content of the material rules that commits the parties to the EEA Agreement, but in the control and enforcement of these obligations. Further, the applicant requests the Court to take account of Article 32 of the Vienna Convention, which deals with the text of treaties which are so ambiguous or obscure that it leads to a result which is manifestly absurd or unreasonable. In this regard, it contends that the result sought by the defendant would create an asymmetry in the system of surveillance and enforcement of the State aid rules in the EEA, meaning that equal conditions of competition will not be assured in an important and rapidly growing economic sector of the EEA. In addition, individuals and economic operators of the EFTA States would lose an important right to judicial recourse in defence of their rights.

41. As a comment on Norway's reference to the principle of conferral, the applicant requests the Court to consider whether the aid system formulated in the Joint Declaration of itself constitutes a direct referral to ESA to act in parallel with the Commission to perform the tasks under Articles 61 and 62 EEA.

*The defendant*

42. The defendant is of the view that the application is unfounded and should be dismissed in its entirety. It refers to its long-standing and consistent practice of not performing State aid surveillance in the fisheries sector.[6] This practice is based on the unambiguous wording of the EEA Agreement and the SCA, which do not confer upon ESA the powers to carry out State aid surveillance in the fisheries sector. In addition, this practice is acknowledged by all Contracting Parties to the EEA. In the defendant's view, the applicant misinterprets the EEA Agreement and the SCA in order to construe a competence which does not exist.

43. With reference to Article 4 of Protocol 9 EEA, the defendant notes, first, that it is for the Contracting Parties to ensure that aid in the fisheries sector, which distorts competition, is abolished. ESA has neither the power to ensure that such aid is abolished, nor is ESA mentioned in Article 4 of Protocol 9 EEA to perform State aid surveillance in the fisheries sector. Instead, Article 4 of Protocol 9 EEA excludes the entire fisheries sector from ESA's State aid competence, including the surveillance of any State aid measures inseparably linked to that sector.[7] Second, the remedies to

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[6] Reference is made to Decision No 195/96/COL of 30 October 1996, Decision No 176/05/COL of 15 July 2005, and Decision No 729/08/COL of 26 November 2008.

[7] Reference is made to Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 65.

offset illegal State aid in the fisheries sector are the application of anti-dumping and/or countervailing procedures.[8] In this context the defendant submits that the European Union has assumed responsibilities to investigate several anti-dumping and countervailing cases against Norway in the fisheries sector.[9] A concurrent competence of ESA to investigate subsidies in the fisheries sector would stand in sharp contrast to the current structure of competence allocation between the two pillars of the EEA. The applicant's assertion that the concept of subsidy is completely different from the notion of State aid is incorrect.

44. The defendant submits further that, in stating that any points at issue may be put to the EEA Joint Committee, Article 6 of Protocol 9 EEA implies that any issues arising in relation to Article 4 of that Protocol should be dealt with by the Contracting Parties and not ESA.

45. In the defendant's view, the wording of the Joint Declaration clarifies that it is for the Contracting Parties to ensure that aid to the fisheries sector is not distorting competition. According to the Joint Declaration, the Contracting Parties will conduct their own assessment of any distortions of competition in the fisheries sector pursuant to the elements inherent in and the principles emanating from Articles 92 and 93 of the EEC Treaty, which correspond to Articles 61 and 62 EEA. No evidence has been submitted by the applicant to support the view that ESA's interpretation is incorrect.

46. The defendant argues that its interpretation is not contradicted by the applicant's reference to the Commission's Guidelines for the examination of State aid to fisheries and aquaculture. In the defendant's view, the fact that these guidelines were communicated in the Official Journal as a text with EEA relevance confirms that the "*acquis communautaire*" has EEA relevance in the context of Article 4 of Protocol 9 EEA and the Joint Declaration, namely for the Contracting Parties to take note of the relevant provisions of the "*acquis communautaire*" in the fisheries sector, in the course of their own State aid assessment.

47. The defendant asserts further that its interpretation of Article 4 of Protocol 9 EEA is confirmed by Article 1 of Protocol 26 EEA. Protocol 26 EEA outlines the State aid rules for which ESA has surveillance powers. The State aid provisions in Protocol 9 EEA are, however, not included in Article 1 of Protocol 26 EEA. Consequently, ESA has no power to give effect to the State aid rules included in

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[8] Reference is made to the first paragraph of Protocol 13 EEA on the non-application of anti-dumping and countervailing measures, which, in the defendant's view, confirms that trade remedies may still apply to the fisheries sector.

[9] Reference is made to Council Regulation (EC) No 1677/2001 of 13 August 2001 (OJ 2001 L 227, p. 15) and Council Regulation (EC) No 1593/2002 of 3 September 2002 (OJ 2002 L 240, p. 22), both amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 1999 L 101, p. 1).

Protocol 9 EEA. Nothing suggests that the Contracting Parties had a different intention when signing the EEA Agreement.

48. The defendant submits further that Article 24 SCA does not include the State aid provisions in Protocol 9 EEA. This is another indication that ESA lacks the competence to perform State aid surveillance in the fisheries sector. Article 24 SCA, together with Protocol 26 EEA, draw up an exhaustive list of provisions according to which ESA can exercise its surveillance powers in the field of State aid. ESA therefore has no competence to perform State aid surveillance in the fisheries sector. No explicit exception to this rule has been provided. General policy considerations, as referred to by the applicant, cannot serve as a legal basis for ESA to enforce State aid law in the fisheries sector. Moreover, in the absence of a specific legal basis in EEA law, ESA is barred from acting.[10]

49. The defendant acknowledges that it has initiated infringement procedures in relation to cases in the fisheries sector. However, these cases all concern specific circumstances in the context of ESA's general surveillance powers. The defendant submits that its competence and procedures concerning general surveillance have to be distinguished from its competence and procedures in the area of State aid. For example, general surveillance does neither provide for a prior approval procedure of national measures nor the recovery of aid granted to undertakings.

50. The defendant submits that the applicant has failed to support claims with any concrete evidence. The applicant refers to agreements, declarations and agreed minutes, which allegedly provides a clear picture of how to interpret Protocol 9 EEA. However, it does not identify any of those documents.

51. The defendant rejects the applicant's view that the burden of proof is on ESA to demonstrate that the Contracting Parties never intended for the fisheries sector to fall outside the scope of ESA's State aid powers. Both primary EEA law and the Joint Declaration demonstrate that ESA has no competence to enforce State aid law in the fisheries sector. If the applicant puts forward a different plea, the onus is on the applicant to substantiate this.

52. Consequently, the defendant submits that it has not infringed its obligation under Article 62(1) EEA to keep under constant review existing State aid schemes as well as any plans to grant or alter State aid.

*Norwegian Industries*

53. Norwegian Industries supports the form of order sought by the applicant. Norwegian Industries submits that there is no evidence from the negotiations to

[10] Reference is made to *Synnøve Finden*, cited above, paragraph 57.

establish the EEA that supports the notion that there should be institutional arrangements for trade in fish and other marine products different to those dealing with trade in other goods. Trade in fish and fish products were, unlike agricultural products, made part of the multilateral undertaking, which characterises the EEA Agreement, by means of Protocol 9 EEA.

54. In the view of Norwegian Industries, the defendant has erroneously read the Joint Declaration as being directed exclusively to the EFTA States, despite the fact that the Declaration records a binding obligation on all Contracting Parties to establish a common regime for the assessment of State aid. While the Joint Declaration does not specify any particular institutional agreement for the implementation of this common regime, it does refer to articles of the EU Treaty, which are incorporated as Articles 61 and 62 EEA. This makes it evident that the notion of EFTA States becoming entrusted with the tasks of carrying out constant review of State aid to the fisheries sector, or of assessing State aid measures in this sector for compatibility with the Agreement, was not an option. In the case of the EFTA States, the relevant surveillance functions can only be carried out by ESA.

55. Norwegian Industries submits that it is inconceivable that the Contracting Parties and not ESA should be competent to enforce State aid provisions in the fisheries sector, since Articles 61 and 62 EEA provide the opposite. Norwegian Industries states that common logic makes it highly unlikely that the negotiators in the Joint Declaration have created obligations which should be outside the normal system of EEA enforcement. Norwegian Industries also finds the defendant's interpretation potentially harmful in economic terms.

*Norway*

56. Norway supports the defendant's interpretation of Article 4 of Protocol 9 EEA, and submits that the application should be dismissed as unfounded.

57. Norway submits that the starting point for the Court's interpretation should be the customary rules on interpretation of public international law, as reflected in Articles 31 to 33 of the Vienna Convention. This is supported by the approach taken by the Court of Justice of the European Union ("the ECJ") in similar matters.[11]

58. Norway submits that EEA law, like international law more generally, is based on the principle of speciality or conferral, meaning that competence that has not been transferred to an EFTA institution, remains with the EFTA States.[12] Norway refers

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[11] Reference is made to the judgment in *Commission* v *Council*, C-91/05, EU:C:2008:288, and the opinions of Advocate General Jacobs in *Commission* v *Council*, C-299/99, EU:C:2001:680, point 148, and Advocate General Trstenjak in *United Kingdom* v *Council*, C-77/05, EU:C:2007:419, point 88.

[12] Reference is made to an Advisory Opinion by the International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, pp. 78 and 79, paragraph 25.

further to Articles 4 and 5 of the Treaty on European Union, where the same principle is reflected. Although not explicitly mentioned in the EEA Agreement, Norway submits that this principle is also a part of EEA law when it comes to questions of the attribution of powers to the EFTA institutions.

59. In Norway's view, the applicant confuses ESA's general surveillance competences and the specific competence as regards State aid. Further, the applicant fails to take account of Article 8(3) EEA regarding the scope of the EEA Agreement, which very much permits the conclusion that the Contracting Parties wished to exclude fisheries and aquaculture not only from that obligation, but from the scope of the Agreement as such.[13] Since fish and marine products are not among the products covered by Article 8(3), these products falls entirely outside the scope of the Agreement, unless otherwise specified elsewhere in the Agreement.

60. In Norway's view, the very existence of Protocol 9 EEA and its *lex specialis* status[14] are reasons to conclude that the Contracting Parties in particular did not want the general obligations regarding State aid and competition to apply to fisheries and aquaculture.

61. Norway submits that the defendant's conclusion is supported by all available sources of law. The wording of Article 4(1) of Protocol 9 EEA leaves it to the Contracting Parties to enforce the obligation to endeavour to ensure conditions of competition, which is also explicitly stated in the Joint Declaration. According to Norway, the Joint Declaration represents an authentic interpretation of Protocol 9 EEA. That interpretation is supported by Protocol 26 EEA and Article 24 SCA. These provisions set out ESA's competence in the field of State aid, and neither makes reference to Protocol 9 EEA. Referring to the principle of conferral, Norway takes this to mean that ESA has not been entrusted with powers to perform surveillance in the fisheries sector.

62. Norway submits further that the defendant's interpretation was supported by all Contracting Parties when the same question was before the Court in *Scottish Salmon Growers Association*, cited above. Norway stresses that the interpretation presented in that case took place shortly after the entry into force of the EEA Agreement. Such contemporaneous practice by the Contracting Parties should be given a particular weight when interpreting Protocol 9 EEA. It also demonstrates that the Contracting Parties never expressed any desire to grant ESA competence to assess and enforce State aid rules in the fisheries sector. Finally, the defendant's interpretation has consistently been upheld in its decisional practice.

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[13] Reference is made to *Synnøve Finden*, cited above, paragraph 57.

[14] Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 36.

*The Icelandic Government*

63. The Icelandic Government, which supports the conclusion of the defendant, submits that the Contracting Parties agreed to apply specific rules to trade in fish and other marine products. This explains why Article 20 EEA refers to Protocol 9 EEA for provisions and arrangements relating to trade in fish and other marine products. Iceland further refers to the fact that Article 4 of Protocol 9 EEA makes no reference to Articles 61 to 63 EEA The Joint Declaration confirms the intention of the Contracting Parties to leave the endorsement of Article 4 of Protocol 9 EEA to the assessment of the Contracting Parties themselves, indicating that the EFTA States would not take over the "*acquis communautaire*" concerning the EEC fishery policy.

64. With regard to the scope of the EEA Agreement, the Icelandic Government agrees with the view put forward by the defendant. According to Article 8(3) EEA, agriculture and fishery products do not fall under the product coverage of the Agreement. To apply the main provisions of the Agreement, including Articles 61 to 63, to fish and other marine products, would therefore require a clear legal basis.[15]

65. Iceland submits further that the statements made during the Commission/EFTA High Level Steering Group Meeting of 20 October 1989 made it clear that the EFTA States and the EEC agreed not to aim at a common fishery policy in the coming EEA negotiations.[16] Iceland claims that the result of those negotiations is now set out in Protocol 9 EEA, which contains, inter alia, a specific provision on State aid. No secondary EEC legislation in the field of State aid to fisheries was included in Protocol 9 EEA or in the Annexes to the EEA Agreement.

66. The Icelandic Government considers it to be an obvious clerical error that the Commission's Guidelines for the examination of State aid to fisheries and aquaculture was marked as a text with EEA relevance in 1994.

67. Iceland submits further that the reference in Article 6 of Protocol 9 EEA to a dispute settlement procedure before the EEA Joint Committee confirms the understanding that the endorsement of the provisions of Protocol 9 EEA is in the hands of the Contracting Parties and not ESA.

68. In Iceland's view, Protocol 26 EEA, together with Article 24 SCA, exhaustively define the powers and functions entrusted to ESA in the field of State aid. These provisions do not mention Article 4 of Protocol 9 EEA. Moreover, the Joint Declaration confirms that different arrangements should apply when it comes to aid in the fisheries sector. The Icelandic Government submits that a clear legal basis is

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[15] Reference is made to *Synnøve Finden*, cited above, paragraph 57, and Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraphs 24 and 25.

[16] Reference is made to Results of the Commission/EFTA High Level Steering Group Meeting, Brussels, 20 October 1989, paragraph 5, pp. 2 and 3.

required for ESA to have competence to carry out surveillance of State aid in the fisheries sector. In this regard, the reference in Article 62 EEA to "all existing systems of State aid" and "any plans to grant or alter State aid" must be read in the context of the EEA Agreement and its scope.

*The Commission*

69. The Commission agrees with the arguments put forward by the defendant. In the Commission's view, ESA has correctly interpreted its competence under the EEA Agreement.

70. The Commission submits that, in referring to Protocol 9 EEA, which creates a *lex specialis* for fish and other marine products, Article 20 EEA removed these products from the scope of the EEA Agreement's normal rules. By virtue of Protocol 9 EEA, in particular its Article 4(3) and Article 6, the EFTA States have agreed to respect the EU's State aid rules with regard to fish and other marine products, by applying the special provisions in that protocol. The normal rules on State aid in Articles 61 to 64 EEA do not apply and there is no role for ESA.

71. The Commission submits that Article 61(1) EEA, which only applies if not otherwise provided for in the EEA Agreement, confirms that the State aid provisions must be read together with the remaining parts of the EEA Agreement, in particular Article 20 EEA. The Commission considers that Protocol 9 EEA, read in conjunction with Article 20 EEA, makes a specific provision for State aid in respect of fish and other marine products. Since the alleged aid measure in the present case relates to the marketing of fish and other marine products, it can be reasonably held to be inseparably linked to trade in these products, and hence it falls under the scope of Protocol 9 EEA.[17]

72. The Commission submits that Article 24 SCA, which defines the competence of ESA, does not refer to Protocol 9 EEA. A similar reference is also absent from Article 1 of Protocol 26 EEA. There is no provision in the EEA Agreement, or in the SCA, which would give ESA any competence in relation to products which fall within Protocol 9 EEA.

73. The Commission submits that Protocol 9 EEA and the Joint Declaration excludes the competence of ESA. According to Article 4(3) of Protocol 9 EEA, it is the responsibility of the EU and the EFTA States to ensure that the conditions of competition are such that the other Contracting Parties will be able to refrain from the imposition of protective measures. The claim by the applicant that Protocol 9 EEA is a snapshot of the status in negotiations that were still in progress is unconvincing in

[17] Reference is made to *Synnøve Finden*, cited above, paragraphs 59 and 60.

light of the clear reference to Protocol 9 EEA in Article 20 EEA, which also excludes these products from the normal rules under the EEA Agreement.

74. The Commission submits that it was never the intention of the Contracting Parties to create a homogenous set of rules in the EEA as regards fish and other marine products. Consequently, there was no need to entrust ESA with the task of monitoring and ensuring homogeneity of the rules.

75. The Commission agrees with the defendant that the wording of the Joint Declaration clarifies that it is for the Contracting Parties to assess State aid in the fisheries sector and to ensure that it is not distorting competition.

76. The Commission submits that since the fisheries sector is an area where the "*acquis communautaire*" has not been adopted by the EFTA States, the prohibition on the imposition of anti-dumping measures, countervailing duties and measures against illicit commercial practices in Article 26 EEA does not apply. If, however, an EFTA State has not applied the State aid rules in this sector correctly, one can request the Commission to investigate the matter and apply appropriate safeguard measures. The Commission has on repeated occasions imposed anti-dumping duties on imports of salmon from Norway. The EU's competence to impose such duties for the products in question presupposes that they are not covered by the normal rules on State aid in the EEA Agreement, which apply the "*acquis communautaire*". A failure by the Commission to investigate a complaint about a trade subsidy is susceptible to challenge before the ECJ by parties who are directly and individually concerned.[18]

Per Christiansen
Judge-Rapporteur

[18] Reference is made to the judgments in *FEDIOL* v *Commission*, 191/82, EU:C:1983:259 and *Timex* v *Council and Commission*, 264/82, EU:C:1985:119.