



JUDGMENT OF THE COURT

21 March 1995

(Decision of the EFTA Surveillance Authority – Constituent Elements – Judicial Review
– Statement of Reasons – Admissibility – Locus standi – Direct and Individual Concern)

In Case E-2/94

Scottish Salmon Growers Association Limited, a company whose registered office is in Perth, Scotland,

represented by Alastair Sutton, Barrister, and Alasdair R. M. Bell, Solicitor, with an address for service in Geneva at the Chambers of Edmond Tavernier, Rue Töpffer 11,

applicant,

v

EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal Service, acting as Agent, with an address for service in Geneva at the office of the Secretary-General of the European Free Trade Association, Rue de Varembe 9–11,

defendant,

supported by the **Kingdom of Norway**, represented by Didrik Tønseth, Assistant Director-General at the Royal Ministry of Foreign Affairs, as agent, with an address for service in Geneva at the Norwegian Delegation, Avenue de Budé 35,

intervener,

APPLICATION for annulment of the decision of the EFTA Surveillance Authority dated 24 March 1994 on its competence in matters concerning State aid to fisheries,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson, Kurt Herndl (Rapporteur), Sven Norberg and Gustav Bygglin, Judges,

Registrar: Karin Hökborg,

having regard to the written pleadings of the parties and the intervener, and the written observations of the EC Commission, represented by Rosemary Caudwell and Ben Smulders, of the Commission's Legal Service, acting as Agents, and

having regard to the Report for the Hearing,

after hearing oral argument from the parties and the intervener and the oral observations of the EC Commission at the hearing on 16 December 1994,

noting that the parties, having been informed by the Court of the resignation of the President, Judge Leif Sevón, on 17 January 1995, and the fact that his successor as Judge had been present at the hearing on 16 December 1994, gave their express consent under Article 41(2) of the Rules of Procedure to dispense with the reopening of the oral procedure,

having decided to dispense with the reopening of the oral procedure,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 28 April 1994, the Scottish Salmon Growers Association Limited ("SSGA") brought an action under 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 ("Surveillance and Court Agreement") for annulment of the decision of the EFTA Surveillance Authority which, in the view of the applicant, was contained in a letter of 24 March 1994 from the EFTA Surveillance Authority addressed to the law firm acting for the SSGA .
- 2 By letter of 24 February 1994, the SSGA lodged a complaint with the EFTA Surveillance Authority in which it alleged that the Norwegian salmon industry had been granted State aid contrary to the EEA Agreement and had requested an appropriate investigation. A similar complaint was lodged with the EC Commission.
- 3 The letter of 24 March 1994 from the EFTA Surveillance Authority reads as follows:

"Brussels, 24 March 1994
1994/ 5222 D

Forrester Norall & Sutton
1 Place Madou, Box 34
B-1030 Brussels

Subject: Your complaint of 24 February 1994 concerning State aid to the Norwegian salmon industry

Dear Sir/Madam,

The EFTA Surveillance Authority acknowledges receipt of your letter of 24 February 1994, whereby on behalf of the Scottish Salmon Growers Association you have lodged a complaint concerning State aid to the Norwegian salmon industry. The complaint has been registered by the Authority under file number SAM020.100.005.

The relevant provisions of the Agreement on the European Economic Area do not confer upon the Surveillance Authority the competence to assess State aid to fisheries.

Therefore, the Surveillance Authority has decided to close the case, of which you are hereby informed.

Yours faithfully,

[signed]
Heinz Zourek
College Member
responsible for State aid".

- 4 The applicant submits that the EFTA Surveillance Authority has adopted a decision in which it wrongly declined jurisdiction to investigate the applicant's complaint and failed to provide an adequate statement of reasons. The applicant requests the Court to annul the decision of the EFTA Surveillance Authority of 24 March 1994, to take such further or different steps as justice may require and to order the EFTA Surveillance Authority to pay the costs of the SSGA.
- 5 The EFTA Surveillance Authority requests the Court to declare the application inadmissible or, alternatively, to declare it unfounded, and to order the applicant to pay the costs. It holds the view that the letter of 24 March 1994 is not a decision susceptible to judicial review under Article 36 of the Surveillance and Court Agreement but only information about an internal measure taken by the EFTA Surveillance Authority. The letter is therefore not subject to the requirement of adequate reasoning. Even if it were so subject, it would meet that requirement since it is also correct in substance, as the EFTA Surveillance Authority has no jurisdiction in relation to State aid to the fisheries sector. The EFTA Surveillance Authority further maintains that the applicant does not have *locus standi* to bring proceedings for annulment of the measure.
- 6 The Kingdom of Norway, whose application to intervene in support of the EFTA Surveillance Authority was granted by the President of the Court on 1 November 1994, supports the view that the EFTA Surveillance Authority has no jurisdiction in relation to State aid to the fisheries sector. The Kingdom of Norway requests the Court to declare the application unfounded.
- 7 The Commission submits that the letter of 24 March 1994 is not a decision addressed to the applicant. The letter cannot therefore be challenged for lack of reasoning. A private party would be entitled to challenge a decision by the EFTA Surveillance Authority that it has no jurisdiction under the EEA Agreement to assess a State aid if that party were directly and individually concerned by the decision. The Commission, however, considers that the SSGA cannot be regarded as falling within this category. As to the substance, the Commission is of the view that the EFTA Surveillance Authority has correctly interpreted its powers under the EEA Agreement. The Commission invites the Court to dismiss the application.
- 8 Reference is made to the annexed Report for the Hearing for a fuller account of the facts of the case, the procedure and the arguments of the parties, the intervener and the Commission, which are set out and discussed below only in so far as is necessary for the reasoning of the Court.

Admissibility

- 9 In determining whether or not the present action is admissible, the Court will deal first with the nature and reviewability of the contested act, and secondly with the question of the *locus standi* of the applicant.

General remarks

- 10 The EFTA Surveillance Authority stresses the fact that, according to Article 3(1) of the Surveillance and Court Agreement, there is no explicit requirement that the provisions of the main part of that Agreement be interpreted in conformity with the relevant rulings of the EC Court of Justice.
- 11 In this respect, the Court refers to the findings in its Judgment of 16 December 1994 in *Restamark* (Case E-1/94, paragraph 24, as well as paragraphs 33 and 34). Although the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the EC Court of Justice when interpreting the main part of that Agreement, the reasoning which led the EC Court of Justice to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which this Court has to interpret. The Court finds that this principle must also apply when considering interpretations of the same expressions in relation to issues such as what constitutes a decision of the EFTA Surveillance Authority, whether a measure is reviewable and who has *locus standi* to bring an action for annulment of a decision.
- 12 The EFTA Surveillance Authority further submits that the wording of Article 6 of the EEA Agreement and Article 3(1) of the Surveillance and Court Agreement indicates that the requirement to interpret provisions in conformity with the relevant rulings of the EC Court of Justice does not apply to rulings of the Court of First Instance of the European Communities. Furthermore, the EFTA Surveillance Authority argues that judgments which were rendered either by the EC Court of Justice after 2 May 1992 (the date of signature of the EEA Agreement) or by the Court of First Instance are not of direct relevance to the present case.
- 13 The Court notes that, according to Article 3(2) of the Surveillance and Court Agreement, the EFTA Surveillance Authority and this Court must pay due account to the principles laid down by the relevant rulings of the EC Court of Justice given after 2 May 1992. Secondly, the Court of First Instance is not a separate institution under Community law but forms part of the EC Court of Justice in terms of Community institutions. In this context reference is also made to Article 106 of the

EEA Agreement according to which the system of exchange of information covers judgments by the Court of First Instance as well as the Court of Justice itself. For these reasons the Court considers that due account should also be paid to the principles laid down in rulings of the Court of First Instance.

Nature and reviewability of the measure

- 14 The EFTA Surveillance Authority raises several questions concerning the admissibility of the application, based on the nature and reviewability of the contested act. It recalls that in carrying out its functions it is to take decisions and other measures in cases provided for in the Surveillance and Court Agreement and the EEA Agreement and submits that the Court's jurisdiction under Article 36 of the Surveillance and Court Agreement is limited to *decisions*. The Authority is of the view that it is difficult to view the letter of 24 March 1994 as a decision since there is nothing to suggest that the Surveillance Authority could be called upon, or would otherwise be obliged, to react on the complaint by the SSGA by means of a formal decision. This is particularly clear in respect of complaints which fall within the competence of neither the EFTA Surveillance Authority nor the Commission. The Authority states that the letter to the SSGA was sent for the sole purpose of recognizing the receipt of the complaint. The Surveillance Authority further submits that the measure is not susceptible to review by the Court since it did not produce any legal effects.

- 15 The letter of 24 March 1994 states unequivocally that "the Surveillance Authority has decided to close the case". Furthermore, as the file shows, there is a handwritten note on the original complaint of 24 February 1994 lodged with the Authority by the SSGA. This note reads as follows:

"1994-03-24

"Case closed due to lack of competence, for reasons stated in doc. No. 1994/4384I and 1994-5176I

For the EFTA Surveillance Authority

[signed]

Heinz Zourek

College Member responsible for State aid".

It must, therefore, be concluded that a decision to close the case was taken and that this decision was a decision of the EFTA Surveillance Authority. The Court also notes that the letter communicating the content of the decision was signed by the College Member responsible for State aid. It implicitly rejects the applicant's requests for an investigation into the alleged grant of State aid to the Norwegian salmon industry and for protection of the Scottish salmon growers against the consequences of the aid, should it be found to be unlawful. The decision

undoubtedly constituted the culmination of procedure within the EFTA Surveillance Authority whereby the Authority gave its ruling on the matter. This interpretation is in line with several judgments of the EC Court of Justice which has frequently dealt with questions concerning the nature and reviewability of contested acts (see e.g. Cases 23, 24 and 52/63, *Usines Henricot et al. v. High Authority*, [1963] ECR 217, at page 224, Case 28/63, *Hoogovens v. High Authority*, [1963] ECR 231, at page 236, and Cases 53 and 54/63, *Lemmerz-Werke et al. v. High Authority*, [1963] ECR 239, at page 248; see also Case C-198/91 *Cook v. Commission*, [1993] ECR I-2487).

- 16 The EFTA Surveillance Authority also submits that a refusal to act for lack of jurisdiction is not a decision in substance and therefore not susceptible to judicial review.
- 17 In declaring that the "relevant provisions of the Agreement on the European Economic Area do not confer upon the Surveillance Authority the competence to assess State aid to fisheries", the Authority ruled on the scope of certain provisions of the Agreement. This interpretation would be final as regards this complaint if the decision in which the interpretation was spelled out were not open to challenge. It cannot, however, be a prerogative of the EFTA Surveillance Authority to assess ultimately the scope of application of the provisions of the EEA Agreement concerning State aid to fisheries, as this would preclude judicial review of the decision under Article 36 of the Surveillance and Court Agreement and would thus deprive the Court of its powers to exercise its functions of judicial control. The view of the Authority that its action is not susceptible to judicial review must therefore be rejected.
- 18 Furthermore, as pointed out by the Commission, a decision taken by the EFTA Surveillance Authority that it had no jurisdiction to assess an alleged State aid must be open to challenge to the same extent as a decision reached by the Authority that it was competent and had proceeded to examine the aid.
- 19 From the legal and factual considerations examined above, it follows that the contested decision of the EFTA Surveillance Authority to close the case is a decision susceptible to judicial review within the meaning of Article 36 of the Surveillance and Court Agreement.

Locus standi

- 20 The EFTA Surveillance Authority submits that the applicant does not have locus standi to challenge the measure before the Court. There was no designated addressee of the measure taken by the Authority and consequently the measure

was not formally notified to anyone. The Authority's measure could therefore only be challenged by the applicant if it were to fulfil the procedural requirement of being directly and individually concerned, as mentioned in Article 36 of the Surveillance and Court Agreement. In the Authority's view the applicant does not meet this requirement.

- 21 Under the second paragraph of Article 36 of the Surveillance and Court Agreement, a decision of the Surveillance Authority may be challenged before the Court by any natural or legal person if the decision is addressed to that person or, if the decision is addressed to another person, it is of direct and individual concern to the former.
- 22 During the proceedings the Court was informed that the SSGA represents the overwhelming majority of, if not all, Scottish salmon growers. Not only does it promote the profitable sales of Scottish salmon and carry on any trade, industry or business which will further its objectives, but also, which is of particular interest in the present case, it negotiates with the UK Government and with the EC Commission in respect of those objectives. Furthermore, had the EFTA Surveillance Authority decided to open a procedure under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, the SSGA would have had the opportunity of taking an active part in that procedure. In fact, the SSGA had already lodged complaints on behalf of Scottish salmon growers with both the EC Commission and the EFTA Surveillance Authority prior to the decision of the latter. It is therefore obvious that the interests represented by the SSGA are centrally concerned by the outcome of the case.
- 23 Consequently, the Court finds that the decision of the EFTA Surveillance Authority to close its file on the matter raised by the SSGA concerns the interests of the SSGA to such an extent that the action brought by it against the Authority must be considered admissible. Accordingly, it is not necessary to examine whether or not the applicant was the addressee of the decision of the Authority.

Statement of reasons

- 24 The applicant claims that Article 16 of the Surveillance and Court Agreement and, thus, an essential procedural requirement within the meaning of Article 36 of that Agreement has been infringed by the EFTA Surveillance Authority's failure to state any adequate reasons for its decision.
- 25 One of the purposes of the requirement in Article 16 that decisions of the EFTA Surveillance Authority must state the reasons on which they are based is that the addressee of the decision, or anyone else directly concerned by it, must be able, on

the basis of what is communicated to him in writing, to assess why the decision has been taken, how the EFTA Surveillance Authority has applied the EEA Agreement and the Surveillance and Court Agreement and whether or not there are grounds to seek judicial review. This is also required in order that the EFTA Court can exercise its power of review. It must therefore be considered an essential procedural requirement within the meaning of Article 36.

- 26 In the view of the Court, the obligation laid down in Article 16 to state the reasons on which a decision is based thus requires an appropriate explanation of the considerations which led the Surveillance Authority to adopt the decision. Therefore, a decision by the EFTA Surveillance Authority must set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Authority to its decision may be understood. This conclusion of the Court is in accordance with general principles of law and is in line with the relevant principles developed by the EC Court of Justice. In numerous cases that Court has considered Article 190 EC which, in this respect, is identical to Article 16 of the Surveillance and Court Agreement (see e.g. Case 24/62 *Germany v. Commission* [1963] ECR 63, at page 69; Case C-41/93 *France v. Commission* [1994] ECR I-1829, paragraph 34).
- 27 In the present case the Court has accordingly to assess whether the EFTA Surveillance Authority has set out in its decision, in a concise but clear and relevant manner, the principal issues of law and fact upon which the decision was based.
- 28 The EFTA Surveillance Authority submits that the internal measure of which the SSGA was informed in the letter of 24 March 1994 was sufficiently reasoned because in the Authority's own file it was stated that the case had been closed for reasons set out in two clearly identified and duly registered documents. The applicant had been informed about the reasons of the measure orally and could have been supplied with the full reasoning in writing if it had asked. Furthermore, the letter sent to the applicant was itself sufficiently reasoned because it made clear that the case was closed due to the EFTA Surveillance Authority's lack of competence to assess State aid to fisheries, which was caused by the fact that no provisions conferred any such jurisdiction.
- 29 The Court notes that, as far as the letter to the SSGA is concerned, it contained a mere statement that "the relevant provisions of the Agreement on the European Economic Area do not confer upon the Surveillance Authority the competence to assess State aid to fisheries". Nothing is said about the reasons which prompted the Authority to arrive at this conclusion. In view of the complexity of the rules on State aid to fisheries and the Authority's surveillance obligations in that respect, as

laid down in the EEA Agreement and the Surveillance and Court Agreement, the above-mentioned sentence cannot be regarded as sufficient reasoning in accordance with Article 16 of the Surveillance and Court Agreement.

- 30 The Authority's argument that the applicant had been orally informed about the reasons must be rejected. Even if the reasons may have been provided to the applicant orally, over the telephone, this cannot satisfy the requirement of a proper statement of reasons inherent in Article 16 of the Surveillance and Court Agreement.
- 31 The Authority's argument that the reasons for the decision to close the case were "set out in two clearly defined and duly registered documents" has led the Court to examine closely the Authority's file on the case. As may be seen from the Report for the Hearing, the Court requested the Authority to transmit to it a copy of the complete file on the complaint. The file was received at the Court Registry on 2 November 1994. The two documents referred to by the Authority are in fact internal memoranda exchanged between the Director of State Aid and Monopolies and the Director of the Legal Service. The full text of the memorandum from the former states that a *prima facie* conclusion would be that the Authority was fully competent to monitor the application of the relevant provisions. On the other hand it mentions several arguments pointing in the other direction. The memorandum of the Legal Service states as one of its conclusions: "It would seem that the EFTA Surveillance Authority has no competences to assess State aid to fisheries". It ends with the comment: "A technical question remains to be solved: what to do with the complaint".
- 32 The two memoranda thus do not reach any firm, unequivocal conclusion as to the legal situation. Nor do they contain any definite and reasoned proposals to the Surveillance Authority as to the action to be taken following the complaints by the SSGA. The actual reasons which prompted the Authority to adopt its decision cannot be derived with certainty from these two memoranda. From the content of the Authority's file it cannot, therefore, be concluded that the decision was adequately reasoned. Under these circumstances, it is not necessary for the Court to deal with the question whether reasons contained in internal documents which were not communicated to the applicant can satisfy the requirement in Article 16 of stating reasons.
- 33 In view of the above, the Court finds that the contested decision must be annulled for infringement of an essential procedural requirement. Consequently, there is no need to consider the other pleas put forward by the applicant.

Costs

- 34 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Accordingly the defendant must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Annuls the decision of the EFTA Surveillance Authority to close the case registered by the Authority under file number SAM020.100.005.**
- 2. Orders the EFTA Surveillance Authority to pay the costs.**

Bjørn Haug

Thór Vilhjálmsson

Kurt Herndl

Sven Norberg

Gustav Bygglin

Delivered in open court in Geneva on 21 March 1995.

Karin Hökberg
Registrar

Bjørn Haug
President