JUDGMENT OF THE COURT

21 July 2005

(State aid – Exemptions from energy tax for the manufacturing and mining industries – Admissibility – Selectivity – Effect on trade and distortion of competition – Existing aid and new aid – Recovery – Legal certainty – Legitimate expectations – Proportionality)

In Joined Cases E-5/04, E-6/04 and E-7/04

Fesil and Finnfjord, represented by Jan Magne Langseth, Advokat, Oslo Norway,

PIL and others, represented by Onno W. Brouwer, Advocaat, and Michael Schütte, Rechtsanwalt, Brussels, Belgium,

The Kingdom of Norway, represented by Ketil Bøe Moen, Advokat, and Thomas Nordby, Advokat, Office of the Attorney General (Civil Affairs), and Ingeborg Djupvik, Adviser, Ministry of Foreign Affairs, acting as Agents, Oslo, Norway,

Applicants

v

EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal & Executive Affairs, and Michael Sánchez Rydelski, Deputy Director, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

Defendant,

APPLICATION for the partial annulment of Decision 148/04/COL of 30 June 2004 concerning environmental tax measures in Norway (OJ 2004 C 319, p. 30),

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

Acting Registrar: Dirk Buschle,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by Vittorio di Bucci, Legal Adviser, and Viktor Kreuschitz, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicants, the Defendant and the Commission of the European Communities at the hearing on 10 May 2005,

gives the following

Judgment

I Facts

1 In 1971, the Kingdom of Norway introduced a tax on electricity consumption with the objective of creating positive environmental effects through a more efficient use of electric power (the “electricity tax”).

2 Since the introduction of the electricity tax, certain industries (in particular the energy intensive industries) have benefited either from reduced rates or total exemptions. From 1 January 1994 until 31 December 2000, the manufacturing, the mining and the greenhouse growing industries were fully exempted from the electricity tax. According to the budgetary decision of the Norwegian Parliament (the “Storting”) for the budget years 2001, 2002 and 2003, the exemptions from the electricity tax would be limited to uses relating to the industrial process.

3 From 1 January 2002 the tax exemptions for the manufacturing, the mining and the greenhouse growing industries, together with an exclusion from the tax exemption of electricity used in administration buildings, were implemented by Sections 3-12-4 and 3-12-5 of the Regulation on Excise Duties. In order to be defined as an ‘administration building’, a minimum of 80% of the building space had to be used for administrative purposes. This amendment was maintained throughout 2002 and 2003.

4 As of 1 January 2002, the general rate of the electricity tax was reduced and set at NOK 0.093 per kWh (approximately EUR 0.012 per kWh); and was, as of 1 January 2003, set at NOK 0.095 per kWh (approximately EUR 0.013 per kWh).

As of 1 January 2004, the tax on electricity consumption was no longer levied on firms, but only on households.

II Relevant law

EEA law

5 Article 61 EEA reads as follows:

> 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 the Contracting Parties, be incompatible with the functioning of this Agreement.
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> …
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> 3. The following may be considered to be compatible with the functioning of this Agreement:
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> …
>
> (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;
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> ...

6 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "ESA/Court Agreement" or "SCA") reads as follows:

> Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

7 Paragraphs one and two of Article 36 SCA read as follows:

> 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.

8 Article 1 in Part I of Protocol 3 to the ESA/Court Agreement, as amended by the Agreements amending Protocol 3 thereto, signed in Brussels on 21 March 1994, 6 March 1998 and 10 December 2001 (hereinafter "Protocol 3 SCA") reads as follows:

> 1. The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.
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> 2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.
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> …
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> 3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

The Environmental Guidelines

9 Point 5 of the EFTA Surveillance Authority Decision No 152/01/COL of 23 May 2001 (OJ 2001 L 237, p. 16) revising the guidelines on the application of the EEA State aid provisions to aid for environmental protection and amending for the twenty-eighth time the Procedural and Substantive Rules in the Field of State aid (hereinafter the "Environmental Guidelines") reads as follows:

> These guidelines establish principles for assessing whether State aid measures will qualify for exemptions from the general State aid prohibition as laid down in Article 61(1) of the EEA Agreement. Such measures may, inter alia, be granted in the form of:
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> — aid for achieving environmental protection in relation to various standards,
>
> — aid as an exemption from environmental taxes.
>
> In the corresponding guidelines issued by the European Commission, aid to assist companies in adapting to mandatory Community standards or tax exemptions leading to lower tax rates than binding minimum rates applicable within the Community, are generally viewed as incompatible with the State aid rules. Aid aimed at achieving higher levels of environmental protection than those required by given standards may, however, on certain conditions be considered compatible. The same applies for tax exemptions that do not conflict with obligatory Community minimum rates and which are temporary in nature.
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> With a view to ensuring equal conditions of competition throughout the EEA, the Authority will, therefore, use the same points of reference when assessing environmental aid measures in the EFTA States for compatibility with the functioning of the EEA Agreement. This implies that the present guidelines refer to Community standards and Community tax harmonisation measures where such are established.
>
> The Authority emphasises that such references to Community legislation do not imply that the EFTA States are obliged to comply with Community legislation when such

legislation has not been implemented in the EEA Agreement. They serve only as a basis for assessing the compatibility of aid measures with the functioning of the EEA Agreement in terms of Article 61(3) of the Agreement.

10 Heading D.3.2. of the Environmental Guidelines, entitled "Rules applicable to all operating aid in the form of tax reductions or exemptions", encompasses points 42 through 48.

11 Point 42 of the Environmental Guidelines reads as follows:

> When adopting taxes that are to be levied on certain activities for reasons of environmental protection, EFTA States may deem it necessary to make provision for temporary exemptions for certain firms notably because of the absence of harmonisation at European level or because of the temporary risks of a loss of international competitiveness. In general, such exemptions constitute operating aid caught by Article 61(1) of the EEA Agreement. When assessing whether such measures qualify for exemptions from the general State aid prohibition as laid down in Article 61(1), it has to be ascertained among other things whether the tax in question corresponds to a tax which is to be levied within the European Community as the result of a Community decision. This aspect will be essential with regard to whether or not there could be a loss of international competitiveness for the taxpayer.

12 Point 46.1 of the Environmental Guidelines reads as follows:

> When, for environmental reasons, an EFTA State introduces a new tax in a sector of activity or on products in respect of which no corresponding European Community tax harmonisation has been carried out or when the tax envisaged by the EFTA State exceeds that provided for in Community legislation, the Authority takes the view that exemption decisions covering a 10-year period with no degressivity may be justified in two cases:
>
> (a) these exemptions are conditional on the conclusion of agreements between the EFTA State concerned and the recipient firms whereby the firms or associations of firms undertake to achieve environmental protection objectives during the period for which the exemptions apply or when firms conclude voluntary agreements which have the same effect. Such agreements or undertakings may relate, among other things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure. The substance of the agreements must be negotiated by each EFTA State and will be assessed by the Authority when the aid projects are notified to it. EFTA States must ensure strict monitoring of the commitments entered into by the firms or associations of firms. The agreements concluded between an EFTA State and the firms concerned must stipulate the penalty arrangements applicable if the commitments are not met.
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> These provisions also apply where an EFTA State makes a tax reduction subject to conditions that have the same effect as the agreements or commitments referred to above;
>
> (b) these exemptions need not be conditional on the conclusion of agreements between the EFTA State concerned and the recipient firms if the following alternative conditions are satisfied:
>
> — where the reduction concerns a tax corresponding to a harmonised European Community tax, the amount effectively paid by the firms after the reduction must

remain higher than the European Community minimum in order to provide the firms with an incentive to improve environmental protection,

— where the reduction concerns a tax which does not correspond to a tax subject to harmonisation at European Community level, the firms eligible for the reduction must nevertheless pay a significant proportion of the national tax.

Norwegian law

13 Section 75(a) of the Norwegian Constitution provides the Storting with the authority to impose taxes. This normally takes the form of tax decisions (*skattevedtak*) in relation to the adoption of the annual budget.

14 The Storting's annual decision for the budget years 2001, 2002 and 2003 with regard to the measures at issue reads as follows:

> Manufacturing, mining, labour market undertakings exercising industrial production and greenhouses are exempted from the tax. The exemption applies to electrical power used in the production process only.

15 Subsection 3 of Section 1 of this decision empowered the Ministry of Finance to clarify the scope of this exemption by way of a Regulation.

16 Section 3-12-4 of Regulation No 1451 on the Excise Duties (Forskrift om særavgift) of 11 December 2001 (hereinafter the "Regulation") reads as follows:

> (1) Electricity which is supplied to the industry, mining, labour market undertakings which operate industrial activities, greenhouse operators and district heating producers is exempted from tax.
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> (2) The exemption is applicable to the electricity used by the undertaking itself; within those parts of the undertaking registered under the following sections or groups:
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> (a) undertakings under Standard Industrial Classification section C Mining and Quarrying;
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> (b) undertakings under Standard Industrial Classification section D Manufacturing;
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> (c) labour market undertakings under Standard Industrial Classification group 85.3 which carry out activities under section C or D;
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> (d) undertakings with greenhouses using electrical heating facilities;
>
> (e) district heating producers under Standard Industrial Classification group 40.3.

17 Section 3-12-5 of the Regulation reads as follows:

> The exemption under Section 3-12-4 does not apply to electricity for administration buildings. Buildings in which 80 per cent or more of the total area of the building is used for administrative purposes are considered administration buildings. Tax is to be levied on all supply of electricity to such buildings. For undertakings which have installed their own meters for electricity supplied to administration buildings, the total tax due shall be calculated on the basis of actual consumption. Undertakings without

such meters installed shall inform the electricity supplier of how much of the electricity supplied is taxable.

III The administrative procedure and the contested decision

18 On 21 December 2000, the Commission of the European Communities (hereinafter the "Commission") adopted new "Community guidelines on State aid for environmental protection" which entered into force on 3 February 2001. In these guidelines, the Commission proposed, as an appropriate measure under Article 88(1) EC, that Member States should bring their existing environmental aid schemes into line with these guidelines before 1 January 2002.

19 Prior to the adoption of the Community guidelines, the EFTA Surveillance Authority (hereinafter "ESA" or the "Defendant") had consulted the EFTA States in multilateral meetings on 21 March 2000 and 16 October 2000 concerning the planned introduction of the new Community guidelines. The Kingdom of Norway submitted comments on the draft Community guidelines to ESA by letters dated 14 April 2000 and 31 October 2000.

20 Subsequently, ESA drafted guidelines corresponding to the Community guidelines and announcing identical appropriate measures. By letter of 11 April 2001, the EFTA States were informed about the draft guidelines and asked to comment. Norway submitted its comments to the draft guidelines by letter dated 18 May 2001. The draft guidelines were also the subject of discussion during bilateral meetings on 26 April 2001 and on 29 June 2001 between ESA and the Kingdom of Norway.

21 With the adoption of the Environmental Guidelines ESA proposed that EFTA States should bring their existing environmental aid schemes into line therewith before 1 January 2002. Norway was informed of the adoption of the Environmental Guidelines by letter dated 23 May 2001 and asked to signify its agreement to the proposal.

22 The Norwegian Government signified its agreement to the Environmental Guidelines by letter from the Ministry of Trade and Industry dated 6 July 2001. Before that, by letter dated 21 June 2001, it had submitted an overview of the environmental taxes applicable in Norway, including the electricity tax.

23 Following the acceptance, another bilateral meeting on 18 September 2001 as well as letters sent by the Ministry of Finance dated 4 December 2001, 21 December 2001 and 31 January 2002 again raised the issue of compliance of, inter alia, the exemptions from electricity tax in the Regulation with the Environmental Guidelines. In its budget proposal for 2001-2002 dated 28 September 2001, the Norwegian Government confirmed that the Environmental Guidelines apply, inter alia, to the electricity tax.

24 By Decision No 149/02/COL of 26 July 2002 (OJ 2003 L 31, p. 36), ESA initiated the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 SCA to the Agreement between the EFTA States on the

Establishment of a Surveillance Authority and a Court of Justice with respect to the compatibility of certain Norwegian environmental tax measures with the EEA Agreement. The Government of Norway and Prosessindustriens Landsforening, a third party to that procedure, submitted their comments to the opening of the formal investigation procedure.

25 On 30 June 2004, ESA adopted a final Decision No 148/04/COL (OJ 2004 C 319, p. 30; hereinafter, the "contested Decision") in which it assessed whether Norway complied with its obligations stemming from the appropriate measures proposed by ESA and accepted by the Norwegian Government. The contested Decision concerns, inter alia, the exemption from the tax on electricity consumption, which was applicable until 31 December 2003, for the manufacturing and mining industries. The greenhouse growing industry was considered to fall outside the scope of the EEA Agreement.

26 ESA took the view that the tax exemption at issue constitutes incompatible State aid pursuant to Article 61(1) EEA. The exemption made for the use of electricity by the manufacturing and the mining industries was sectoral in nature; the general rule under the electricity tax system being that all uses of electricity were subject to taxation. The result of including Section 3-12-5 regarding the use of electricity in administration buildings in the Regulation was not to make it a general measure not covered by Article 61(1) EEA, but merely to define the sectoral exemption more narrowly than before. Furthermore, in the view of ESA, the exemption for the manufacturing and the mining industries did not derive directly from the basic or guiding principle of the electricity tax system and, therefore, no justification existed.

27 As to the other elements of State aid described in Article 61(1) EEA, ESA stated that the sectoral exemption from the electricity tax constituted a loss of tax revenues for the Norwegian State and an advantage for certain undertakings. Given that the industries benefiting from the exemption were engaged in activities open to competition in markets in which there is trade between Contracting Parties, the tax exemption was found liable to distort competition and affect trade between the Contracting Parties.

28 ESA found that the aid was incompatible with the functioning of the EEA Agreement under Article 61(3)(c) EEA in combination with the Environmental Guidelines, on grounds of the absence of harmonisation at a European level and because of the temporary risks of a loss of international competitiveness, since the requirements set out in point 46.1(a) and (b) in combination with point 42 of the Environmental Guidelines were not fulfilled.

29 Furthermore, referring to consistent practice of the Commission, ESA stated in the contested Decision that the measures at issue had become new aid from 1 January 2002 due to the acceptance by the Norwegian Government of the Environmental Guidelines as proposed appropriate measures within the meaning of Article 1(1) in Part I of Protocol 3 SCA. This result was in the view of ESA not precluded by the fact that no specific measures with respect to individual aid

schemes had been proposed. The contested Decision states that it was up to the Norwegian Government to carry out the necessary assessment of which aid schemes had to be amended, subject to any later control by ESA.

30 Finally, the contested Decision states that as the aid at issue constituted unlawful and incompatible aid after 1 January 2002, it was subject to recovery. After the publication on 6 February 2003 of the opening decision at the latest, diligent aid recipients could no longer enjoy a legitimate expectation that the tax exemption retained the characteristic of lawful and compatible aid measures. Therefore, the aid granted between 6 February 2003 and 31 December 2003 in the form of the exemption from the electricity tax for the manufacturing and the mining industries was to be recovered. As to the amount to be recovered, ESA considered that payment of an amount equalling the minimum rate for electricity in Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51; hereinafter the "Energy Tax Directive"), i.e. EUR 0.5 per mWh, would provide undertakings with an incentive to improve environmental protection and would also amount to a significant proportion of the national tax under the second indent of point 46.1(b) of the Environmental Guidelines.

31 The operative part of the contested Decision, in its relevant points, reads as follows:

> 1. The following Norwegian measures constitute State aid within the meaning of Article 61(1) of the EEA Agreement:
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> a) the exemption from the tax on electricity consumption for the manufacturing and the mining industries;
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> …
>
> 4. The measures referred to under point 1 of the present decision constitute new aid as from 1 January 2002.
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> …
>
> 6. The measures referred to under point 1 a), b) and c) of the present decision are incompatible with the functioning of the EEA Agreement.
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> …
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> 8. The incompatible aid referred to under point 1 a) and b) of the present decision must be recovered from the aid recipients from 6 February 2003 onwards. Recovery shall be affected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision. The amount of recovery should equal a significant proportion of the national tax, and at least the minimum rate of EUR 0,5 per mWh laid down in the Energy Tax Directive (Council Directive 2003/96/EC). The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid and shall be annually compounded.

9. The Norwegian Government is requested to inform the Authority within two months from the receipt of this decision of the measures taken to comply with the present decision.

10. This Decision is addressed to the Kingdom of Norway.

…

IV Procedure and forms of order sought

32 By application lodged at the Registry of the Court on 1 September 2004 as Case E-5/04, Fesil ASA and Finnfjord Smelteverk AS (hereinafter "Fesil and Finnfjord") brought an action under Article 36 SCA for partial annulment of the contested Decision. Fesil and Finnfjord operate three melting plants producing ferrosilicon and silicon metal.

33 Fesil and Finnfjord claim that the Court should:

- annul the EFTA Surveillance Authority's Decision No 148/04/COL, point 1 a);

- annul the EFTA Surveillance Authority's Decision No 148/04/COL, point 8; and

- order the EFTA Surveillance Authority to pay the applicants' costs.

34 By application lodged at the Registry of the Court on 6 September 2004 as Case E-6/04, Prosessindustriens Landsforening (hereinafter "PIL") and others brought an action under Article 36 SCA for partial annulment of the contested Decision. PIL is the association of the Norwegian manufacturing industry, and the other applicants are undertakings active in that sector.

35 PIL and others claim that the Court should:

- declare void Articles 1 a), 4, 6 and 8 of the EFTA Surveillance Authority's Decision No 148/04/COL;

- in the alternative, declare void Article 8 of the EFTA Surveillance Authority's Decision No 148/04/COL to the extent that it orders the recovery of the aid referred to in Article 1 a) of that Decision from the aid recipients; and

- order the EFTA Surveillance Authority to pay the costs of the proceedings.

36 By application lodged at the Registry of the Court on 6 September 2004 as Case E-7/04, the Kingdom of Norway (together with Fesil and Finnfjord and PIL and others, the "Applicants") brought an action under Article 36 SCA for partial annulment of the contested Decision.

37 The Kingdom of Norway claims that the Court should:

- declare void points 1 a), 4, and 8 of the EFTA Surveillance Authority's Decision No 148/04/COL; and

- order the EFTA Surveillance Authority to pay the costs of the proceedings.

38 The Defendant submitted Statements of Defence in Cases E-5/04, E-6/04 and E-7/04, which were registered at the Court on 12 November 2004.

39 The Defendant claims that the Court should:

- dismiss the applications as unfounded; and

- order the Applicants to pay the costs.

40 The Reply from Fesil and Finnfjord in Case E-5/04, and the Reply from PIL and others in Case E-6/04 were registered at the Court on 4 February 2005; the Reply from the Kingdom of Norway in Case E-7/04 was registered at the Court on 8 February 2005. A Rejoinder from the Defendant in the joined cases was registered at the Court on 4 March 2005.

41 The Commission submitted, pursuant to Article 20 of the Statute, written observations, registered at the Court on 15 November 2004.

42 The parties presented oral argument and replied to questions put to them by the Court at the hearing on 10 May 2005 in Luxembourg.

43 By a decision of 13 October 2004, the Court, pursuant to Article 39 of the Rules of Procedure and after having received observations from the parties, joined the three cases for the purposes of the written and oral procedure. On account of the connection between them, it is appropriate to also join them for the purposes of the judgment.

44 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V Admissibility

Arguments of the parties

45 The Defendant has not raised objections with regard to *locus standi* of any of the Applicants. The Commission on the other hand argues that the applications made by Fesil and Finnfjord and by PIL and others are inadmissible and refers in that respect to the second paragraph of Article 36 SCA.

46 According to the Commission, the case at hand is to be distinguished from judgments such as the ones rendered by the Court of Justice of the European Communities in Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR, I-8855 and in Case C-298/00 P *Italy* v *Commission*, judgment of 29 April 2004, not yet reported, where *locus standi* was accepted. In those cases, the aid schemes did not grant advantages directly and automatically to all undertakings fulfilling certain conditions, but allowed national authorities to grant advantages to the beneficiaries through further administrative acts. The fact that the members of PIL, and Fesil and Finnfjord have automatically benefited from the tax advantages at issue makes their situation no different from that of all other beneficiaries, even though they were actual, not only potential, beneficiaries of the general aid scheme.

47 As to the applicant PIL, the Commission maintains that it has *locus standi* neither on behalf of its members nor in its own right. It questions whether PIL can really be seen to act on behalf of its members, since some of its members made an application against the contested Decision in their own right. In any event, the members represented must individually be in a position to bring an action. As to PIL's standing in its own right, the Commission points out that it was neither a negotiator of the national measures nor of the relevant rules applied by ESA.

48 The Commission also refers to the strict approach to admissibility taken by the Court of Justice of the European Communities since Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, and recently confirmed in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR, I-6677, and by the Court in Case E-2/02 *Technologien Bau- und Wirtschaftsberatung and Bellona Foundation* v *ESA* [2003] EFTA Court Report 52.

49 Fesil and Finnfjord maintain that the Commission's observations under Article 20 of the Statute cannot broaden the scope of the proceedings as defined by the parties' claims and submissions. Even if the Commission had intervened, it would only be allowed to support the claims of ESA, which has not submitted that the application is inadmissible. In any event, it is argued that both applicants are individually affected since they are faced with a claim for repayment of alleged State aid granted to them as consumers of non-taxed electricity. Moreover, they are faced with severe economic consequences due to the contested Decision.

50 PIL and others refer to Article 20 of the Statute and invite the Court to disregard the Commission's observations on this point. They maintain that PIL, in its own right, is directly and individually concerned by the contested Decision. PIL represents the overwhelming majority of manufacturing undertakings that benefit from the disputed Norwegian tax exemption and has been involved in the administrative procedure before ESA. Moreover, PIL claims to have *locus standi* on behalf of its members, based on the assumption that those members are themselves individually concerned, since these undertakings were all actual (and not only potential) beneficiaries of the alleged aid measure.

Findings of the Court

51 Article 20 of the Statute of the Court entitles, inter alia, the Community and the Commission to submit statements of case or written observations to the Court. Its applicability in direct actions makes Article 20 of the Statute a special feature of EEA procedural law, not having a counterpart in the rules of the two courts of the European Communities. Under this Article, the Commission is not prevented from commenting on the admissibility of an action even though the defendant does not avail itself of this possibility.

52 In any event, the question of whether an application is admissible under the second paragraph of Article 36 SCA involves an issue of public policy that may be raised by the Court *proprio motu* (compare Case C-298/00 P *Italy* v *Commission*, at paragraph 35). The Court's competence to examine the procedural issue of *locus standi* is not constrained by the existence or absence of pleas of inadmissibility put forward by the parties (compare the judgment of the Court of First Instance of the European Communities in Case T-55/99 *CETM* v *Commission* [2000] ECR, II-3207, paragraph 21).

53 The second paragraph of Article 36 SCA provides that any natural or legal person may, on specified grounds, institute proceedings before the Court against a decision of ESA addressed to another person, if it is of direct and individual concern to the former. The Court has, for the sake of homogeneity, repeatedly held that although there is, under Article 3(1) SCA, strictly speaking no requirement to interpret the ESA/Court Agreement in conformity with the case law of the courts of the European Communities, such case law is relevant when the expressions to be interpreted are identical in substance to those of Community law (see, inter alia, Case E-2/02 *Technologien Bau- und Wirtschaftsberatung and Bellona Foundation* v *ESA*, paragraph 39).

54 In Community law, according to settled jurisprudence of the Court of Justice of the European Communities, persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes that are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors, distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission*).

55 The Court will first consider the procedural status of Fesil and Finnfjord and of the members of PIL. The contested Decision declares as State aid the exemption from the electricity tax granted to the sectors of manufacturing and mining. According to the case law of the two courts of the European Communities, an undertaking cannot, in principle, contest decisions prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis the undertaking, a measure of general application covering situations that are determined objectively, and entails legal effects for a class of persons envisaged in a general and abstract manner (compare Joined Cases

67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrtunternehmen* v *Commission* [1999] ECR II-179, paragraph 45).

56 On the other hand, it follows from the case law of the Community Courts that a decision cannot be regarded as affecting the applicant solely by virtue of its capacity as a potential beneficiary of a measure allegedly constituting State aid if there are factors that place the applicant in a situation that differentiates it from all other operators (Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR, II-3367, paragraph 78). This is a situation where undertakings are not only affected by virtue of being undertakings in the sector concerned and potential beneficiaries of the aid scheme in question, but also by virtue of being actual recipients of individual aid granted under that scheme, the recovery of which has been ordered by the Commission. In such circumstances, the Court of Justice of the European Communities has granted the applicants *locus standi* (Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission*, paragraph 34; Case C-298/00 P *Italy* v *Commission*, paragraph 39). The situations of Fesil, Finnfjord and the members of PIL satisfy these criteria.

57 The Court holds that for the reasons set out above Fesil and Finnfjord, as well as the members of PIL, have *locus standi* in the present case.

58 With regard to its argument that the applicant PIL has no *locus standi*, neither on behalf of its members nor in its own right, the Commission refers to the case law of the Community Courts. There it has been held that an association responsible for protecting the collective interests of undertakings is, as a matter of principle, entitled to bring an action for annulment of a final decision of the Commission on State aid only where the undertakings in question are also entitled to do so individually or where it is able to rely on a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled (Case T-55/99 *CETM* v *Commission*, paragraph 23).

59 The Court recalls that it has recognised *locus standi* for representative bodies for the purpose of challenging a decision of ESA under the second paragraph of Article 36 SCA in relation to matters of State aid in respect of associations representing the interests of its members in Cases E-2/94 *Scottish Salmon Growers* v *ESA* [1994/1995] EFTA Court Report, 59, and E-4/97 *Norwegian Bankers' Association* v *ESA "Husbanken I"* [1998] EFTA Court Report 38.

60 As regards the case at hand, PIL undisputedly represents the overwhelming majority of manufacturing undertakings that benefit from the tax exemption. It follows from what has been stated above that the members of PIL are individually concerned as beneficiaries of the aid scheme in question and are therefore in a position to bring the action before the Court. It must therefore be concluded that PIL has *locus standi* on behalf of its members.

61 It follows from all the foregoing that the actions are admissible.

VI Substance

62 In the applications, there are three main pleas in law. The first alleges incorrect application of Article 61(1) EEA relating to the issues of selectivity, effect on EEA trade, distortion of competition and insufficient statement of reasons; the second, incorrect assessments under Article 61(3) EEA, and the third, the contention that the Defendant erred in ordering recovery. The third plea can be divided into four parts, i.e. infringement of procedural requirements, lack of legal basis for an order of recovery, breach of the principle of legal certainty when ordering recovery, and violation of the proportionality principle in relation to the recovery order.

The first main plea, alleging incorrect application of Article 61(1) EEA

63 The Applicants essentially argue that the tax exemptions at issue do not constitute State aid within the meaning of Article 61(1) EEA. It is also submitted by the applicants other than the Kingdom of Norway that there is no distortion of competition and/or effect on trade between the Contracting Parties. Finally it is submitted that, in this respect, the contested Decision is not properly reasoned.

Selectivity

Arguments of the parties

64 The Applicants argue that the Regulation imposes a tax on all undertakings for electricity used for lighting and heating purposes. Only electricity that is used for production purposes is exempted from the tax. Unlike the situation that existed in Case C-143/99 *Adria Wien Pipeline* v *Wietersdorfer & Peggauer Zementwerke* [2001] ECR, I-8365, the Norwegian scheme only concerned a particular use of electricity and the exemption was open for all undertakings carrying out this kind of activity. Consequently, the tax measure is not selective and does not constitute State aid under Article 61(1) EEA.

65 The Applicants further contend that the tax exemption was not selective after the entry into force of the Regulation, because the exemption from electricity tax no longer extended to the use of electricity in administration buildings. This limitation is considered an important tool to ensure that the tax exemption really applies to production activities rather than to an entire industrial sector. The Kingdom of Norway refers in this regard to the Storting's budgetary decision of 2001 and the preparatory works leading thereto.

66 Moreover, the Applicants contend that the tax exemption at issue must, in any event, be regarded as being justified by the nature or general scheme of the tax system. In that regard it is submitted that similar use of electricity is taxed in the same way. The service and industry sectors that are not exempted do not use electricity in production processes such as those that are exempted. Moreover, those sectors do not have an equivalent level of energy consumption and do not have equal saving potential.

67 It is acknowledged by the Kingdom of Norway that there may be undertakings outside the manufacturing and mining sectors where electricity may be used for purposes similar to those exempted. However, some degree of differential tax treatment must be justifiable by reference to practical and administrative considerations.

68 It is finally submitted that the contested Decision contradicts Decision No 149/04/COL, issued on the same day, where the Defendant concluded that the remaining total exemptions were not to be considered State aid, since they could be justified according to the logic and the nature of the new electricity tax system which was established in 2004.

69 The Defendant maintains that the tax exemptions laid down in the Regulation were selective in nature since they favoured the manufacturing and mining industries. The general rule under the electricity tax system was that all uses of electricity were subject to taxation with the overall objective of taxing all consumption of electricity and thereby ensuring a more efficient use of electrical power. The exemption made to this rule benefited the manufacturing and mining industries compared to, for example, the service sector and the building sector. Also, within these industries, electricity is in many cases used as a fuel in exactly the same way as in the service sector. The allegation that the general rationale of the Norwegian tax system was to tax only non-production uses of electricity is not accepted by the Defendant, as the Regulation distinguished on the basis of the user rather than on the type of use.

70 The argument put forward by the Applicants to the effect that the limitation of the exemption with regard to administration buildings ensured that the tax exemption was non-selective, is not accepted by the Defendant.

71 As to the Applicants' invitation to focus on the Storting's intentions when assessing the tax exemption, the Defendant argues that the purpose behind the national legislation is irrelevant when assessing the question of whether a given state measure is selective, since the concept of aid is defined by its effects. Deviating from this concept would, in the Defendant's view, open up for circumvention.

72 In the Defendant's view, the aid in question cannot be justified on the basis of the nature or general scheme of the tax system since to exempt the sectors that consume the most electricity runs counter to the aim of the electricity tax, namely to ensure a more efficient use of electric power. The Defendant argues that the factual and legal situation in the case at hand resembles the situation in Case C-143/99 *Adria Wien Pipeline* v *Wietersdorfer & Peggauer Zementwerke*.

73 As concerns the approval in Decision No 149/04/COL of the amendments made to the Norwegian tax scheme in 2004, the Defendant states that the amendments established a new system with a new logic. The decisions are therefore not comparable.

74 The Commission is of the opinion that the electricity tax exemption favours undertakings in the manufacturing and mining industries in a selective way. The fact that electricity consumed in the administrative buildings of such undertakings is not exempted does not alter that finding.

75 As to possible justification by virtue of compliance with the internal logic of the tax system, the Commission argues for a strict interpretation of exceptions to the prohibition of State aid. High-consumption activities can also be found in the service sector. Accordingly, a justification on that ground is to be rejected. Whether or not the system is based on certain legitimate policy considerations is, in the Commission's view, not decisive under Article 61(1) EEA.

Findings of the Court

76 The Court notes at the outset that according to established case law it is the effect and not the form of an aid which is decisive when determining whether measures entail State aid (see, inter alia, Case 173/73 *Italy* v *Commission* [1974] ECR 709). Rebates or exemptions granted from an obligation to pay energy taxes may, as a matter of principle, constitute State aid, since they guarantee the supply of energy on preferential terms to the recipient undertakings and thereby relieve them of all or part of the expenses which they would normally have had to bear in their usual activities (see, as regards a rebate on energy taxes for undertakings engaged in the production of goods, Case C-143/99 *Adria Wien Pipeline* v *Wietersdorfer & Peggauer Zementwerke*, paragraphs 38-40).

77 The wording of Article 61(1) EEA requires that in order for a measure to be classified as State aid it must favour certain undertakings or the production of certain goods. The selective application of a State aid measure therefore constitutes one of the criteria inherent in the notion of State aid (Case E-6/98 *Norway* v *ESA* [1999] EFTA Court Report 74, paragraph 33). In that regard, it is necessary to determine whether or not the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity (compare Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 24). It must further be noted that aid in the form of a general scheme may concern a whole economic sector and still be covered by Article 61(1) EEA (compare Case C-75/97 *Belgium* v *Commission "Maribel"* [1999] ECR I-3671, paragraph 33).

78 The contested Decision concerns the Norwegian Regulation in force from 1 January 2002 and maintained through 2002 and 2003. According to the Regulation, the manufacturing and the mining industries were exempted from the electricity tax in question except for the use of electricity in administration buildings. Those exemptions were identified by way of reference to specific categories of standard industrial classification and therefore only applied to certain economic sectors. They accord an economic advantage to the undertakings active in those sectors, relieving them from part of the costs which they would normally have to bear. Undertakings in other sectors also characterised by similar use of significant quantities of electricity, such as certain

branches of the services or construction sectors, were excluded from the benefit of the tax exemption.

79 Two conclusions are to be drawn from the foregoing. First, the Regulation introduced an exemption from a general rule that electricity consumption is liable to tax. To understand it the way the Applicants do, namely that the Regulation establishes tax liability only for a particular use of electricity, would run counter to the structure of the tax scheme in question and reverse the usual relationship between rule and exemption as confirmed by the explicit use of the term "exemption" in the Regulation. Second, it is clear that the exemption in question benefits those undertakings which belong to the exempted economic sectors and thereby favours certain undertakings within the meaning of Article 61(1) EEA.

80 Finally, the Court cannot accept the argument that the taxation of electricity use in administration buildings can be taken as an indication that the general purpose has changed, and that the intention now was only to tax electricity used for non-production purposes. Despite the taxation of electricity used in administrative buildings, the fact remains that the exemption only applies to undertakings in the specified sectors. Consequently, this only redefined, but did not alter the exemption to the general scheme.

81 Based on the foregoing, the Court holds that the Defendant did not err in finding that the tax exemptions at issue were favouring certain undertakings within the meaning of Article 61(1) EEA.

82 The Court will then address the question of whether the tax exemptions at issue are justified by the nature or general scheme of the system (see Case E-6/98 *Norway* v *ESA*; Case C-143/99 *Adria Wien Pipeline* v *Wietersdorfer & Peggauer Zementwerke*, paragraph 42; Case T-308/00 *Salzgitter* v *Commission*, judgment of 1 July 2004, not yet reported, paragraph 42).

83 According to the documents of the case, electricity taxation in Norway has as its overall objective environmental protection, and, to this end, aims at curbing energy consumption by taxing the use of electricity. The argument put forward by the Applicants to the effect that the objective is to be understood in a narrower sense, and that it is limited to the taxation of electricity used for non-production purposes, must be rejected, since in fact it is based on what has been identified by the Court as the exemption, not the general scheme of the system.

84 The exemption of two energy consuming sectors from electricity taxation is not consistent with the rationale of electricity taxation that has environmental protection as its purpose. Further, the exemptions are not applied uniformly to all economic sectors that may be in a comparable situation, as they are not granted, inter alia, to the services and construction sectors. The service and construction sectors may use electricity in the same manner as the manufacturing and mining sectors, both as regards the quantity consumed and its purpose. Cooling facilities in the service sector and major construction projects can be mentioned as examples. For comparison, the Court notes that the Court of Justice of the

European Communities held that undertakings supplying services may be major consumers of energy, and the ecological considerations underlying legislation similar to the one at issue do not justify treating these sectors differently (see Case C-143/99 *Adria Wien Pipeline* v *Wietersdorfer & Peggauer Zementwerke*, paragraphs 50 and 52). Finally, the circumstances of the case do not indicate that differential treatment of the two situations can be justified by practical difficulties in the implementation of the tax system, as argued by the Applicants.

85 Therefore, the grant of a tax exemption exclusively to the manufacturing and mining sectors cannot be justified by the nature or general scheme of the tax system as established by the Regulation.

86 As to the argument that such a finding stands in contrast to the Defendant's Decision 149/04/COL, where the Regulation, in its version as amended in 2004, was found to fall outside the scope of Article 61(1) EEA, it suffices to say that the subject matter of the present actions is limited to the review of the legality of the contested Decision. The Court must refrain from expressing a view on a decision of the Defendant that falls outside the present proceedings.

87 The Court concludes that the Defendant did not err in finding that the measure contained in the Regulation was selective within the meaning of Article 61(1) EEA.

Effect on intra-EEA trade, distortion of competition and insufficient statement of reasons

Arguments of the parties

88 The applicants PIL and others submit that the aid measure in question does not distort competition and does not affect trade between the Contracting Parties, since the exemptions under the Regulation were available to all undertakings in the manufacturing industry in Norway and since most other Contracting Parties also exempted their industries from a comparable tax insofar as such a tax existed. Consequently, the exemption granted under the Norwegian tax regulations does not strengthen the position of Norwegian undertakings vis-a-vis their European competitors. Furthermore, it is submitted that the contested Decision does not satisfy the requirement of Article 16 SCA for a sufficient statement of reasons for the finding that the aid distorted competition and affected trade between Contracting Parties. The reasons contained in the contested Decision did not, in the view of the applicants, meet the minimum standards as established in the case law of the Community Courts. In this respect, the applicants refer, inter alia, to Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission*, paragraph 66.

89 According to the applicants Fesil and Finnfjord, the Defendant should have carried out a market analysis in order to establish that the measure in question distorts competition and affects trade. To support their view, they refer to point 42 of the Environmental Guidelines and argue that an assessment of the aspect of

international competitiveness was necessary. In failing to do so, the Defendant infringed an essential procedural requirement.

90 The Defendant claims to have satisfied the obligation to state reasons, laid down in Article 16 SCA, the case law of the Court of Justice of the European Communities concerning the parallel provision of Article 253 EC, and the procedure for reviewing State aid. It was explicitly stated in the contested Decision that the criterion concerning effect on trade is always met when some of the aid recipients are engaged in markets in which there is intra-EEA trade, and it is undisputed that several of the Applicants are such companies.

91 With regard to the alleged lack of a market analysis and of an assessment of the aspect of international competitiveness, the Defendant states that point 42 of the Environmental Guidelines only relates to the compatibility assessment under Article 61(3) EEA and not to the analysis under Article 61(1) EEA.

92 The Commission refers to the Court's judgment in Case E-6/98 *Norway* v *ESA*. The argument that most other EEA States also exempted their manufacturing industries contradicts the principle that a breach by a Member State of an obligation in connection with the prohibition of State aid cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The Commission furthermore submits that the reasons given in the contested Decision were sufficiently precise in light of what was stated in Joined Cases 296/82 and 318/82 *Netherlands* and *Leeuwarder* v *Commission* [1985] ECR 809.

Findings of the Court

93 With regard to the argument that the Defendant was not correct in concluding that there is an effect on trade between Contracting Parties and a distortion of competition, the Court must consider whether the aid in question is capable to strengthen the position of an undertaking compared with other undertakings competing in the EEA trade. In this respect, the Court notes that ESA is not required to establish that such aid has an appreciable effect on trade between Contracting Parties and that competition is actually being distorted, but only to examine whether such aid is liable to affect trade and to distort competition.

94 In the present case, it is undisputed that in the exempted sectors many of the recipient undertakings in Norway were in competition with undertakings outside Norway. The advantage conferred on them by the tax exemption strengthened their financial situation and thus was at least likely to improve their competitive position to the detriment of competitors in other Contracting Parties. With reference to those circumstances, the Court holds that ESA has sufficiently established that the tax exemption in question was liable to affect trade and distort competition within the meaning of Article 61(1) EEA. Consequently, the Defendant was not under an obligation to carry out a market analysis. In this respect, the case at issue must be distinguished from Case E-4/97 *Norwegian Bankers' Association* v *ESA* "*Husbanken II*" [1999] EFTA Court Report 1, paragraphs 68-70 on Article 59(2) EEA. The Applicants' argument that the

manufacturing undertakings in most other EEA States were also not subject to electricity tax does not alter this finding (see, for comparison, case C-6/97 *Italy* v *Commission*, [1999] ECR I-2981, paragraph 21). With regard to the argument that ESA failed to assess the aspect of international competitiveness, it suffices to note that this argument is not relevant under Article 61(1) EEA.

95 Based on the foregoing, the Court concludes that the Defendant has shown that intra-EEA trade was liable to have been affected by the granting of the tax exemption at issue and that competition was distorted or threatened to be distorted.

96 The Applicants argue that the Defendant failed to comply with its obligation under Article 16 SCA to state sufficient reasons for its decision on the effect on intra-EEA trade and the distortion of competition. The purpose of this requirement is, in particular, that the addressee of the decision, or anyone concerned by it, must be able on the basis of the text of the decision alone, to assess why the decision has been taken, how the Defendant has applied EEA law, and whether or not there are grounds to seek judicial review. Sufficiently detailed reasons are also required in order for the Court to be able to exercise its power of review (Case E-2/94 *Scottish Salmon Growers* v *ESA*, paragraph 25).

97 Article 16 SCA thus requires an appropriate explanation of the considerations which led the Defendant to adopt a decision. Therefore, a decision by ESA must set out, in a concise but clear and relevant manner the principal issues of law and fact upon which it is based and that are necessary in order to understand the reasoning which led the Defendant to its decision (Case E-2/94 *Scottish Salmon Growers* v *ESA*, paragraph 26).

98 As concerns reasoning with regard to distortion of competition and effect on trade, the Defendant stated in the contested Decision that the sectoral exemption from the electricity tax constituted a loss of tax revenues for the Norwegian State and an advantage for certain undertakings. Furthermore, it was stated that given the fact that the industries benefiting from the exemption were engaged in activities open to competition on markets in which there is trade between Contracting Parties, the tax exemption was liable to distort competition and affect trade between the Contracting Parties.

99 The Court holds that in the case at hand the very circumstances in which the aid in question was granted made it clear that the aid was capable of affecting trade between Contracting Parties and of distorting or threatening to distort competition. In that situation, the statement of reasons for the Defendant's decision must at least set out with sufficient clarity what those circumstances were (compare, inter alia, Case C-372/97 *Italy* v *Commission* [2004] ECR, I-3679, paragraph 71).

100 As has been noted by the Applicants, the statement of reasons by ESA in the contested Decision is brief. It is limited to a very short description of the circumstances under which the aid was granted. However, this description does

contain the crucial circumstances, i.e. that undertakings exempted from the electricity tax were engaged in activities open to competition on markets in which there is trade between Contracting Parties. In view of this and taking into account the contested Decision as a whole, the Defendant's statement of reasons must, notwithstanding its brevity, be considered as sufficient.

101 Consequently, the Applicants' argument concerning an alleged failure to state reasons with regard to distortion of competition and effect on trade between Contracting Parties must be rejected.

102 On all those grounds, the pleas that the tax exemption at issue does not constitute State aid within the meaning of Article 61(1) EEA, does not distort competition and does not affect intra-EEA trade, and that, in this respect, the contested Decision is not sufficiently reasoned, must be dismissed as unfounded.

The second main plea, alleging incorrect assessment under Article 61(3) EEA

103 The second plea, made by Fesil and Finnfjord, alleging incorrect assessment under Article 61(3) EEA, is based on the premise that ESA in its compatibility assessment under Article 61(3) EEA should have considered Article 2(4)(b) of the Energy Tax Directive and the aspect of international competitiveness referred to in point 42 of the Environmental Guidelines. Point 42, read with point 5, should have led the Defendant to have revised its Environmental Guidelines in light of the subsequent changes in energy taxation. However, the Defendant has not assessed international competitiveness.

104 The Defendant contends that this plea is unfounded. In particular, the Environmental Guidelines do not require it to perform an individual assessment of the aspect of international competitiveness. Furthermore, as the Energy Tax Directive had not yet entered into force in 2002 and 2003, the reference made to that Directive in point 46.1(b) of the Environmental Guidelines was irrelevant. Finally, for an exemption to be granted, the conditions set out in point 46 of the Environmental Guidelines must be fulfilled. The Kingdom of Norway did not provide information suggesting that this was the case.

105 The Commission contends that the Defendant enjoys wide discretion in applying Article 61(3) EEA subject to only limited judicial review. As to an alleged obligation to revise the Environmental Guidelines, Fesil and Finnfjord fail to demonstrate any manifest error or abuse of power. As to the aspect of international competitiveness, the Defendant was bound to apply the relevant rules of the Environmental Guidelines and could not have relied on Article 61(3) EEA directly in order to decide otherwise in an individual case.

Findings of the Court

106 The Court notes, at the outset, that pursuant to Article 61(3) EEA, State aid may be considered compatible with the functioning of the EEA Agreement in specific cases. This derogation from the general rule laid down in Article 61(1) EEA is

contingent upon ESA taking action, which is, in principle, subject to judicial review by the Court.

107 In applying Article 61(3) EEA, ESA enjoys wide discretion (see Case E-6/98 *Norway* v *ESA*, paragraph 42). Use of that discretionary power may either be made on a case-by-case basis or by way of adopting general guidelines. By adopting such guidelines, ESA is bound to exercise its discretion within the limits following from the guidelines, provided it does not depart from the rules in the EEA Agreement (compare Case C-409/00 *Spain* v *Commission* [2003] ECR, I-1487, paragraph 95).

108 In point 5 of the Environmental Guidelines, the Defendant states that "these guidelines establish principles for assessing whether State aid measures will qualify for exemptions from the general State aid prohibition as laid down in Article 61(1) of the EEA Agreement." Consequently, the Defendant is under an obligation to grant exemptions in cases in which the conditions laid down in the Environmental Guidelines are satisfied, as elaborated on under heading D.3.2. of the Environmental Guidelines. The Defendant's conclusions in this respect are subject to judicial review (Case E-6/98 *Norway* v *ESA*, paragraph 41).

109 The Court notes that Fesil and Finnfjord made no objection as regards the application of point 46.1 of the Environmental Guidelines to the contested Decision and do not dispute the statements made in the contested Decision that no harmonization of energy taxes existed in 2002 and 2003.

110 As regards Fesil and Finnfjord's argument in relation to point 42 of the Environmental Guidelines, and their reference to Article 2(4) of the Energy Tax Directive, the Court holds that ESA is not under an obligation to base its decisions on the Energy Tax Directive, which has not been made part of the EEA Agreement. In that regard, the Court holds that the procedure laid down in Article 97 EEA *et seq.* must in any case be respected when it comes to the adoption of harmonising acts of Community law in the EFTA pillar of the EEA (see also Case E-3/97 *Jan and Kristian Jæger AS* v *Opel Norge AS* [1998] EFTA Court Report 1, paragraph 21, *et seq.*) Even though the level of harmonisation reached in Community law may have to be taken into account in the interpretation of the EEA State aid rules for the sake of ensuring homogeneity and equal conditions of competition in the EEA, private parties and economic operators in EEA/EFTA States cannot normally invoke a provision of Community law that has not been made part of EEA law.

111 It follows from the foregoing that by not granting an exemption under Article 61(3)(c) EEA, the Defendant has not committed a manifest error of assessment. Fesil and Finnfjord's plea must therefore be dismissed as unfounded.

The third main plea, alleging that the Defendant erred in ordering recovery

112 Having reached the conclusions that the Defendant did not err in finding that the tax exemption constitutes State aid within the meaning of Article 61(1) EEA, and

that it did not commit a manifest error of assessment by not granting an exemption under Article 61(3) EEA, the Court will examine whether the conditions for ordering recovery were present. The arguments of the Applicants in this respect may be grouped in four categories, i.e. infringement of procedural requirements, lack of legal basis for recovery, infringement of the principle of legal certainty, and infringement of the principle of proportionality and of Articles 61 and 62 EEA.

Infringement of procedural requirements

Arguments of the parties

113 The Applicants argue that the Defendant infringed essential procedural requirements in dealing with the matter up to the acceptance of the appropriate measure and that the measure in question did not fulfil the requirements of an appropriate measure according to Article 1(1) and Section V of Protocol 3 SCA. In their view, the Defendant did not observe the proper procedure for the review of existing aid, as now codified in Articles 17 and 18 of Part II of Protocol 3 SCA, mirroring Council Regulation (EC) No 659/1999 of 22 March 1999 (OJ 1999 L 83, p. 1) in the EC pillar. In the view of the Applicants, these procedural requirements are merely an elaboration of the duty of cooperation enshrined in Article 1(1) of Part I of Protocol 3 SCA, and may therefore be derived from the original Protocol 3 SCA.

114 More specifically, the Norwegian Government claims that ESA did not comply with its obligations: to seek information concerning the individual aid schemes concerned, cf. Article 17(1) of Part II of Protocol 3 SCA; to make a concrete assessment of the compatibility of the tax exemptions, inform Norway of its preliminary view and give the Norwegian Government the opportunity to submit its comments, cf. Article 17(2) of Part II of Protocol 3 SCA; to reach a final conclusion as to the compatibility of the tax exemption, and to refer to specific aid schemes in its proposal for appropriate measures, cf. Article 18 of Part II of Protocol 3 SCA.

115 In addition to the procedural requirements invoked by the Norwegian Government, the applicants PIL and others refer to Article 19(2) of Part II of Protocol 3 SCA. In their view, the absence of a specific provision dealing with a situation where a Contracting Party accepts a proposal for an appropriate measure, but fails to implement it, must imply that this situation is to be treated in the same manner as a failure to accept the proposal.

116 In support of their view that the Defendant was required to make a concrete assessment of the compatibility of the tax exemptions, as now stated in Article 17 of Part II of Protocol 3 SCA, the Applicants claim that the Defendant cannot place the burden of assessing individual aid schemes on national authorities and thereby shift the review task by proposing abstract appropriate measures. While appropriate measures in the form of guidelines may be proposed, guidelines constitute only one of the elements of the cooperation foreseen under Article 1(1)

of Part I of Protocol 3 SCA, and it is still necessary to scrutinize specific schemes. In the Applicants' view, this conclusion may be drawn from, inter alia, Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603. This is seen as particularly important when the guidelines are as general and vague as the ones in the case at hand.

117 The Defendant contests that the appropriate measures should have related to specific aid schemes. The proposal of appropriate measures in relation to general guidelines constitutes a legitimate and common approach to reviewing existing aid. The proposal does not need to be preceded or accompanied by an assessment of individual cases. Putting the burden of identifying and amending specific aid schemes on the State is, in the Defendant's view, not contrary to the aim of cooperation provided in Article 1(1) of Part I of Protocol 3 SCA. The Defendant maintains that this is the actual purpose in linking the proposal of appropriate measures to general guidelines. Moreover, the Defendant contests the Applicants' argument that the appropriate measures were not sufficiently clear and precise. The measures contained an unambiguous obligation to bring existing environmental aid schemes into line with the Environmental Guidelines, and a date for compliance.

118 Further, the Defendant argues that the Kingdom of Norway was involved in the drafting process of the Environmental Guidelines and was well aware of their implications for its existing aid schemes approximately one and a half years before they eventually entered into force. Therefore, the Norwegian Government did have opportunity to discuss consequences of accepting the appropriate measures and their relationship to the electricity tax, so that the cooperation procedure between the Defendant and the Kingdom of Norway was fully respected in the present case. The Defendant also contends that the Kingdom of Norway's claim that the measures were not appropriate measures within the meaning of Article 1(1) Protocol 3 SCA, and that the cooperation procedure under Protocol 3 SCA had not been followed, should be excluded from consideration, since that had not previously been argued.

119 The Commission contends that the procedural framework in place at the time when the appropriate measures were accepted consisted of Protocol 3 SCA before the amendment. Part II of Protocol 3 SCA cannot be taken as a mirror of the practice in place before its adoption since it was not exclusively a codification of earlier practice. In that regard, reference is made to the Opinion of Advocate General Jacobs in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101. Consequently, any arguments to the effect that the necessary procedural steps as prescribed by Part II of Protocol 3 SCA were not followed, should be rejected.

120 The Commission further argues that reviewing aid under Article 1(1) of Protocol 3 SCA can be done in general terms, and refers to Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237. The alternative would be that ESA must open formal procedures for each and every aid scheme — an unmanageable task given its resources and thus one that would seriously undermine the discipline of the

Contracting Parties in complying with the State aid rules. Nothing in the case law indicates that specific aid schemes must be examined. Furthermore, the Commission contends that the proposal of appropriate measures is a non-binding act, which may not be challenged before the Court. Submissions concerning the validity of the proposal for appropriate measures or its degree of clarity and precision, as well as all objections to the procedure followed by the Defendant, must accordingly be rejected. In any case, the Commission maintains that the Defendant's proposal of appropriate measures fully satisfied the procedural requirements. The Kingdom of Norway's right to be heard was fully respected since it was repeatedly consulted before the proposal of appropriate measures and was thus given the opportunity to submit its views on the proposed measures.

Findings of the Court

121 To begin with, the Court finds it necessary to address the issue of which set of rules applies to the procedure leading up to the acceptance of the proposed appropriate measures by the Kingdom of Norway.

122 The administrative procedure in the field of State aid is governed by Protocol 3 SCA, originally only mirroring Article 88 EC. By an amendment of 10 December 2001, additional provisions were inserted into that Protocol. Part II was inserted in Protocol 3 SCA and essentially replicated Council Regulation No 659/1999, which lays down detailed rules for the application of Article 88 EC. Part II of Protocol 3 SCA contains, inter alia, provisions governing the procedure regarding existing aid schemes. However, since these amendments entered into force only on 28 August 2003, it is undisputed that they are not directly applicable to the case at hand.

123 It is, as a matter of principle, not for the Court to apply provisions of EC secondary law which have not been made part of the EEA Agreement. The Applicants argue, however, that Part II of Protocol 3 SCA should be regarded as constituting a codification of rules already applicable prior to the entry into force of the amendment. In his Opinion in Case C-99/98 *Austria* v *Commission*, paragraph 28, Advocate General Jacobs expresses the view that the new system established by Regulation No 659/1999 "strikes a somewhat novel and different balance between the interests of the Community, of Member States and of other interested parties … it would … be hazardous to isolate individual rules of that Regulation and to claim that those rules (which would be necessarily taken out of their context) codify the preexisting state of the law". The Court shares this view. The administrative procedure leading up to the contested Decision must be examined on the basis of the rules in force at the relevant time.

124 As concerns the argument of the Commission that the proposal of appropriate measures is not subject to judicial review, the Court notes that in the case at hand, the agreement concluded between the Kingdom of Norway and the Defendant has been invoked as the legal basis for the contested Decision. The legality of the proposal of appropriate measures constitutes a precondition for the conclusion of a valid agreement. The Court holds that the proposal of appropriate

measures is therefore, in the context of a dispute over the consequences of the resulting agreement, subject to judicial review.

125 Further, an applicant is not prevented from alleging the infringement of procedural requirements on the grounds that such argument has not been put forward by the Contracting Party concerned in the course of the administrative proceedings. Proceedings before the Court serve different purposes than the procedure before an administrative body. Moreover, there may be factual and legal points that become evident only after the acceptance of the appropriate measures which may entitle a Contracting Party to raise new claims.

126 In the case at hand it is undisputed that if the tax exemptions in question are considered to be State aid within the meaning of Article 61(1) EEA, they would remain existing aid at least until the expiry of the time limit laid down in the proposed appropriate measure. Therefore, the procedure with which the Defendant had to comply was the one in Article 1(1) of Protocol 3 SCA.

127 Article 1(1) of Protocol 3 SCA provides that ESA, in cooperation with the EFTA/EEA States, is to keep under constant review the systems of aid existing in these States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the EEA Agreement. That provision thus involves an obligation of regular, periodic cooperation on the part of ESA and the EFTA/EEA States, from which neither side can release itself unilaterally (see Case C-311/94 *IJssel-Vliet Combinatie BV* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraph 36).

128 It is the obligation of ESA to initiate a procedure under Article 1(1) of Protocol 3 SCA and to come forward with a proposal of appropriate measures if required. In this regard it enjoys a broad discretion (Case E-4/97 *Husbanken II*, paragraph 36). Although ESA is not under an obligation to open formal proceedings under Article 1(1) of Protocol 3 SCA, it is nevertheless under a duty not only to respect the right of the State concerned to be heard, but also to cooperate sincerely with the latter in that procedure. Such an obligation follows from Article 3 EEA (compare Case 2/88 *Zwartveld* [1990] ECR I-3365, paragraph 17). The EFTA/EEA States are equally obliged to co-operate sincerely in the procedure. Moreover, if they accept appropriate measures, they are under an obligation to comply with the rules they have accepted (compare Case C-311/94 *IJssel-Vliet*, paragraph 36).

129 In the context of proposing appropriate measures under Article 1(1) of Protocol 3 SCA, the issuance of general guidelines may constitute one element of the regular, periodic cooperation (compare, inter alia, Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603, paragraph 28). The adoption of guidelines aims at structuring the Defendant's discretion in the application of Article 61 EEA instead of exercising it on a case-by-case basis. In this context, the Court observes that a certain degree of abstraction is inherent in the formulation of guidelines.

130 The Court notes that in point 69 of its Environmental Guidelines, the Defendant stated that it "will … propose, as an appropriate measure under Article 1(1) of Protocol 3 SCA, that EFTA States should bring their existing environmental aid schemes into line with these guidelines before 1 January 2002". This was subsequently proposed by way of a letter to the Kingdom of Norway of 23 May 2001. By a letter dated 6 July 2001, the Kingdom of Norway accepted the appropriate measure.

131 The Applicants do not dispute that appropriate measures may be proposed by reference to general guidelines. The controversial questions in this regard relate to whether ESA fulfilled the procedural requirements of Article 1(1) of Protocol 3 SCA, including the degree of clarity and specificity required, and whether ESA was under an obligation to assess each aid scheme individually. In this respect, the Court must examine, inter alia, the number and type of the aid schemes potentially concerned, the extent and depth of communication between the Defendant and national authorities prior to the proposal of the appropriate measures and the content of the proposed appropriate measures.

132 At the oral hearing it was confirmed by the agent of the Kingdom of Norway that besides the electricity tax exemptions there were only two other aid schemes existing in Norway at the time that could, in principle, fall within the scope of the Environmental Guidelines, namely tax schemes aimed at limiting emissions of SO_2 and CO_2. Consequently, the general scope of the Environmental Guidelines was narrowed down considerably by the circumstances prevailing.

133 As concerns the communication between the Defendant and the Kingdom of Norway, it is clear from the information submitted to the Court that the Norwegian authorities were involved in the drafting of the Environmental Guidelines. Prior to the adoption of the guidelines, there was an extensive exchange of information and views between the Defendant and the Norwegian Government. It must be concluded from the letter sent by the Ministry of Trade and Industry, dated 14 April 2000, that the Kingdom of Norway could not have been unaware of its obligation to adapt its existing aid schemes to the Environmental Guidelines. That the Kingdom of Norway was aware of its obligation also appears from an overview of all environmental taxes applicable in Norway, sent by the Ministry of Finance to the Defendant in a letter dated 21 June 2001. That overview included the tax on electricity consumption. In the Government's budget proposal for 2001-2002 of 28 September 2001, it is explicitly stated that the Environmental Guidelines "encompass, inter alia, the conditions for exemptions from … environmental taxes and will, in Norway's case, apply, inter alia, for exemptions for … the electricity tax. … The Government will in particular analyse the electricity tax … in relation to EFTA Surveillance Authority's new guidelines for environmental aid". The Court notes that the Ministry of Finance set up a working group with the task of assessing exemptions from electricity tax in the light of the Environmental Guidelines. Furthermore, it must be concluded from the Ministry of Finance's letters dated 4 December 2001, 21 December 2001, and 31 January 2002, i.e. after the acceptance of the appropriate measures, that the exemption from electricity tax

for the manufacturing and the mining industries was the subject of consideration with respect to its compliance with the Environmental Guidelines.

134 From the above, the Court concludes that the Kingdom of Norway was kept informed by the Defendant throughout the process leading up to the adoption of the Environmental Guidelines and given ample opportunity to submit its comments in writing and in multilateral meetings, starting already at the stage of the drafting of the Commission's guidelines. The argument that the Defendant did not observe the proper procedure for the review of existing aid measures and the Kingdom of Norway thereby was deprived of an opportunity to comment on substantive issues during the process must consequently be rejected.

135 As regards the preciseness and specificity of the appropriate measure, it must also be concluded from the above that the Kingdom of Norway must have been aware that the electricity tax system would be subject to the rules of the Environmental Guidelines and that it would be under an obligation to adjust its regulations in accordance with them. The Court does not share the Applicants' view that ESA was under an obligation to carry out an individual assessment of specific aid schemes in addition to the general evaluations made when drafting the Environmental Guidelines and in the procedure leading up to its adoption. An absolute obligation to that effect can not be derived from the system of co-operation under Article 1(1) of Protocol 3 SCA. In this regard, it must be borne in mind that according to the content of the proposed appropriate measures and the unconditional acceptance thereof, the Kingdom of Norway undertook to adjust its legislation to the Environmental Guidelines and thus to carry out an assessment.

136 The question of whether the proposal of appropriate measures should have been more specific with regard to the consequences of non-compliance with the accepted appropriate measures will be addressed below.

137 It is to be concluded from the foregoing that the Defendant did not infringe procedural requirements when proposing appropriate measures under Article 1(1) of Protocol 3 SCA in connection with its Environmental Guidelines, and that the Defendant was not under an obligation to carry out an individual assessment of specific aid schemes.

Lack of legal basis for recovery

Arguments of the parties

138 The Applicants submit that there was no legal basis for recovery of the aid in the case at hand, since it was existing aid at the time of the order for recovery. ESA erred in considering the aid as new aid after 1 January 2002, the time limit for bringing all existing aid schemes into line with the Environmental Guidelines. As a consequence, it is argued, the Defendant's finding that the aid was illegal and recoverable was erroneous.

139 The Kingdom of Norway contends that under the agreement concluded with the Defendant it was not obliged to complete all the changes to the environmental tax schemes within the agreed period of time. Instead, its obligations were limited to loyally adjusting the existing aid schemes without an imposed deadline for completion of this undertaking. The time frame for all necessary amendments was far too short, and there was no reference to individual aid schemes in the agreement. If a binding obligation, however, were to be accepted, legal consequences of a delayed implementation of the Environmental Guidelines would be limited to an enforcement action against the State and State liability.

140 In the view of the Applicants, the acceptance of proposed appropriate measures does not generally have the effect of reclassifying existing aid as new aid. It is submitted that this follows from the definitions of existing and new aid in Part II of Protocol 3 SCA, as well as from the very system in Part I of Protocol 3 SCA before amendment. The absence of a specific provision prescribing reclassification must be understood to mean that no automatic reclassification may occur.

141 According to the Applicants, the judgment of the Court of Justice of the European Communities in Case C-313/90 *CIRFS* v *Commission* cannot serve as authority for reclassification as new aid. In that case, it was the appropriate measure itself that, by setting out notification requirements, had the effect of transforming existing aid to new aid. *CIRFS* is not to be understood as establishing a general principle that the acceptance of a proposal of appropriate measures will turn existing aid into new aid as from the time limit set forth therein.

142 The Applicants argue that the acceptance of the proposal of appropriate measures can have such effect if reclassification is clearly stated in the proposal. In the case at hand, the proposed appropriate measures contained no such clause.

143 The Applicants assert that there is no consistent Commission practise supporting reclassification as new aid, as contended by the Defendant; and that in any event, the Commission's practice cannot serve as legal basis for reclassification.

144 In further support of the view that no reclassification as new aid has occurred, it is argued that reclassification without a legal basis in the present case would violate the principle of legal certainty because of the vague and general nature of the appropriate measures. The principle of legal certainty calls for predictability in the changes that are required. Beneficiaries of the alleged aid scheme were deprived of the opportunity to foresee and predict, with the required level of legal certainty, their future position and the possibility of a recovery order. This was aggravated by the fact that the Norwegian Government’s acceptance of the appropriate measures was not published.

145 In the alternative, if the Court were to find that the acceptance of proposed appropriate measures might, in principle, transform existing aid into new aid, the Applicants submit that no such transformation took place in the present case in

light of the special circumstances: ESA did not, in its proposed appropriate measures, state its view on the legal position of the tax exemption, and Norway could not foresee what was required by the Environmental Guidelines, or what was implied by an acceptance thereof. It is argued that as the proposal was not sufficiently clear and precise, Norway's acceptance did not specify any aid schemes, and consequently, the acceptance did not comprise the assumption of an obligation to amend the electricity tax scheme in the Regulation and could not have the effect of reclassifying the aid.

146 The Defendant maintains that the binding effect of Norway's acceptance of the proposed appropriate measures implies that aid granted in violation of the obligations assumed by Norway constitutes new aid from the date on which Norway promised to bring its aid schemes into line with the Environmental Guidelines (i.e. on 1 January 2002). With a proposal of appropriate measures, ESA asks the EFTA/EEA States, to the extent indicated, to forgo exercising the right to grant aid that they may derive under hitherto applicable rules. In itself, the request to accept the appropriate measures does not have any bearing on the classification of an aid scheme as new or existing. By contrast, a State's acceptance of the proposed appropriate measures implies that State's promise to change, if necessary, its legislation to comply with the appropriate measures by a given date, as can be concluded from the judgment of the Court of Justice of the European Communities in Case C-313/90 *CIRFS*. The reclassification effect is, according to the Defendant, caused by mutual agreement to introduce a new regime. This effect does not depend on a reclassification clause. In that respect, the Defendant also refers to consistent Commission practice.

147 As to claim that under the agreement between the Defendant and the Kingdom of Norway the latter was only under an obligation to make a loyal adjustment, the Defendant insists on the binding character of the acceptance of appropriate measures and the need for compliance with the deadline set. Had Norway not found the guidance in the Environmental Guidelines sufficient, it should have refrained from signing its unconditional acceptance. Furthermore, since the Government of Norway accepted the compliance date, there is no room to argue that the deadline was too short.

148 Whether the Environmental Guidelines themselves are imprecise, does not, in the Defendant's view, have any bearing on the question of whether the aid is new or existing. Neither the principle of legitimate expectations nor that of legal certainty can influence the classification of new or existing aid, as follows from the judgment of the Court of First Instance of the European Communities in Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309. Even though the Government of Norway may not have been aware of the legal consequences of a breach of its obligations, the Defendant does not acknowledge an *ex officio* obligation to inform the EFTA/EEA States. The failure to do so is, in any event, immaterial to the solution of the present dispute, since the classification of aid does not depend on a subjective test.

149 In any event, the Defendant does not accept the view that the appropriate measures were not sufficiently clear and precise. The fact that the phrase "existing environmental aid schemes" might cover different kinds of schemes does not alter the fact that both the proposal and the acceptance were unequivocal and precise, but merely means that the Government made a commitment of a certain size. That it was not specified precisely in which way the individual tax schemes had to be modified, is due to the fact that ESA can only conclude that a given piece of legislation is incompatible with EEA law, but has no power to order an EFTA/EEA State to draft its legislation in any particular way.

150 The Commission refers to the *CIRFS* case to support the argument that the acceptance of appropriate measures has the effect of turning existing aid into new aid. Thereby, the onus to alter any so identified aid schemes is on the Contracting Party, which must adapt existing schemes in accordance with the appropriate measures. Otherwise, the acceptance of appropriate measures by a Contracting Party would be devoid of any practical purpose. If the Contracting Party, as in the present case, unequivocally, fully and unconditionally accepts such appropriate measures, it undertakes to achieve the result of adapting the existing schemes to the new rules referred to by the appropriate measures and cannot logically subsequently argue that such rules are too vague. In doing so, the Kingdom of Norway would contravene its duty of sincere cooperation with ESA. Finally, the Commission submits that the Court lacks jurisdiction to consider the acceptance by Norway, which is an act by a Contracting Party.

Findings of the Court

151 As to a possible legal basis for the recovery order in the contested Decision, the Defendant and the Commission maintain that hitherto existing aid was re-classified as new aid when it was not abolished or modified in compliance with the appropriate measures within the time limit agreed, i.e. from 1 January 2002. They refer in that respect to consistent practice of the Commission, to the case law of the Court of Justice of the European Communities (C-313/90 *CIRFS* v *Commission*) and to an interpretation of the agreement entered into between the Defendant and the Kingdom of Norway.

152 The Court notes that the existence of a legal basis for the recovery order is a precondition for the legality of the contested Decision. In that respect, the Court recalls the settled case law of the Community Courts, according to which the recovery of aid that has been found incompatible with the common market has as its purpose to re-establish the previously existing situation. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors (see, inter alia, Cases C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraphs 21 and 22; C-75/97 *Maribel*, paragraph 64).

153 As neither the ESA/Court Agreement nor Protocol 3 SCA contain provisions concerning the legal consequences of non-compliance with accepted appropriate measures, it needs to be examined whether a legal basis for reclassification from

existing aid to new aid is to be found in the sources referred to by the Defendant and the Commission.

154 As to the reliance by the Defendant on the practice of the Commission, the Court recalls that the Commission's practice as such cannot be a source of law for the interpretation of the EEA Agreement by the Court.

155 As regards the reliance by Defendant on Case C-313/90 *CIRFS* v *Commission*, the Court notes that this judgment was basically concerned with the question of whether a so-called "discipline" is capable of having binding effect (cf. paragraph 34). The rationale of that discipline was to avoid increases of production in a sector suffering from overproduction and excess production capacity. In the discipline, the Commission proposed to the EC Member States that they "… should desist from making any decisions to grant aid which would lead to an increase in the present production capacity ... Where regional aid is concerned the synthetic fiber industry should cease to benefit, even when national regulations provide for aid to be granted automatically with no need for prior notice to be given." It was also stated that the Commission should be informed beforehand of any aid which the Member States proposed granting, irrespective of whether it involved an increase in capacity (cf. paragraph 3 of the judgment). The Member States agreed to the discipline.

156 It was on this basis that the Court of Justice of the European Communities held that the rules set out in the discipline and accepted by the Member States themselves have the effect, inter alia, of withdrawing from certain aid the authorisation previously granted and thus of classifying it as new aid and subjecting it to the obligation of prior notification (see paragraphs 35 and 36 of that judgment). That Court thereby formulated its interpretation of the content of the discipline.

157 Irrespective of whether a general theory regarding the effect of reclassification can be based on the findings in the *CIRFS* case, the Court holds that it must be concluded from that judgment that existing aid can in principle, by non-compliance with the acceptance of proposed appropriate measures, become new aid. This presupposes that a sufficiently clear and precise binding agreement was entered into between ESA and a Contracting Party. It therefore needs to be examined in each case whether the acceptance of a proposed appropriate measure must be understood to this effect.

158 In the present case, it is not disputed that a binding agreement was entered into between the Kingdom of Norway and the Defendant. It is to be recalled that in its letter dated 23 May 2001 the Defendant stated: "The Authority also proposes that the EFTA State brings its existing environmental aid schemes into line with the new guidelines before 1 January 2002." In its letter dated 6 July 2001, the Kingdom of Norway replied: "The Norwegian Government hereby signifies its agreement to the appropriate measures concerning aid for environmental protection as proposed by the EFTA Surveillance Authority in the documents referred to above."

159 By accepting the appropriate measure without any reservation, the Kingdom of Norway committed itself to complying with the rules laid down in the Environmental Guidelines within the time-limit proposed by the Defendant, i.e. 1 January 2002. At the same time, the Environmental Guidelines offered assurance that ESA would act in conformity with them in its application of Article 61(3) EEA.

160 In its submissions, the Kingdom of Norway suggested the possibility that the acceptance of appropriate measures may lead to reclassification of existing aid to new aid where such legal effect is explicitly agreed upon through the proposal of appropriate measures and its acceptance. Similarly, counsel for the applicants PIL and others acknowledged that an agreement between the Defendant and the EFTA/EEA State may substitute for a lacking express legal basis, provided reclassification to new aid has been specifically foreseen and agreed in advance.

161 As regards the arguments that the appropriate measures were not sufficiently clear and precise, that it was not clear which national measures had to be changed and what alterations were regarded as necessary, the Court recalls its findings in relation to the Applicants' plea concerning procedural requirements. There, the Court has already concluded that in light of the circumstances of the case, the appropriate measures accepted by the Government of Norway were sufficiently clear and precise for that Government to be able to identify the relevant national tax schemes and to comply with the appropriate measures (see paragraphs 132-137 above).

162 Concerning the argument that the appropriate measures lacked clarity and precision in relation to the consequences of non-compliance, the Court notes that the agreement does not include any explicit statement in this respect. However, the Kingdom of Norway as a Contracting Party must have been in a position to recognise that it had undertaken by its unconditional acceptance of the appropriate measures the obligation to bring into line its electricity tax exemptions with the Environmental Guidelines. It should also have been aware that the exemptions would become new aid after 1 January 2002 and that thereby a precondition for a subsequent recovery order was established.

163 Legal certainty is a general principle of EEA law, as confirmed by the Court in Case E-1/04 *Fokus Bank* v *Norway* [2004] EFTA Court Report 11, paragraph 37. It may be invoked not only by individuals and economic operators, but also by Contracting Parties. In a case such as the one at hand, where recovery is essentially based on an agreement between ESA and a Contracting Party in a specific context, legal certainty calls for the terms of that agreement to be sufficiently clear and precise. The Kingdom of Norway, as a party to the agreement, participated in negotiating it and had the opportunity to influence its content. If in doubt, the Norwegian Government had occasion to seek clarification of the content and the implications of the proposed appropriate measures, and in particular to raise the question of consequences of non-compliance. The terms of the agreement must have been sufficiently clear for the Government of Norway to have felt confident in accepting it. Since the

Government of Norway, as earlier concluded, was in a position to assess the legal consequences, it cannot claim afterwards that the principle of legal certainty was infringed.

164 In light of the above, the Court concludes that the aid in question became unlawful from the time of the expiry of the time limit laid down in the accepted appropriate measures, i.e. from 1 January 2002. The plea that the Defendant's order for recovery of the aid is lacking a legal basis must therefore be rejected.

165 As far as beneficiaries of the aid in question are concerned the principle of legal certainty calls for protection of their legitimate expectations vis-à-vis the recovery order, which the Court will discuss below.

Infringement of the principle of protection of legitimate expectations

Arguments of the parties

166 The applicants Fesil and Finnfjord and the members of PIL submit that recovery of the aid would be contrary to the principle of legal certainty and their legitimate expectations. In their view, the Environmental Guidelines are general and vague in nature, so that the applicants had no reason to doubt that the Norwegian legislation was in line with the appropriate measures or, in the alternative, Article 2(4)(b) of the Energy Tax Directive was applicable. A publication in the Official Journal of the European Union of the decision to open a formal investigation procedure does not affect legitimate expectations.

167 The Kingdom of Norway argues that due to the lack of publication of the proposal of appropriate measures and their acceptance by Norway, the beneficiaries of the tax exemptions were not able to evaluate whether their position could be affected. Reinforced by the unspecified nature of the Environmental Guidelines, this results in an infringement of the principle of legal certainty.

168 The Defendant contends that it has sought to respect the legitimate expectations of beneficiaries of the aid by making the date of publication of the opening decision decisive for recovery. Although the acceptance of the appropriate measure was not published in the Official Journal, the Defendant considered that from the date of the publication of the decision to open a formal procedure onwards, operators in the market were sufficiently informed that aid schemes not in conformity with the Environmental Guidelines could be subject to recovery.

169 The Commission observes that no aid recipient could have harboured any legitimate expectations as to the legality of the aid after 6 February 2003, when the opening decision was published in the Official Journal.

Findings of the Court

170 The Court holds, at the outset, that ESA has broad discretion in ordering the recovery of aid granted contrary to Article 61 EEA and Protocol 3 SCA. It will

only in exceptional circumstances exceed the bounds of that discretion (compare Cases C-75/97 *Maribel*, paragraph 66; C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 99). In the contested Decision, recovery of aid was ordered from 6 February 2003 onwards, i.e. from the date of publication in the Official Journal of the decision to open the formal procedure. The recovery order only concerned aid granted after that time.

171 The Kingdom of Norway can not plead legitimate expectations of beneficiaries in order to justify a failure to comply with the Defendant's order for the recovery of aid. Otherwise, Article 61 EEA and Article 1 of Protocol 3 SCA would be deprived of all practical force, since Contracting Parties would then be able to render ineffectual decisions taken by ESA pursuant to those provisions (compare Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 17; Case C-310/99 *Italy* v *Commission*, paragraph 104).

172 A beneficiary of aid is not precluded from invoking exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful. In the case at hand, the publication of the decision to open the formal procedure informed potential beneficiaries of the risk attached to any aid in breach of Article 61(1) EEA, in that recovery might be ordered (compare Case C-310/99 *Italy* v *Commission*, paragraph 102). Until the publication, the beneficiaries may assume that the measure constitutes a general measure not falling within the scope of Article 61(1) EEA or that it constitutes existing aid. After the publication, there is clearly a situation of uncertainty as to the legality of the measure. Beneficiaries have been made aware of the possibility that the aid may be considered to infringe Article 61(1) EEA and recovery may be sought. They may in that case either not accept the new advantages, or make provision for possible subsequent financial consequences in accordance with general accounting practices.

173 It follows that the plea based on infringement of the principle of protection of legitimate expectations must be rejected.

Infringement of the principle of proportionality and of Articles 61and 62 EEA

Arguments of the parties

174 The applicants PIL and others argue that, instead of ordering recovery, the Defendant should have considered a complete exemption from the electricity tax pursuant to Article 2(4)(b) of the Energy Tax Directive or the application of a taxation level down to zero pursuant to Article 15(1)(c) and (d) and/or 17(2) of the Energy Tax Directive. When the Defendant decided to base its assessment of the amount to be recovered on the minimum rates provided for in the Energy Tax Directive, it was also under an obligation to assess whether the exemption provisions in the Energy Tax Directive were applicable in the present case. PIL and others maintain that the failure to do so infringes Articles 61 and 62 EEA. In their view, this also infringes the principle of proportionality, since the Defendant did not take into account alternative and less burdensome ways of establishing the amount to be recovered.

175 In the view of Fesil and Finnfjord the contested Decision runs contrary to the principle of proportionality since the Kingdom of Norway is under an obligation to recover exempted tax even for uses that are not covered by the minimum tax rates in the Energy Tax Directive.

176 The Defendant argues that it is for Norway to show how a derogation is justified by the nature and logic of the scheme and to establish a direct link between the alleged specific features and the tax concessions granted. Norway did not show that the conditions under point 46.1(a) of the Environmental Guidelines were present.

177 The Commission submits that, under point 46(1)(b) of the Environmental Guidelines, the Defendant was not required to apply the Energy Tax Directive. In any event, it follows from recital 32 of the Energy Tax Directive that the mere fact that an exemption is allowed does not mean that this exemption, in case it constitutes State aid, is compatible with the internal market.

Findings of the Court

178 The Court finds that the recovery of State aid, which aims at restoring the *status quo ante*, can not be regarded as disproportionate to the objectives of the EEA State aid provisions. It may be noted in this context that the recovery order in the case at hand is limited to a significant proportion of the tax.

179 With regard to the invocation of provisions of the Energy Tax Directive, the Court recalls that provisions of secondary law which have not been made part of EEA law by the EEA Joint Committee do, as a matter of principle, not apply (see paragraph 110 above). In its order for recovery, the Defendant chose, as previously explained, to limit its claim for recovery, and in that respect took into account the minimum rate set forth in the Energy Tax Directive to alleviate the burden on the beneficiaries. This does not mean that the Defendant was obliged under Article 61 EEA to directly apply the Energy Tax Directive which was not made part of the EEA Agreement.

180 Article 62 EEA is a procedural provision that lays down the division of competences between ESA and the Commission in the field of State aid. It cannot be invoked by the Applicants as a basis for contesting the proportionality of the recovery order.

181 In conclusion, the arguments of the Applicants based on infringement of the principle of proportionality and Articles 61 and 62 EEA must be rejected.

182 As the Court found all the pleas of law brought forward by the Applicants unfounded, the applications must be dismissed.

VII Costs

183 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Defendant has asked for the Applicants to be ordered to pay the costs. Since the latter have been unsuccessful in their applications, they must be ordered so to do. The costs incurred by the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

1. Joins Cases E-5/04, E-6/04 and E-7/04 for the purposes of the judgment;

2. Dismisses the applications;

3. Orders the applicants to pay the costs of the proceedings.

Carl Baudenbacher Per Tresselt Thorgeir Örlygsson

Delivered in open court in Luxembourg on 21 July 2005.

Dirk Buschle
Acting Registrar

Carl Baudenbacher
President