REPORT FOR THE HEARING

in joined Cases E-5/04, E-6/04, E-7/04

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

Fesil ASA and Finnfjord Smelteverk AS (Case E-5/04),
Prosessindustriens Landsforening and others (Case E-6/04),
The Kingdom of Norway (Case E-7/04)

and

EFTA Surveillance Authority

seeking the annulment in part of the EFTA Surveillance Authority's Decision No 148/04/COL of 30 June 2004.

I. Facts and procedure

1. By decision of 23 May 2001,[1] the EFTA Surveillance Authority adopted new guidelines on the application of the EEA State aid provisions to aid for environmental protection and proposed "that EFTA States should bring their existing environmental aid schemes into line with these guidelines before 1 January 2002". The Norwegian Government signified its agreement to the proposed appropriate measures by letter from the Ministry of Trade and Industry dated 6 July 2001.

2. By decision of 26 July 2002,[2] the EFTA Surveillance Authority initiated the formal investigation procedure provided for in Article 1(2) in Part I of Protocol 3 to 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") 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 the procedure, submitted their comments to the opening of the formal investigation procedure.

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1 Decision No 152/01/COL, OJ 2001 L 237, p. 16.

2 Decision No 149/02/COL, OJ 2003 L 31, p. 36.

3. On 30 June 2004, the EFTA Surveillance Authority adopted a final Decision No 148/04/COL (hereinafter the "contested Decision").[3] The relevant points in the operative part of the contested Decision read as follows:

> *1. The following Norwegian measures constitute State aid within the meaning of Article 61(1) of the EEA Agreement:*
>
> *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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> …
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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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> …
>
> *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.*
>
> *11. This Decision is authentic in the English language.*

4. As regards the exemptions from the tax on electricity consumption referred to in point 1 a), the contested Decision describes the situation as follows:

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[3] OJ 2004 C 319, p. 30 (footnotes have been omitted from the quoted text). On the same day, the Commission of the European Communities adopted its decision on aid scheme C 42/2003 (ex NN 3/B/2001) implemented by Sweden for an exemption from the tax on energy from 1 January 2002 to 30 June 2004.

1. Exemptions from tax on electricity consumption

a) The exemption from the tax on electricity consumption for the manufacturing, the mining and the greenhouse growing industries

The tax on electricity consumption was first introduced in 1971. According to the Norwegian Government, the objective of the tax was to ensure a more efficient use of electric power and thus lead to positive environmental effects that would not otherwise occur.

Since the introduction of the electricity tax, certain industries (in particular the energy intensive industries) have benefited either from reduced rates or total exemptions. As from 1 January 1994 and until 31 December 2000, the manufacturing, the mining and the greenhouse growing industries were fully exempted from the electricity tax…

As from 1 January 2001, the exemption from the electricity tax for the manufacturing, the mining and the greenhouse growing industries continued to apply but should, according to the annual budgetary decision of the Norwegian Parliament, be limited to uses in the industrial process as such ('Fritaket omfatter kun elektrisk kraft som benyttes i selve industriprosessen'). This limitation was implemented by way of reference to use of electricity by the manufacturing, the mining and the greenhouse growing industries in administration buildings, which should be taxed ('Fritaket gjelder ikke elektrisk kraft som leveres til administrasjonsbygg').

As from 1 January 2002 the tax exemption for the manufacturing, the mining and the greenhouse growing industries and the exclusion of electricity used in administration buildings from the tax exemption were implemented by the Regulation on Excise Duties (cf. §§ 3-12-4 and 3-12-5 of Chapter 3-12 of the Regulation on Excise Duties …).

The amendment in 2001, which was maintained throughout 2002 and 2003, followed a request from the Norwegian Parliament to examine how companies exempted from the tax could pay tax on electricity used for other purposes than production.

The amendment implied that the manufacturing, the mining and the greenhouse growing industries, which were in principle exempted from the electricity tax, would be subject to the tax on electricity used in administration buildings. In order to be defined as 'administration building', a minimum of 80 % of the building space had to be used for administrative purposes. If a building qualified as an 'administration building', all electricity used in that building was taxed, even though part of the electricity consumption was in fact related to production processes. On the other hand, if production activities occupied more than 20 % of the total building space, the electricity delivered to that building was not taxed, even though part of the electricity was used for administrative purposes. This was, according to the Norwegian Government, seen as the only practical way of taxing electricity used for purposes other than production.

As from 1 January 2002, the general rate of the electricity tax was reduced to NOK 0,093 per kWh (approximately EUR 0,012 per kWh) and was, as from 1 January 2003, set at NOK 0,095 per kWh (approximately EUR 0,013 per kWh).

According to information from the Norwegian Government, the losses in tax revenues in 2002 due to the sectoral exemptions amounted to NOK 4 605 million (approximately EUR 575 million).

As from 1 January 2004, the tax on electricity consumption was no longer levied on undertakings, only on households.

5. With regard to the applicability of the EEA Agreement to those two exemptions from the tax on electricity consumption, the Decision reads as follows:

The present decision is limited to assessing whether the Norwegian Government complied with its obligations stemming from the appropriate measures proposed by the Authority and accepted by the Norwegian Government.

The decision concerns, firstly, the exemption from the tax on electricity consumption, which was applicable until 31 December 2003, in favour of the manufacturing and mining industries and certain regions (municipalities). In contrast, it does not apply to the similar exemption for the greenhouse growing industry given that this industry concerns goods falling outside the scope of products to which the provisions of the EEA Agreement apply, including those related to State aid (cf. Article 8(3) of the EEA Agreement). With regard to mining, the EEA Agreement applies to trade in coal and steel products, except where the bilateral Free Trade Agreement contains specific provisions which have not been set aside by Protocol 14 to the EEA Agreement. Consequently, this decision applies to the mining industry, without prejudice to the products which are still governed by the bilateral Free Trade Agreement and to which this decision does not apply.

6. As regards the question of whether the above-mentioned exemptions from the tax on electricity consumption constitute State aid within the meaning of Article 61(1) of the EEA Agreement, the EFTA Surveillance Authority took the following view:

The introduction of environmental taxes is not as such caught by Article 61(1) of the EEA Agreement, insofar as they are general measures which do not favour particular firms or sectors of industry. Exceptions to a general tax do, however, fall under that provision, if they are targeted at certain firms or sectors of industry, and without these exemptions being justified by the nature or general scheme of the tax system in question.

…

The general rule under the electricity tax system was that all uses of electricity were liable to taxation. An exemption was made from this rule for the use of electricity by the manufacturing and the mining industries. The scope of this

exemption was defined by reference to certain sectors in the statistical classification of economic activities. The exemption was therefore sectoral in nature.

The Norwegian Government argued that the amendment as from 1 January 2001 established a system under which all enterprises using electricity for production purposes would be exempted from the tax and that the exemption for this reason should be viewed as a general measure not covered by Article 61(1) of the EEA Agreement.

The Authority cannot subscribe to this point of view.

…

The result of the amendment was merely that the sectoral exemption was more narrowly defined than before.

Against this background, the Authority maintains the view … that the tax exemption for the manufacturing and the mining industries was selective in the sense of Article 61(1) of the EEA Agreement.

…

The Authority takes the view that 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, that no justification existed.

…

All other elements of State aid in the meaning of Article 61(1) of the EEA Agreement were fulfilled. 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 on markets in which there is trade between EEA Contracting Parties, the tax exemption was liable to distort competition and affect trade between the Contracting Parties.

…

Consequently, the Authority concludes that the sectoral exemption from the electricity tax constituted State aid within the meaning of Article 61(1) of the EEA Agreement.

7. The EFTA Surveillance Authority then examined the compatibility of those tax measures that have been found to constitute State aid, with Article 61(3)(c) of the EEA Agreement in combination with the Environmental Guidelines:

According to section D.3.2 of the Environmental Guidelines, EFTA States might deem it necessary to make provisions for temporary exemptions from environmental taxes notably because of the absence of harmonisation at

European level or because of the temporary risks of a loss of international competitiveness. However, as can be seen from point 42 of the Environmental Guidelines, these exemptions constitute operating aid, which have to fulfil the requirements set out in the Guidelines.

…

The Norwegian Government did not show that the conditions under point 46.1(a) of the Environmental Guidelines (environmental agreements or other measures having similar effects) were fulfilled.

There were no harmonised electricity taxes in the European Community in 2002 and 2003. Point 46.1(b) first indent of the Environmental Guidelines is therefore not applicable. In any event, the Norwegian Government did not show that the undertakings in question paid an amount which remained higher than the Community minimum under the Energy Tax Directive applicable as from 1 January 2004.

The Norwegian Government did not submit information about the consequences of the amendments in 2001 in terms of collection of the electricity tax. The Authority has therefore not been in a position to confirm that some of the exempted companies could be regarded as paying a significant proportion of the electricity tax (point 46.1(b) second indent of the Environmental Guidelines). More importantly, the electricity tax regime at issue did not contain any provisions which would have ensured that companies paid a significant proportion of the tax.

…

Consequently, the Authority concludes that the sectoral exemption from the electricity tax for the manufacturing and the mining industries was incompatible with the functioning of the EEA Agreement.

8. As regards the qualification of the measures at issue as new aid from 1 January 2002, the contested Decision refers to Article 1(1) in Part I of Protocol 3 SCA and the concept of "appropriate measures" mentioned therein:

…where a review is initiated with respect to an undetermined number of existing aid schemes, the Authority will normally prepare guidelines, which lay down the conditions under which State aid can be regarded as being compatible with the functioning of the EEA Agreement. New guidelines, such as the Environmental Guidelines, constitute an expression of how the basic State aid rules of the EEA Agreement will be interpreted and applied by the Authority. The Authority may consider that existing aid schemes which do not fulfil the requirements set out in the new guidelines are not, or are no longer, compatible with the functioning of the EEA Agreement. Consequently, in the context of the adoption of new guidelines, the Authority would propose as appropriate measures to the EFTA States that existing aid schemes be brought in line with these new requirements. This conclusion does not need to be preceded by an assessment of individual

cases, but may be based on general considerations regarding the compatibility of aid in certain sectors or for certain purposes.

…

If an EFTA State accepts the proposed measures, these measures become legally binding on that state.

…

The binding effect of the Norwegian Government's acceptance of the proposed appropriate measures cannot be questioned by reference to alleged procedural improprieties as the co-operation procedure was fully respected in the present case.

…

In line with consistent Commission practice, the Authority takes the view that the binding effect of the Norwegian Government's acceptance of the proposed appropriate measures implied that aid granted in violation of the obligations assumed by Norway constitutes 'new aid' as from the date on which Norway promised to bring its aid schemes in line with the Environmental Guidelines (i.e. on 1January 2002).

…

Thus, the fact that the Authority's decision to propose appropriate measures referred to the requirements set out in the new Environmental Guidelines, without proposing specific measures with respect to individual aid schemes, did not imply that aid incompatible with Norway's acceptance of the appropriate measures would not turn into new aid when the agreed compliance date had passed. It merely meant that it was up to the Norwegian Government itself to carry out the necessary assessment of which aid schemes that had to be changed, subject to any later control by the Authority.

9. With regard to recovery, the Decision states:

a) Legitimate expectations

The sectoral exemption … [was] not notified to the Authority and [was] aid granted in conflict with the requirements laid down in Article 61(3)(c) of the EEA Agreement and the new Environmental Guidelines. These exemptions therefore constituted unlawful and incompatible aid after 1 January 2002. This aid is thus subject to recovery to the extent that this would not be in conflict with general principles of EEA law, notably, legitimate expectations on the part of the beneficiary.

…

[T]he Authority takes the view that a publication of the EFTA State's acceptance of the proposed appropriate measures, in combination with the proposed

measures, could provide a diligent aid recipient with enough information to be aware that the aid received had to be in compliance with the new Environmental Guidelines. … However, as the amendments to Protocol 3 to the Surveillance and Court Agreement, incorporating the EC procedural State aid Regulation, had not yet entered into force at the time when Norway accepted the appropriate measures, the Authority did not … publish the Norwegian Government's acceptance of the appropriate measures. Information about the acceptance of the appropriate measures was only provided in the Authority's decision to open a formal investigation procedure in the present case.

…

[T]he Authority takes the view that after the publication of the opening decision at the very latest, diligent aid recipients could no longer enjoy legitimate expectations that the aid still had the character of lawful and compatible aid measures.

It follows from the above that 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 … shall be recovered from the beneficiaries.

…

b) The amount to be recovered

…

[T]he Authority considers that an amount paid by undertakings which equals the European Community minimum as laid down in the Energy Tax Directive will provide undertakings with an incentive to improve environmental protection. It can therefore be accepted that a tax which equals the minimum rate for electricity in the Energy Tax Directive, i.e. EUR 0,5 per mWh, would also amount to a significant proportion of the national tax under point 46.1(b) second indent of the Environmental Guidelines. Consequently, what needs to be recovered is a significant proportion of the national tax which at the very least must equal the minimum rate for electricity laid down in the Energy Tax Directive.

10. Case No E-5/04 was registered at the Court on 1 September 2004 pursuant to an application of 31 August 2004 by Fesil ASA and Finnfjord Smelteverk AS (hereinafter “Fesil and Finnfjord”) bringing 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.

11. Case No E-6/04 was registered at the Court on 6 September 2004 pursuant to an application of 31 August 2004 by Prosessindustriens Landsforening (hereinafter “PIL”) and others bringing 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.

12. Case No E-7/04 was registered at the Court on 6 September 2004 pursuant to an application of 1 September 2004 by the Kingdom of Norway bringing an action under Article 36 SCA for partial annulment of the contested Decision.

13. 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 procedures.

14. The EFTA Surveillance Authority 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. 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 EFTA Surveillance Authority in the joined cases was registered at the Court on 4 March 2005.

15. The Commission of the European Communities submitted, pursuant to Article 20 of the Statutes, written observations, registered at the Court on 15 November 2005.

II. Form of order sought by the parties

16. Fesil and Finnfjord claim that the Court should:

(i) annul the EFTA Surveillance Authority's Decision No 148/04/COL, point 1 a);
(ii) annul the EFTA Surveillance Authority's Decision No 148/04/COL, point 8; and
(iii) order the EFTA Surveillance Authority to pay the Applicants' costs.

17. PIL and others claim that the Court should:

(i) declare void Articles 1.a), 4, 6 and 8 of ESA Decision No 148/04/COL;
(ii) in the alternative, declare void Article 8 of ESA 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
(iii) order the Authority to pay the costs of the proceedings.

18. The Kingdom of Norway claims that the Court should:

(i) declare void points 1 a), 4, and 8 of ESA Decision No 148/04/COL; and

(ii) order the EFTA Surveillance Authority to pay the costs of the proceedings.

19. The EFTA Surveillance Authority contends that the Court should:

(i) dismiss the Applications as unfounded; and
(ii) order the Applicants to pay the costs.

20. The Commission of the European Communities submits that the applications should be dismissed and the costs of the proceedings be borne by the applicants.

III. Legal background

EEA law

21. 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.*
>
> …
>
> *3. The following may be considered to be compatible with the functioning of this Agreement:*
>
> …
>
> *(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;*
>
> ...

22. Article 62 EEA reads as follows:

> *1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:*
>
> *(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;*

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

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

23. Article 5 SCA reads as follows:

1. The EFTA Surveillance Authority shall, in accordance with the provisions of this Agreement and the provisions of the EEA Agreement and in order to ensure the proper functioning of the EEA Agreement:

(a) ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement and this Agreement;

(b) ensure the application of the rules of the EEA Agreement on competition;

(c) monitor the application of the EEA Agreement by the other Contracting Parties to that Agreement.

2. To this end, the EFTA Surveillance Authority shall:

(a) take decisions and other measures in cases provided for in this Agreement and in the EEA Agreement;

(b) formulate recommendations, deliver opinions and issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the present Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;

(c) carry out cooperation, exchange of information and consultations with the Commission of the European Communities as provided for in this Agreement and the EEA Agreement;

(d) carry out the functions which, through the application of Protocol 1 to the EEA Agreement, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.

24. Article 16 SCA reads as follows:

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

25. Article 24 SCA reads as follows:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to,

the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I.

26. Article 36(1) and (2) SCA reads 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.

27. 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") 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.

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.

…

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.

28. Article 1 in Part II of Protocol 3 reads as follows:

For the purpose of this Chapter:

(a) 'aid' shall mean any measure fulfilling all the criteria laid down in Article 61(1) of the EEA Agreement;

(b) 'existing aid' shall mean:

(i) all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the EEA Agreement;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the EFTA Surveillance Authority or, by common accord as laid down in Part I, Article 1 (2) subparagraph 3, by the EFTA States.

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Chapter or prior to this Chapter but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 15 of this Chapter;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the European Economic Area and without having been altered by the EFTA State. Where certain measures become aid following the liberalisation of an activity by EEA law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

(c) 'new aid' shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…

(f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 1(3) in Part I;

…

29. Article 14(1) in Part II of Protocol 3 reads as follows:

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the EFTA Surveillance Authority shall decide that the EFTA State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The EFTA Surveillance Authority shall not require recovery of the aid if this would be contrary to a general principle of EEA law.

30. Article 17 in Part II of Protocol 3 reads as follows:

Cooperation pursuant to Article 1(1) in Part I

1. The EFTA Surveillance Authority shall obtain from the EFTA State concerned all necessary information for the review, in cooperation with the EFTA State, of existing aid schemes pursuant to Article 1(1) in Part I.

2. Where the EFTA Surveillance Authority considers that an existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall inform the EFTA State concerned of its preliminary view and give the EFTA State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the EFTA Surveillance Authority may extend this period.

31. Article 18 in Part II of Protocol 3 reads as follows:

Proposal for appropriate measures

Where the EFTA Surveillance Authority, in the light of the information submitted by the EFTA State pursuant to Article 17 of this Chapter, concludes that the existing aid scheme is not, or is no longer, compatible with the functioning of the EEA Agreement, it shall issue a recommendation proposing appropriate measures to the EFTA State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.

32. Article 19 in Part II of Protocol 3 reads as follows:

Legal consequences of a proposal for appropriate measures

1. Where the EFTA State concerns accepts the proposed measures and informs the EFTA Surveillance Authority thereof, the EFTA Surveillance Authority shall record that finding and inform the EFTA State thereof. The EFTA State shall be bound by its acceptance to implement the appropriate measures.

2. Where the EFTA State concerned does not accept the proposed measures and the EFTA Surveillance Authority, having taken into account the arguments of the EFTA State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4) of this Chapter. Articles 6, 7 and 9 of this Chapter shall apply mutatis mutandis.

The EC Energy Tax Directive

33. Recital 32 of the preamble to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity[4] (hereinafter the "Energy Tax Directive") reads as follows:

Provision should be made for the Member States to notify the Commission of certain national measures. Such notification does not release Member States from the obligation, laid down in Article 88(3) of the Treaty, to notify certain national measures. This Directive does not prejudice the outcome of any future State aid procedure that may be undertaken in accordance with Articles 87 and 88 of the Treaty.

34. Article 2(4)(b) of the Energy Tax Directive reads as follows:

4. This Directive shall not apply to:

…

(b) the following uses of energy products and electricity:

- energy products used for purposes other than as motor fuels or as heating fuels,

- dual use of energy products

An energy product has a dual use when it is used both as heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use,

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4 OJ 2003 L 283, p. 51.

- *electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes,*

- *electricity, when it accounts for more than 50 % of the cost of a product. "Cost of a product" shall mean the addition of total purchases of goods and services plus personnel costs plus the consumption of fixed capital, at the level of the business, as defined in Article 11. This cost is calculated per unit on average. "Cost of electricity" shall mean the actual purchase value of electricity or the cost of production of electricity if it is generated in the business,*

- *mineralogical processes*

  'Mineralogical processes' shall mean the processes classified in the NACE nomenclature under code DI 26 'manufacture of other non-metallic mineral products' in Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community[(2)].

  However, Article 20 shall apply to these energy products.

[(2)] OJ L 293, 24.10.1990, p. 1. Regulation as last amended by Commission Regulation (EC) No 29/2002 (OJ L 6, 10.1.2002, p. 3).

35. Article 5 of the Energy Tax Directive reads as follows:

Provided that they respect the minimum levels of taxation prescribed by this Directive and that they are compatible with Community law, differentiated rates of taxation may be applied by Member States, under fiscal control, in the following cases:

- *when the differentiated rates are directly linked to product quality;*

- *when the differentiated rates depend on quantitative consumption levels for electricity and energy products used for heating purposes;*

- *for the following uses: local public passenger transport (including taxis), waste collection, armed forces and public administration, disabled people, ambulances;*

- *between business and non-business use, for energy products and electricity referred to in Articles 9 and 10.*

36. Article 15(1)(c) of the Energy Tax Directive reads as follows:

1. Without prejudice to other Community provisions, Member States may apply under fiscal control total or partial exemptions or reductions in the level of taxation to:

…

(c) energy products and electricity used for combined heat and power generation;

37. Article 17(2) of the Energy Tax Directive reads as follows:

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.

The Environmental Guidelines

38. Point 5 of the Environmental Guidelines[5] (hereinafter the "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:*

— 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.

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.

39. Heading D.3.2. of the Guidelines, entitled, "Rules applicable to all operating aid in the form of tax reductions or exemptions" encompasses points 42 through 48. Point 42 of the Guidelines reads as follows:

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[5] Cf. footnote 1.

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[47]. This aspect will be essential with regard to whether or not there could be a loss of international competitiveness for the taxpayer.

[47] See point 5.

40. Point 46.1 of the 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.

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.*

National Legislation

41. Section 75(a) of the Norwegian Constitution provides the Parliament (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.

42. Section 1 of the Act on Excise Duties of 19 May 1933 No 11 (*Lov om særavgifter av 19. mai 1933 nr. 11*) states that:

> *when the Parliament adopts decisions on excise duties to the State, in accordance with this act […] the Ministry [of Finance] adopts further regulations as to the calculation, collection and control.*

43. The Parliament'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.*

44. Subsection 3 of section 1 of this decision empowered the Ministry of Finance to clarify the scope of this exemption in a Regulation.

45. Section 3-12-4 of Regulation No 1451 on the Excise Duties (*Forskrift om særavgift*) of 11 December 2001[6] (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.*
>
> *(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:*
>
> *(a) undertakings under Standard Industrial Classification section C Mining and Quarrying;*
>
> *(b) undertakings under Standard Industrial Classification section D Manufacturing;*

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6 Unofficial translation provided in the application of the Kingdom of Norway.

(c) labour market undertakings under Standard Industrial Classification group 85.3 which carry out activities under section C or D;

(d) undertakings with greenhouses using electrical heating facilities;

(e) district heating producers under Standard Industrial Classification group 40.3.

46. Section 3-12-5 of the Regulation[7] 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.

IV. Submissions of the Parties

47. The applicants in Case E-5/04, *Fesil* and *Finnfjord*, essentially submit that the contested Decision is invalid because of incorrect assessment under Article 61(1) and (3) EEA, errors in procedure and law in relation to the "appropriate measures" and the recovery of the aid, as well as violation of general principles of EEA law. The applicants in Case E-6/04, *PIL and others*, base their application on a violation of Article 61 EEA by qualifying the exemption from electricity tax as State aid; a violation of Article 61 EEA and of Part II of Protocol 3 by treating an existing aid as new aid; a violation of the principle of legal certainty; a violation of procedural rules by failing to follow the proper procedure for the implementation of appropriate measures; and, a violation of Articles 61 and 62 EEA as regards the recovery order. The applicant in Case E-7/04, the *Kingdom of Norway*, essentially alleges that the contested Decision is void due to incorrect assessment under Article 61(1) and errors in procedure and law as regards the alleged legal basis for the transition from existing aid to new aid as from 1 January 2002. The EFTA Surveillance Authority submits that all these claims should be dismissed.

Admissibility

48. The *Commission of the European Communities* submits, based on Article 36(2) SCA, that the applications made by PIL and its members: Borregaard, Elkem ASA, Eramet Norway AS, Norsk Hydro ASA, Norske Skogindustrier

[7] Unofficial translation provided in the application of the Kingdom of Norway.

ASA, Södra Cell Folla AS, Tinfos Titan & Iron KS and Yara International ASA; and by Fesil and Finnfjord, are inadmissible.

49. By reference to the Court's judgments in *Scottish Salmon Growers*[8] and *Bellona*,[9] the Commission of the European Communities deems the case law of the EC Courts on Article 230(4) EC relevant when interpreting Article 36(2) SCA. Accordingly, persons other than those to whom a decision is addressed, may only claim to be individually concerned if the decision affects them by reason of certain attributes peculiar to them, or by reason of factual circumstances by which they are distinguished from all other persons, and by virtue of those factors are distinguished individually in the same way as the person addressed.[10] In the present case, the contested Decision was addressed only to the Kingdom of Norway. Furthermore, the EFTA Surveillance Authority found that a general tax scheme was incompatible with the State aid provisions of the EEA Agreement. Hence the contested Decision, in principle, applied to all exempted users of electricity, of which PIL, its members, and Fesil and Finnfjord are part, but does not distinguish them in the same way as the person addressed (i.e. the Kingdom of Norway). In the view of the Commission of the European Communities, PIL, its members, and Fesil and Finnfjord are part of a class of persons envisaged in an abstract and general manner only. This view is underpinned by reference to a number of judgments of the EC Courts.[11] Other judgments,[12] possibly leading to the conclusion that beneficiaries of a scheme are entitled to challenge a decision ordering the recovery of any aid granted under the scheme, are distinguished on the facts from the case at hand.

50. Despite being actual, not only potential, beneficiaries of the general aid scheme, the members of PIL and Fesil and Finnfjord have automatically benefited from the tax advantages at issue and their situation is not different from that of all other beneficiaries. As to PIL itself, the Commission of the European Communities contests that it has *locus standi* both on behalf of its members and in its own right. Further reference is made to the strict approach to admissibility taken by the Court of Justice of the European Communities in *Unión de Pequeños Agricultores*,[13] the caution advocated by this Court in *TBW and*

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8 Case E-2/94 *Scottish Salmon Growers* v *ESA* [1994-1995] EFTA Court Report 59, para 13.

9 Case E-2/02 *Technologien Bau-und Wirtschaftsberatung and Bellona Foundation* v *ESA* [2003] EFTA Court Report 52, paras 39-40.

10 Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrtunternehmen* v *Commission* [1999] ECR II-179 para 42 with further references.

11 Inter alia, Joined Cases 67, 68 and 70/85 *van der Kooy and Others* v *Commission* [1988] ECR 219, para 15; Case T-398/94 *Kahn Scheepvaart BV* v *Commission* [1996] ECR II-477 and Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, para 77.

12 Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855 and Case C-298/00 P *Italy* v *Commission*, judgment of 29 April 2004, not yet reported.; Case T-55/99 *Confederación Española de Transporte de Mercancías* v *Commission* [2000] ECR II-3207, paras 22-25.

13 Case C-50/00 P *Unión de Pequeños Agricultores* v *Commission* [2002] ECR I-6677.

Bellona,[14] and to Article III-365(4) of the Treaty establishing a Constitution for Europe. Furthermore, in the Community context, an effective judicial protection and centralised control can be achieved through actions brought by the beneficiaries before the national judges, who may then ask the Court of Justice of the European Communities to assess the validity of the Commission's decision in a preliminary ruling under Article 234 EC. It is admitted, however, that the ESA/Court Agreement does not provide for a comparable procedure that would allow the national courts to ask the EFTA Court to assess the validity of a decision taken by the EFTA Surveillance Authority.

51. *Fesil and Finnfjord* maintain, at the outset, that the Commission of the European Communities' observations under Article 20 of the Statute cannot broaden the scope of the proceedings. The scope of direct actions is defined by the parties' claims and submissions. Even if the Commission of the European Communities had intervened, it would only be allowed to support the claims of the EFTA Surveillance Authority, which has not submitted that the application is inadmissible. In any event, it is argued that both applicants are individually affected. 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. Finally, the applicants refer to effective access to justice, procedural economy and the particularities of the EEA legal order.

52. The submissions made by *PIL and others* fall into two categories. First, it is stated that PIL, in its own right, is directly and individually concerned by the contested Decision. PIL represents the overwhelming majority of manufacturing companies that benefit from the disputed Norwegian tax exemption and, furthermore, PIL has been involved in the administrative procedure before the EFTA Surveillance Authority. Moreover, PIL has *locus standi* on behalf of its members if– by bringing the action – it has substituted itself for one or more of the members that it represents, based on the assumption that those members are themselves in a position to bring an admissible action in the present case.[15] Second, the members of PIL are individually concerned since these companies were all actual (and not only potential[16]) beneficiaries of the alleged aid measure.[17] Norsk Hydro, one of PIL's members, has also participated in the proceedings. Finally, the Court is invited to disregard the Commission of the

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14 Case E-2/02 *Technologien Bau-und Wirtschaftsberatung and Bellona Foundation* v *ESA*.

15 Reference is made, *inter alia*, to Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others* v *Commission* [1995] ECR II-1971, para 60; Case T-380/94 *AIUFASS, AKT* v *Commission* [1996] ECR II-2169, para. 50.

16 Reference is, inter alia, made to Case T-398/94 *Kahn Scheppvaart*, para 39; Case T-86/96 *ADL and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paras 45 to 46; Joined Cases C-15/98 and C-105/99 *Sardegna Lines* v *Commission* [2000] ECR I-8855, para 33; and Opinion by Advocate-General Alber in Case C-298/00 P, *Italy* v *Commission* [2004], not yet reported, para 85.

17 Reference is made to Case C-15/98 and C-105/99 *Sardegna Lines* v *Commission*, para 34.

European Communities' observations on this point due to their status under Article 20 of the Statute.

Assessment under Article 61(1) EEA

53. *Fesil and Finnfjord* submit that the EFTA Surveillance Authority was wrong in stating that the exemption for the manufacturing and the mining industries constitutes State aid within the meaning of Article 61(1) EEA. This contradicts Decision 149/04/COL, issued on the same day, regarding certain exemptions from the current Norwegian electricity tax, where the EFTA Surveillance Authority concluded that those exemptions were not to be considered State aid. In that context, the applicants doubt whether the EFTA Surveillance Authority during the formal investigation procedure has acted in conformity with the principle of loyal co-operation under EEA law.

54. According to the applicants, the EFTA Surveillance Authority has, in the contested Decision, failed to correctly establish the general system of the Norwegian electricity tax scheme, as amended from 1 January 2001. Under Article 61(1) EEA, a measure cannot be deemed of a specific character simply because it is determined in relation to specific beneficiaries. Specificity must be established in relation to the nature and scheme of the system. In fact, the tax system established by the Parliament did not tax all uses of electricity and it was not intended to do so. As a disincentive tax, it did not target production processes, but rather non-production uses, since they had the best energy saving potential. The EFTA Surveillance Authority focuses erroneously on the "technical" formulation of the rules, i.e. that there is a general rule to the effect that all uses of electricity are taxed and then there is an exemption for manufacturing and mining. Consequently, the above-mentioned exemptions do not constitute derogations from the general system but an inherent differentiation in keeping with the aims and purposes of the tax as defined by the Parliament. In support of the permissibility of differentiation within tax systems, the applicants refer to the Court's judgment in *Einarsson*,[18] the decisions of the Commission of the European Communities in the *Denmark – Electricity Reform* case[19] and in the *British Climate Change Levy* case,[20] as well as to Articles 2(4) and 5 of the Energy Tax Directive.

55. In the alternative, the applicants examine whether possible derogations can be justified on the basis of the nature and general scope of the system and conclude that there is a lack of consistency between the EFTA Surveillance Authority's reasoning in the contested Decision and in Decision 149/04/COL. Had the EFTA Surveillance Authority applied the same standards, it would have had to find that an exemption for certain industrial processes, such as

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18 Case E-1/01 *Hörður Einarsson* v *The Icelandic State* [2002] EFTA Court Report 1.

19 Case N 416/1999.

20 Commission Decision 2002/676/EC, OJ 2002 L 229, p. 15.

metallurgical processes, falls outside the definition of State aid in Article 61(1) EEA. Furthermore, by having refused to carry out a market analysis as a precondition for establishing that the measures in question distort competition and affect trade, and having not carried out an assessment of the aspect of international competitiveness as provided for in point 42 of the Guidelines, the EFTA Surveillance Authority has infringed an essential procedural requirement.

56. *PIL and others* submit that the EFTA Surveillance Authority erroneously interpreted the law when it considered that the exemption provisions of the Regulation constitute State aid pursuant to Article 61(1) EEA. The Regulation was not a selective, but a general measure. According to the Court of Justice of the European Communities in *Adria Wien*, a measure is not selective if it benefits all undertakings in the national territory, without distinction.[21] The Norwegian measures at issue imposed a tax on all undertakings to the extent that energy is used for consumable, i.e. lighting and heating, purposes. Only energy used for production purposes was exempted. Simply referring to the manufacturing and mining industry as exemptions disregards the level of differentiation introduced by Section 3-12-4 of the Regulation. Section 3-12-5, by imposing the tax on the electricity consumption in administrative buildings, is an important tool to achieve the objective of the tax exemption, i.e. to tax all non-productive consumption and to exempt only such activities where electricity is used as an ingredient in the production process. To further support their claim that the Norwegian tax exemptions are not selective, the applicants distinguish the case at hand from a number of cases decided by the Court of Justice of the European Communities.[22]

57. Moreover, the applicants maintain that the exemption for the manufacturing industry is justified by the nature and general scheme of the tax.[23] While the Norwegian tax measures at issue are to be distinguished from the Austrian tax rebate scheme at issue in the *Adria Wien* case, the objectives underlying the differentiation in *Denmark – Electricity Reform* and *British Climate Change Levy* are comparable to the objective of the Norwegian tax exemptions in the present case. Already at an early stage, the Norwegian Government explained that the objective was to differentiate, for the purpose of taxation, between the use of electricity for heating purposes and for production purposes.

58. Finally, in the applicants' view, the EFTA Surveillance Authority has not established that the alleged State aid measure distorts competition or affects trade

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21 Case C-143/99 *Adria Wien* [2001] ECR I-8365, para 35.

22 In particular Case C-143/99 *Adria-Wien;* Case C-75/97 *Belgium* v *Commission (Maribel)* [1999] ECR I-3671; Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487 Case C-241/94 *France* v *Commission* [1996] ECR I-4551; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie* v *GEMO (GEMO)* [2003], not yet reported.

23 Case C-143/99 *Adria Wien*, para 42; C-53/00 *Ferring* v *ACOSS* [2001] ECR I-9067, para. 17 Case E-6/98 *Norway* v *ESA*, para 38.

between EEA Member States. The EFTA Surveillance Authority should have carried out a proper analysis of the competitive situation and given proper reasons for its finding pursuant to Article 16 SCA.[24] The reasoning contained in the contested Decision does not meet the minimum standards.[25] In reality, the alleged State aid measure does not distort competition or affect trade between EEA States. This is so because the exemptions under the Regulation were available to all businesses in the manufacturing industries in Norway, and most other EEA Member States also exempted their manufacturing industry from this obligation (or did not have an energy tax until the entry into force of the Energy Tax Directive). Accordingly, there is no strengthening of the Norwegian companies' positions if their foreign competitors legally benefit from tax exemptions similar to the Norwegian tax exemption.

59. The *Kingdom of Norway* contests that the exemption from the tax on electricity consumption for the manufacturing and the mining industries constitutes State aid. The differentiation between the use of electricity in particular production processes – which is exempted – and other kinds of use is not selective within the meaning of Article 61(1) EEA. First, the EFTA Surveillance Authority did not sufficiently appreciate the significance of the Parliament's decision of 2001 and the preparatory works thereto, but focused rather on the Regulation implementing this decision. However, identifying the underlying policy considerations of the measure is necessary in order to establish the nature and logic of the system and is not precluded by the case law of the Court of Justice of the European Communities. Second, the non-selective nature of the Norwegian measures in taxing only a particular use of electricity is supported by the test established by the Court of Justice of the European Communities in *Maribel*. Conversely, the judgment in *Adria Wien* should not have an impact on this conclusion since the rebate in that case was linked to the general consumption of energy whereas the Norwegian scheme only concerns a particular use ("non-fuel use") and the exemption is available to all economic operators carrying out this kind of activity. The decision to tax only fuel use is part of each EEA State's discretionary power to determine the general tax system. The selectivity criterion would be met only if not all undertakings actually carrying out one of these particular processes are eligible for the tax exemption.

60. Alternatively, should the Court find that the measure is selective because the production process in the service sector was not exempted, the applicant submits that the distinction is justified by the nature and logic of the tax scheme. The objective pursued by the Parliament was essentially to tax electricity used in

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[24] Reference as to the obligation to state reasons is made to Cases 296 and 318/82 *Leeuwarder* [1985] ECR 809, and Case E-2/94 *Scottish Salmon Growers Association Limited*, paras 24 to 33, and E-4/97 *Norwegian Bankers' Association* v *ESA* [1999] EFTA Court Report 1, para 71.

[25] Reference is made to Joined Cases T-127/99, T-129/99 and T-148/99, *Territorio Histórico de Álava – Diputación Foral de Álava a.o.* v *Commission* [2002] ECR II-1275, para 201 and Joined Cases C-15/98 and C-105/99 *Sardegna Lines* v *Commission*, para 66.

similar ways as fuel. It is acknowledged that there may be examples outside the manufacturing and mining sectors, e.g. in the service and construction sectors, where electricity may be used for other purposes. However, the applicant claims that some degree of differential tax treatment must be justifiable by reference to practical and administrative considerations.[26] Taking the view that only minor imperfections may be justified, and only if considerable practical difficulties exist, is deemed by the applicant as too strict.

61. It is finally submitted that, should the Court not find that all the exempted use can be justified, this would not automatically mean that all exempted use by the industry constitutes State aid.[27] Should the Court find that an exemption for a particular use of electricity by the industries is justified, an exemption for the use of electricity that cannot be so justified would not affect the former conclusion.

62. The *EFTA Surveillance Authority* is of the opinion that the pleas of all applicants should be dismissed. It expresses the view that 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. From this rule an exemption was made for the use of electricity by the manufacturing and mining industries. This exemption was explained by Norway as having the purpose of offsetting the loss of competitiveness that would have followed from normal taxation. The exemption thereby benefited the manufacturing and mining industries compared to, for example, the service sector and the building sector. Hence, the exemption was selective and could therefore only escape Article 61(1) of the EEA Agreement if justified by the nature or general scheme of the tax system. The burden to present such justification is on the Kingdom of Norway. However, to exempt *per se* the sectors that consume most electricity runs counter to the aim of the tax, namely to ensure a more efficient use of electric power. The allegation that greater energy saving potential exists in the service sector than in the exempted sectors remains unsubstantiated. Even if it were so, the fact that the energy saving potential is different in different industries does not eliminate the steering effect of the tax. As electricity consumption by all sectors is equally damaging to the environment, any tax exemption for undertakings in the manufacturing and mining sectors defies the logic of the system. This is in line with the *Adria Wien* judgment, according to which, national measures that provide for a rebate of energy taxes on electricity only in the case of undertakings whose activities are shown to consist primarily of the manufacturing of goods must be regarded as State aid.[28]

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26 See, e.g. the *British Climate Change Levy* case.

27 See, e.g. the judgment of the Court of Justice of the European Communities in Joined Cases 675, 68 and 70/85 *van der Kooy*.

28 Case C-143/99 *Adria Wien*, para 55. See also Case C-75/97 *Maribel*, para 31.

63. As to the inconsistency between the contested Decision and Decision 149/04/COL alleged by Fesil and Finnfjord, the EFTA Surveillance Authority states that their individual use of electricity is immaterial to the assessment of the selectivity of the tax exemption that was the object of the contested Decision. Moreover, Decision 149/04/COL dealing with recent and fundamental changes to national law has to be distinguished from the situation underlying the contested Decision. Nor can the findings in the decisions of the Commission of the European Communities in the *British Climate Change Levy* case and the *Denmark - Electricity Reform* case support the applicants' claim. With regard to the alleged lack of a market analysis and of an assessment of the aspect of international competitiveness, the EFTA Surveillance Authority points out that point 42 of the Guidelines only relates to the compatibility assessment under Article 61(3) EEA and not to the analysis under Article 61(1) EEA.

64. The EFTA Surveillance Authority refutes the assumption made by PIL and others that a national system that differentiates between electricity used in production processes and electricity used otherwise is not capable of constituting State aid. This assumption ignores the fact that the exemption was only made for electricity used for production processes by the manufacturing and the mining industries. Other production processes were still subject to the electricity tax. Also within these industries, electricity is in many cases used as a fuel in exactly the same way as it is used in the service sector. The assertion that the reference to administrative use ensured that the tax exemption *de facto* was a general measure that did not favour certain industries or sectors is also rejected by the EFTA Surveillance Authority. Not even within the group of undertakings covered by the exemption did Section 3-12-5 of the Regulation distinguish based on the actual consumption of electricity. In any case, this provision did not change the selectiveness of exempting certain industries from the tax regardless of the type of use of electricity. As to the allegation that distortion of competition and effect on trade have not been established, the EFTA Surveillance Authority claims to have satisfied the obligation to state reasons in the light of Article 16 SCA, the case law of the Court of Justice of the European Communities 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.

65. As to the invitation by the Kingdom of Norway to focus on the intention of the Parliament when assessing the tax exemptions, the EFTA Surveillance Authority points out that the EEA States have no discretion whatsoever in deciding whether a given measure is State aid. The Norwegian interpretation would undermine the effective and uniform application of the State aid rules and open-up for circumvention to the detriment of the aim of equal competition in the EEA. Moreover, according to the case law of the Court of Justice of the European Communities, the causes or aims behind the national legislation are irrelevant to the question of whether a given state measure is selective or not, as

the concept of aid is defined by its effects.[29] Unlike the Kingdom of Norway, the EFTA Surveillance Authority interprets *Maribel* and *Adria Wien*, as being supportive of the contested Decision. The allegation that the exemption to the tax was open to all Norwegian undertakings consuming electricity in similar ways is contested. The exemption only applies to those in particular sectors. Furthermore, it is argued that the aim was not to tax electricity used in similar ways as fuel. The distinction made was based on the user rather than on the type of use. In any case, such a justification was not advanced in the administrative procedure where justification was sought by reference to so-called "household use". Generally speaking, the legality of a State aid decision is to be assessed in light of the information available to the EFTA Surveillance Authority when the decision is adopted. Furthermore, the EFTA Surveillance Authority disputes the impossibility of introducing a system whereby the different electricity consumptions for production and other purposes could be measured.[30] Finally, the EFTA Surveillance Authority refutes that the Norwegian tax scheme could have been partly approved and that the recovery decision therefore could have been limited.

66. The *Commission of the European Communities*, with regard to the selectivity criterion, compares the facts of the present case to those underlying the *Adria Wien* judgment, and concludes that the electricity tax exemption equally favours undertakings in the manufacturing and mining industries. The fact that electricity consumed in the administrative buildings of such undertakings is not tax exempted does not alter that finding. It remains that the electricity consumed for the main aspect of its endeavours, namely the manufacturing of goods, is tax exempt, whereas such electricity consumed by undertakings in the service sector, including energy consumption for non-administrative purposes, is fully subject to the tax. Therefore, the Norwegian measure does not benefit all undertakings without distinction within the meaning of the *Adria Wien* judgment. The interpretation given by the Kingdom of Norway to the *Maribel* case is considered misconceived.

67. As to consistency with the internal logic of the tax system in general,[31] the Commission of the European Communities recalls that it is for the Member State that has introduced a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question.[32] Since it constitutes an exception to the principle that State aid is prohibited, it must be interpreted strictly. The Commission of the European

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29 Case C-241/94 *France* v *Commission*, paras 19 and 20; Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, para 52; Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, para 16; Case T-159/99 *Thermenhotel Stoiser Franz Gesellschaft* v *Commission*, judgment of 13 January 2004, not yet reported, para 106.

30 In that context, the comparison with the *British Climate Change Levy* case is considered distorting.

31 Case E-6/98 *Norway* v *EFTA Surveillance Authority*, para 38.

32 Case C-159/01 *Netherlands* v *Commission*, judgment of 29 April 2004, not yet reported, para 43.

Communities submits that the exemption under scrutiny is a conspicuous exception to the overall logic of electricity taxation. The argument put forward by PIL and others that the exemption for the manufacturing and mining industry was intended to benefit only the high-consumption activities, is countered with the statement that high-consumption activities can also be found in the services sector and that the distinction between different economic sectors has nothing to do with the internal logic of the electricity tax. Whether or not the system is based on certain legitimate policy considerations, as contended by the Kingdom of Norway, is not decisive under Article 61(1) EEA.[33] Contrary to the argument put forward by Fesil and Finnfjord, that a narrower exemption covering, *inter alia*, metallurgical processes, would in any event be justified by the nature and general scheme of the system (as was accepted in Decision 149/04/COL), the Commission of the European Communities submits that if the exemption is not in line with the internal logic of the tax system, it is not for the EFTA Surveillance Authority to carve out a different and narrower exemption.

68. The assertion made by PIL and others to the effect that the electricity tax exemption does not affect trade between the Contracting Parties and does not distort competition is refuted by reference to the Court's judgment in *Norway* v *EFTA Surveillance Authority*.[34] The argument that most other Contracting Parties also exempted their manufacturing industries, does, in any event, contradict the principle that any 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 effects of more than one distortion of competition on trade between Member States do not cancel out one another, but they accumulate, and the damaging consequences to the common market are increased as a result.[35] As regards the argument that the EFTA Surveillance Authority does not provide proper reasoning, its findings are deemed sufficiently precise by the Commission of the European Communities in the light of the *Leeuwarder* case.[36] Neither the carrying out of a market analysis nor a demonstration of the real effect of the aid on competition and trade between Member States, is required in a case such as the one at issue.

Application of Article 61(3) EEA

69. *Fesil and Finnfjord* submit that omitting from the compatibility assessment both an application of Article 2(4)(b) of the Energy Tax Directive and a discussion of possible correspondence "to a tax which is to be levied within the European Community" in the light of "international competitiveness" within the meaning of point 42 of the Guidelines, constitutes manifest lack of reasoning. In light of point 42, the EFTA Surveillance Authority should have revised its

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33 Case E-6/98 *Norway* v *EFTA Surveillance Authority*, para 38.

34 Case E-6/98 *Norway* v *EFTA Surveillance Authority*, para 59.

35 Case 78/76 *Steinike & Weinlig* [1977] ECR 595, para 24.

36 Joined Cases 296/82 and 318/82 *Leeuwarder*.

Guidelines. The Norwegian Government is now under an obligation to recover exempted tax even for uses that are not covered by the minimum taxation rates in the Energy Tax Directive. In that regard, the contested Decision runs contrary to the principle of proportionality under EEA law.

70. The *EFTA Surveillance Authority* argues that these assertions made by the applicants are irrelevant since they lack any connection with their applications. The applicants have not invited the Court to annul point 6 of the contested Decision, the part that relates to Article 61(3) EEA. In any event, the applicants' arguments are unfounded. In particular, the Guidelines do not require the EFTA Surveillance Authority to perform an individual assessment of the aspect of international competitiveness. Furthermore, as there were no harmonised electricity taxes in the European Community in 2002 and 2003, point 46.1(b) of the Guidelines was not applicable. Finally, the Kingdom of Norway, in the administrative procedure leading to the case at hand, did not show that the undertakings in question paid an amount higher than the Community minimum under the Energy Tax Directive applicable as from 1 January 2004.

71. The *Commission of the European Communities* contends that the EFTA Surveillance Authority enjoys wide discretion in applying Article 61(3) EEA subject to only limited judicial review.[37] As to an alleged obligation to revise the Guidelines, the applicants fail to demonstrate any manifest error or abuse of power. As to the aspect of international competitiveness, the Commission of the European Communities states that the EFTA Surveillance Authority was bound to apply the relevant rules in the Guidelines and could not have relied on Article 61(3) EEA directly in order to decide otherwise in an individual case.[38]

Existing aid or new aid and recovery

72. *Fesil and Finnfjord* contend that the use made of general appropriate measures by the EFTA Surveillance Authority runs contrary to Article 1(1) in Part I of Protocol 3, wherein the distribution of tasks dictates that the EFTA Surveillance Authority reviews and proposes appropriate measures. It cannot shift the review task to the national administrations by simply proposing appropriate measures *in abstracto*. Therefore, the measures proposed by the EFTA Surveillance Authority are not appropriate measures within the meaning of Article 1(1) in Part I of Protocol 3. Moreover, the adoption of the general measures is flawed since it did not comply with the procedure provided for in Part II of Protocol 3 flowing from general principles of good administration. Furthermore, the Guidelines lacked preciseness and their interpretation by the EFTA Surveillance Authority was in breach of fundamental principles of EEA law such as the principle of legality. In case the Court should hold that there are

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37 With respect to the Commission of the European Communities under Community Law, see Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paras 45-46.

38 Reference is made to Case C-313/90 *CIRFS and others* v *Commission* [1993] ECR I-1125, para 44.

applicable appropriate measures within the meaning of Article 1(1) in Part I of Protocol 3, it is submitted that there is no legal basis according to which acceptance of vague and general appropriate measures entails a reclassification of existing aid to new aid. The EFTA Surveillance Authority's allegation that the contested Decision is in line with consistent Commission practice does not resolve the problem; it just shifts it. Alternatively, if there exists a rule of law which triggers a reclassification of aid, one must assess the facts of the situation to determine whether there has been an acceptance, and if so, the scope of such acceptance. The applicants claim that the burden is on the EFTA Surveillance Authority to prove that there was an acceptance in relation to the tax scheme at issue and that such acceptance resulted in a reclassification of existing aid to new aid.

73. In the event that the aid is considered new aid as of 1 January 2002, the applicants submit that recovery of the aid is contrary to general principles of EEA law. Demanding recovery would be contrary to the applicants' legitimate expectations. Due to the general and vague nature of the Guidelines - in particular its point 46.1(b) - and since consistency requires that if one part of the Energy Tax Directive is applied at least indirectly, the exemptions of the Directive – namely Article 2(4)(b) thereof – must also be expected to apply, the applicants had a legitimate reason to trust that the Norwegian legislation was in line with the appropriate measures. Unlike in the case law of the Court of Justice of the European Communities on the relation between legitimate expectations and recovery,[39] there are no clear procedural rules in the case at hand with which to comply. In particular, there are no rules providing for a reclassification of existing aid to new aid. A publication in the Official Journal of the decision opening the formal investigation procedure does not suffice to destroy legitimate expectations.[40]

74. Under the premise that the tax exemptions constitute State aid under Article 61(1) EEA, *PIL and others* submit that the acceptance of the proposed appropriate measures by Norway - despite its binding force - cannot have the effect of changing the nature of the tax exemptions in the Regulation from hitherto existing aid to new aid. There are no provisions that would allow this kind of reclassification of an aid measure, unless this had been specifically foreseen and agreed in advance or the State significantly alters the existing aid measure. The acceptance of the proposed appropriate measures by an EFTA State does not, in itself, constitute an "alteration to an existing aid", as required by Article 1(c) in Part II of Protocol 3. The proposal for appropriate measures, in the form of Decision No 152/01/COL of 23 May 2001, neither expressly nor implicitly stipulated that existing aid schemes would be re-classified as "new aid" if they were not adapted to conform with the Guidelines prior to 1 January

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39 See, e.g. Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, para 30; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, para 52; and Case C-5/89 *Commission* v *Germany (BUG-Alutechnik)* [1990] ECR I-3437, para 3.

40 See, e.g. Case 223/85 *RVS* v *Commission* [1987] ECR 4617.

2002. In light of the very significant consequences that a change of the status of the alleged aid measure from existing aid to new aid has because of the possibility of ordering the recovery of aid under Article 14 in Part II of Protocol 3 and the alleged aid measure being exposed to the suspension obligation in Article 1(3)(3) in Part I of Protocol 3 and Article 3 in Part II of Protocol 3, such a change would require an express legal basis. As to the EFTA Surveillance Authority's reference to "consistent Commission practice", the applicants – besides pointing to a lack of consistency – note that particularly one case[41] rather supports their point of view. Furthermore, the practice of the Commission of the European Communities has not yet been challenged before a court. The judgment of the Court of Justice of the European Communities in *CIRFS* must, on several crucial points, be distinguished from the facts of the case at hand, most significantly because there was no notification obligation contained in Decision No 148/04/COL.

75. In the alternative, even if, in general, the acceptance of proposed appropriate measures may transform an aid measure from existing aid to new aid, the applicants maintain that it did not do so in the present case. Here, the acceptance of the appropriate measures could not have the effect of turning the existing tax exemptions into new aid, as the appropriate measures were not sufficiently clear and precise. Conversely, Norway's general acceptance of the Guidelines did not specifically state which aid schemes Norway regarded as covered by the acceptance. Even though Norway in fact accepted to implement the Guidelines, such acceptance cannot put the entire burden of identifying and amending specific aid schemes on the EFTA State. If that was the case, the States would be forced to refuse to accept any appropriate measures in the form of non-sector specific Guidelines in order to avoid potential recovery orders if requirements laid down by the EFTA Surveillance Authority at a later point in time were not met as from the effective date of the acceptance. Therefore, while Norway accepted the appropriate measures by way of a letter to the EFTA Surveillance Authority, this acceptance did not constitute an acceptance of the requirement to amend the electricity tax exemption scheme. Accordingly, the acceptance by the Norwegian Government of the proposed appropriate measures in the form of the Guidelines did not have the effect of changing the status of the alleged aid measure from existing aid to new aid, and thus, the EFTA Surveillance Authority was barred from seeking the recovery of the aid in the contested Decision.

76. The applicants furthermore contend that the contested Decision infringes the principle of legal certainty[42] by extending the effect of the appropriate measures – which were general in nature and left a large margin of discretion to Norway as to implementation – to specific provisions laid down in the

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41 No E 10/2000 – *Germany*.

42 Reference is made, inter alia, to Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, para 124; Case 169/80 *Gondrand Frères* v *Zollverwaltung* [1981] ECR 1931, para 17.

Regulation. As a result, beneficiaries of the alleged aid measure 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 is aggravated by the fact that the Norwegian Government's acceptance of the appropriate measures was not published. The proposed appropriate measures, in referring to a "substantial proportion" of the national energy tax, also failed to specify the amount of electricity tax that would be considered adequate under the Guidelines. Given the vague and general character of the Guidelines, the EFTA Surveillance Authority was under an obligation to cooperate with the EFTA States, i.e. to identify the appropriate steps for compliance with the Guidelines and to discuss the possible options in this context. As to the conflict between legal certainty and administrative efficiency, the applicants are of the view that the burden of resolving that conflict may not be placed on the individual aid recipient and claim to find support for that position in jurisprudence.[43]

77. Moreover, the applicants argue that the EFTA Surveillance Authority failed to follow the proper procedure for the implementation of appropriate measures and thereby infringed an essential procedural requirement. Even though Part II of Protocol 3 – mirroring Regulation (EC) No 659/1999[44] - only came into force on 28 August 2003, the principle of homogeneity would have called for its application. Furthermore, the new provisions merely constitute an elaboration of the duty of cooperation under Articles 88(1) and 10 EC.[45] By not observing the proper procedure now laid down in Articles 17, 18 and 19 in Part II of Protocol 3, the EFTA Surveillance Authority deprived the Norwegian Government of the opportunity to comment on the substantive issues regarding the electricity tax exemptions. The appropriate measures in the form of the Guidelines are not sufficiently specific to permit any comment on whether and to what extent the exemptions may or may not be in line with the Guidelines. The measures in question therefore did not fulfil the requirements of appropriate measures. While appropriate measures in the form of guidelines may be proposed, any individual aid scheme still requires specific scrutiny, and therefore further guidance from the EFTA Surveillance Authority.[46] Apart from meetings and correspondence, there has been neither concrete cooperation nor an undertaking of the proper procedure foreseen to convert the principles of the Guidelines into specific and concrete action concerning individual tax schemes or aid measures in Norway. Conversely, the Norwegian Government indeed expressed reservations about the proposed appropriate measures, stating, in particular, that the time frame for the implementation was too ambitious.

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43 Case T-115/94, *Opel Austria* v *Council*, para 124.

44 Council Regulation (EC) No 659/1999 of 22 March 1999, OJ 1999 L 83, p. 1.

45 Case 78/76 *Steinike and Weinlig* v *Germany*, para 9; Case 74/76, *Iannelli and Volpi* v *Paolo Meroni* [1977] ECR 557, paras 11/12.

46 Reference is made to Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603, supporting the applicant's argument that the EFTA Surveillance Authority should have resorted to intermediate measures.

78. Moreover, had it taken the view that Norway did not properly implement the proposed appropriate measures, the EFTA Surveillance Authority should have treated the Norwegian Government's alleged failure to do so as a failure to accept these proposed appropriate measures, and should have opened the formal procedure under Article 19(2) in Part II of Protocol 3 to remedy this situation. Had the EFTA Surveillance Authority complied with this obligation, a recovery order would not have been possible.

79. Furthermore, the applicants are of the view that including a recovery order in the contested Decision and not ordering Norway to modify Section 3-12-5 of the Regulation violates the principle of proportionality. Finally, the EFTA Surveillance Authority infringed Articles 61 and 62 EEA and failed to provide due process in not considering a complete exemption from energy tax pursuant to Article 2(4)(b) of the Energy Tax Directive or the application of a taxation level down to zero pursuant to Articles 15(1)(c) and (d) and/or 17(2) of the Energy Tax Directive. When the EFTA Surveillance Authority 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.

80. The *Kingdom of Norway* is of the opinion that the measures referred to in point 1 of the contested Decision do not constitute new aid as from 1 January 2002. It is submitted that the tax exemption measures at issue do not fulfil the requirements of appropriate measures under Article 1(1) in Part I of Protocol 3 and Articles 17 to 19 in Part II of Protocol 3.[47] An infringement of these essential procedural requirements regarding existing aid renders points 4 and 8 of the contested Decision void. Moreover, the EFTA Surveillance Authority did not seek to obtain information as foreseen under Article 17(1) in Part II of Protocol 3, nor did it carry out the preliminary assessment as to the compatibility of the individual tax schemes with the EEA Agreement, or formally give Norway the opportunity to submit comments as required by Article 17(2) in Part II of Protocol 3. Furthermore, the applicant is not aware of any conclusion from the EFTA Surveillance Authority on the existing, individual aid scheme as required under Article 18 in Part II of Protocol 3. Finally, as the proposal by the EFTA Surveillance Authority must relate to one or more specific existing aid schemes, the acceptance must, in order to be given the legal effect set out in Article 19 in Part II of Protocol 3, also relate to one or more specific aid schemes. This is not contradicted, but is supported by the case law of the Court of Justice of the European Communities.[48] Operating only with generally formulated guidelines prevents the EFTA Surveillance Authority from making the concrete assessment necessary under Protocol 3, and places the burden of carrying out such an

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47 Although Part II of Protocol 3 came into force only on 28 August 2003, the provisions contained therein can be consulted to the extent that they codify rules already applicable prior to the amendment of Protocol 3.

48 See, e.g. Case C-242/00 *Germany* v *Commission*, para 28; and Case 70/72 *Commission* v *Germany* [1973] ECR 813, para 23.

assessment on the EFTA State concerned. As the procedural requirements laid down in the amended Protocol 3 have not been fulfilled, the agreement between the EFTA Surveillance Authority and Norway falls outside its scope. Thus it constitutes an error of law to base a recovery decision on Article 14 in Part II of Protocol 3. Alternatively, the violations constitute infringements of essential procedural requirements. The right to make these arguments has not been forfeited as a consequence of the acceptance of the proposed appropriate measures. Neither can the exchanges that took place between the EFTA Surveillance Authority and the applicant be regarded as compliance with the EFTA Surveillance Authority's procedural obligations.

81. Furthermore, the applicant submits that the EFTA Surveillance Authority has infringed EEA law by assuming that Norway was obliged to have completed the adjustment of all relevant existing aid schemes by 1 January 2002. Instead, Norway's obligation under the agreement concluded with the EFTA Surveillance Authority is limited to loyally adjusting the existing aid schemes without a valid deadline existing for completion of this undertaking. This is inferred from an interpretation of the agreement that takes into account the absence of a reference to individual aid schemes. There is also a presumption against an interpretation which would have overburdened Norway with the assessment and amendment of every possible scheme with environmental impact. The time frame for all possible amendments was far too short to support the interpretation by the EFTA Surveillance Authority. As to the electricity tax exemptions in particular, there was good reason to believe at the time of the agreement that they do not constitute State aid.[49] Thus, in the absence of a binding obligation, the alleged transition from existing aid to new aid cannot be based on the appropriate measures, and the legal basis for regarding the tax exemptions as new aid fails.

82. Finally, the applicant submits that the EFTA Surveillance Authority has infringed EEA law by assuming that the tax schemes at issue were reclassified from existing aid to new aid as from 1 January 2002. Acceptance of appropriate measures does not alter the classification of the tax schemes from existing to new aid, except for cases where such a legal effect is expressly agreed. There is no legal basis for such transition in Protocol 3, nor would it be reconcilable with the system of said Protocol.[50] Transition of existing aid to new aid without legal basis, however, would violate the principle of legal certainty. Instead, the acceptance of appropriate measures has other legal consequences, namely triggering both an enforcement action against the EFTA State and State liability. The judgment in the *CIRFS* case, as relied upon by the EFTA Surveillance Authority, is, in the applicant's view, only of limited relevance and is not to be understood as establishing a general principle that an acceptance of appropriate measures will turn existing aid into new aid as from the time limit set out in the

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49 See, e.g. the Advocate General's Opinion in Case C-143/99 *Adria Wien*.

50 With regard to Article 1 in Part I of Protocol 3, reference is made to Case E-4/97 *Norwegian Bankers' Association*, para 32.

appropriate measures. Also, the decisions of the Commission of the European Communities in Case No E 10/2000 and Case No C 37/2000 are to be distinguished from the case at hand. Case No C 42/2003 was decided in parallel with the contested Decision. More generally, Commission practice can hardly be of relevance in cases before the European Courts.

83. Alternatively, the applicant submits that the special features of the measures in the case at hand must lead to the conclusion that the tax schemes continue to be existing aid until the contested Decision was handed down on 30 June 2004. The violation of the principle of legal certainty due to a lack of clarity and preciseness of the Guidelines is among those special features.

84. The *EFTA Surveillance Authority* 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 in line with the Guidelines (i.e. on 1 January 2002).[51] With a proposal for appropriate measures, the EFTA Surveillance Authority asks the EFTA States, to the extent indicated, to forgo exercising the right to grant aid which 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. In the *CIRFS* case[52] the Court of Justice of the European Communities held that the effect of the State's acceptance is to classify existing aid as new aid. In that context, the EFTA Surveillance Authority disagrees with PIL and others and the Kingdom of Norway as to their conclusion drawn from State aid Case No E 10/2000 and rejects any distinction between appropriate measures where the reclassification is explicitly mentioned and measures where it is not. The reclassification effect is triggered by mutual agreement to introduce a new regime. This effect does not depend on a reclassification clause.

85. With regard to the argument that the appropriate measures should have related to specific aid schemes, but not to an undetermined number of aid schemes, it is recalled that the proposal of abstract appropriate measures 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 or any intermediate measures. In that connection, Case C-242/00 *Germany* v *Commission* does not support the applicants' view. Reference is also made to Article 1(1) in Part I of Protocol 3 providing for cooperation between the

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51 Reference is made to the practice of the Commission of the European Communities before (State Aid No C 42/2003 - *Sweden*; State Aid No E 10/2000 – *Germany*; and, State Aid No C 37/2000 – *Portugal*), and after the entry into force of Regulation (EC) No 659/1999 (Commission Decision of 30 June 2004 on Aid Scheme C 42/2003).

52 Case C-313/90, para 35.

EFTA Surveillance Authority and the EFTA States in carrying out the review mentioned therein. Putting the burden of identifying and amending specific aid schemes on the State is not contrary to the aim of Protocol 3, but is precisely the purpose behind the use of abstract appropriate measures. This is justified as Norway was involved in the drafting process of the 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. It is incorrect that the Norwegian Government did not have ample opportunity to discuss consequences of accepting the appropriate measures and their relationship to the electricity tax. The EFTA Surveillance Authority was not aware of the Government's lack of knowledge of the legal consequences of a breach of its obligations and does not acknowledge any obligation to *ex officio* inform the States. Such ignorance is, in any event, immaterial to the solution of the present dispute, since the classification of aid does not depend on a subjective test.

86. In any event, the EFTA Surveillance Authority contests that the appropriate measure was 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 the EFTA Surveillance Authority can only conclude that a given piece of legislation is incompatible with EEA law, but has no powers to order an EFTA State to draft its legislation in any particular way. Finally, whether the Guidelines themselves are imprecise does not have any bearing on the question of whether the aid is new or existing. However, it is emphasised that the wording of the Guidelines is more precise than the wording of Article 61 EEA alone.

87. As to an infringement of the principle of legal certainty, the EFTA Surveillance Authority argues that there is generally an inherent element of legal uncertainty, when it comes to the classification of State aid under Article 61(1) EEA. In its view, the argument about the vagueness of the appropriate measures amounts to an inadmissible claim that the Guidelines are invalid. In contrast, even a possible vagueness of the rules could not have any bearing on whether the binding acceptance of the Guidelines can imply the reclassification of the aid measure from existing to new aid. Furthermore, it follows from jurisprudence that neither the principle of legitimate expectations nor that of legal certainty can influence the classification of new or existing aid.[53] As to legitimate expectations on the part of the recipients, the EFTA Surveillance Authority claims that it has compensated the lack of publication of the acceptance of the appropriate measures, by making the date of publication of the opening decision decisive for informing operators about the possibility of a recovery.

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53 Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, para 129.

88. The EFTA Surveillance Authority does not subscribe to the view expressed by PIL and others that Norway's failure to implement the appropriate measures be interpreted as a failure to accept these proposed appropriate measures. Norway actually accepted the appropriate measures. Following the applicants' suggestion would also imply that a failure to comply with appropriate measures would have no consequences and would lead to significant delays in the implementation process. But even a formal investigation procedure following the non-acceptance of appropriate measures would not have examined individual aid schemes, since the opening of the formal investigation procedure in such a case has the sole purpose of imposing previously proposed appropriate measures in a legally binding way. The State's acceptance of appropriate measures therefore replaces a formal investigation procedure and a final and binding decision. Any aid granted after the compliance date set out in such a decision would constitute new aid. Therefore it is also irrelevant that Norway did not, in its acceptance of the appropriate measures, agree to amend the electricity tax in order to bring it into line with the Guidelines. In the EFTA Surveillance Authority's view, Norway agreed to amend all relevant legislation concerning aid for environmental protection in order to achieve that aim.

89. The EFTA Surveillance Authority also rejects PIL and others' argument as regards violation of the proportionality principle. As to the alleged infringement of Articles 61 and 62 EEA by not considering the exemption provisions of the Energy Tax Directive in favour of specific features of certain processes, the EFTA Surveillance Authority maintains that it is up to 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. It is reiterated in that regard that the new Norwegian tax exemption scheme underlying Decision 149/04/COL fundamentally differs from the old scheme. Furthermore, Norway did not show that the conditions under point 46.1(a) of the Guidelines were fulfilled, nor did it submit information about the consequences of the amendments in 2001 in terms of collection of the electricity tax.

90. As regards the Kingdom of Norway's claim that the appropriate measures did not fulfil the requirements regarding existing aid as laid down in Protocol 3, the EFTA Surveillance Authority is of the opinion that this argument should be disregarded as inadmissible. Since the applicant had never previously argued that the agreed measures were not appropriate measures in the sense of Article 1(1) in Part I of Protocol 3 and had, on the contrary, itself referred to that provision, the current argument constitutes *venire contra factum proprium*. The applicant's submission that the cooperation procedure under Protocol 3 had not been followed should be precluded for similar reasons. In any event, both allegations are unfounded, since the cooperation procedure between the EFTA Surveillance Authority and the applicant was fully respected in the present case. The claim to the effect that proposing guidelines as appropriate measures requires an application to individual national aid schemes does not find support in the case law and publications cited by the applicant. As to the interpretation of the

agreement between the EFTA Surveillance Authority and the applicant, leading to the conclusion that the latter was only under an obligation to make a loyal adjustment, the EFTA Surveillance Authority insists on the binding character of the acceptance of appropriate measures and compliance with the deadline set. Had Norway not found the guidance in the Guidelines sufficient, it should have refrained from signing its unconditional acceptance. Furthermore, since the applicant accepted the compliance date, there is now no room for arguing that the deadline was too short. Finally, several statements made by EFTA Surveillance Authority staff and referred to by the Kingdom of Norway are deemed immaterial to the solution of the present dispute.

91. The *Commission of the European Communities* commences by recalling that the Norwegian Government, in its letter dated 6 July 2001, unequivocally, fully and unconditionally accepted the appropriate measures proposed by the EFTA Surveillance Authority. Reviewing aid under Article 1(1) in Part I of Protocol 3 can be done in general terms in order to avoid that the EFTA Surveillance Authority must open formal procedures for each and every aid scheme; a task which would be unmanageable for its resources and hence seriously undermine the State aid discipline.[54] The effect of the acceptance of appropriate measures, namely turning existing aid into new aid, has been clearly set out in the *CIRFS* case. Thereby, the onus to alter any so identified aid schemes is on the Member State, which must either adapt existing schemes in accordance with the appropriate measures or turn them into new aid schemes subject to notification and to subsequent scrutiny by the EFTA Surveillance Authority. Otherwise, the provision for appropriate measures and its acceptance by a Contracting Party would be devoid of any practical purpose. Therefore, denying the effect of transforming existing aid into new aid entailed by the acceptance by Norway of the appropriate measures would concern the whole review mechanism for existing aid schemes. Furthermore, as all aid schemes are under the proviso that they may, as market conditions evolve, have to be adapted to the relevant State aid rules, there is no requirement for this being specifically stipulated in any authorisation. Finally, nothing in the case law, and in Case C-242/00 *Germany* v *Commission* in particular, indicates that specific aid schemes must be examined. If the Contracting Party 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 object that such rules are too vague.

92. Norway cannot admissibly question the validity of the appropriate measures that it unconditionally accepted, or its own acceptance, or the necessary legal consequences of that acceptance, without contravening its duty of loyal cooperation with the EFTA Surveillance Authority, and is prevented from doing so by the doctrine of *estoppel* and by the general legal principle of *venire contra*

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54 As to the recognition in jurisprudence of the Commission's authority to propose appropriate measures based on guidelines, reference is made to Case C-288/96 *Germany* v *Commission*, [2000] ECR I-8237, paras 62 and 64.

factum proprium. Since the proposal of appropriate measures is a non-binding act,[55] it may not be challenged before the Court. The Court also lacks jurisdiction to opine on the acceptance by Norway, an act by a Contracting Party. For this reason alone, all 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 EFTA Surveillance Authority must be rejected. Moreover, Norway did not in fact specify any specific schemes in its acceptance, but neither did it qualify its acceptance. Even if it did not mention specific schemes, this nevertheless means that Norway accepted to render all existing schemes compatible with the Guidelines. Guidelines become binding the moment a Contracting Party accepts appropriate measures providing for the adaptation of existing schemes thereto.

93. The procedural framework in place at the time when the appropriate measures were accepted consisted of Protocol 3 before the amendment that came into force only on 28 August 2003. The new Part II of Protocol 3 cannot be taken as a mirror of the practice in place before its adoption since it was not exclusively a codification of earlier practice.[56] Consequently, all arguments made to the effect that the appropriate steps as foreseen by the new Part II of Protocol 3 were not followed, are devoid of any basis in law and should be rejected for that reason. In the alternative, the EFTA Surveillance Authority's proposal of appropriate measures would have fully satisfied the procedural requirements. As to the alleged infringement of the principle of legal certainty, one should bear in mind that the only unfavourable consequences of the contested Decision, namely the recovery of the aid granted from 6 February 2003 onwards, concerned aid granted at a time after the publication of the opening decision in the Official Journal. The publication made it abundantly clear that, in the EFTA Surveillance Authority's view, the electricity tax exemption should have been modified in order to comply with the appropriate measures. Furthermore, Norway was repeatedly consulted before the proposal of appropriate measures and was thus given the opportunity to submit its views on the envisaged appropriate measures. Thus, its right to be heard was fully respected. The exchange with the EFTA Surveillance Authority does qualify as cooperation in accordance with Article 17 in Part II of Protocol 3, which does not contain an obligation to specifically review individual schemes. The EFTA Surveillance Authority was under no obligation to follow the procedure in Article 19(2) in Part II of Protocol 3, since that provision concerns the situation in which "the EFTA State concerned does not accept the proposed measures". Finally, as the EFTA Surveillance Authority is not obliged to suggest remedies for individual aid schemes, a violation of the principle of proportionality is without substance.

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55 Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, para 35.

56 Reference is made to the Opinion of Advocate General Jacobs in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, para 28.

94. As to the argument that the principle of legitimate expectations prevents recovery, the Commission of the European Communities contends that no aid recipient could have harboured any legitimate expectations as to the legality of the aid after 6 February 2003, when the decision to open a formal procedure was published in the Official Journal. Only then did the order for recovery for aid granted take effect. The argument put forward by PIL and others to the effect that an exemption under the Energy Tax Directive should have been granted cannot be upheld in the view of the Commission of the European Communities. Under point 46(1)(b) of the Guidelines, the EFTA Surveillance Authority was not required to apply the Energy Tax Directive, which served only as a guideline for determining what constitutes a significant proportion of the tax. 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.

Carl Baudenbacher
Judge-Rapporteur