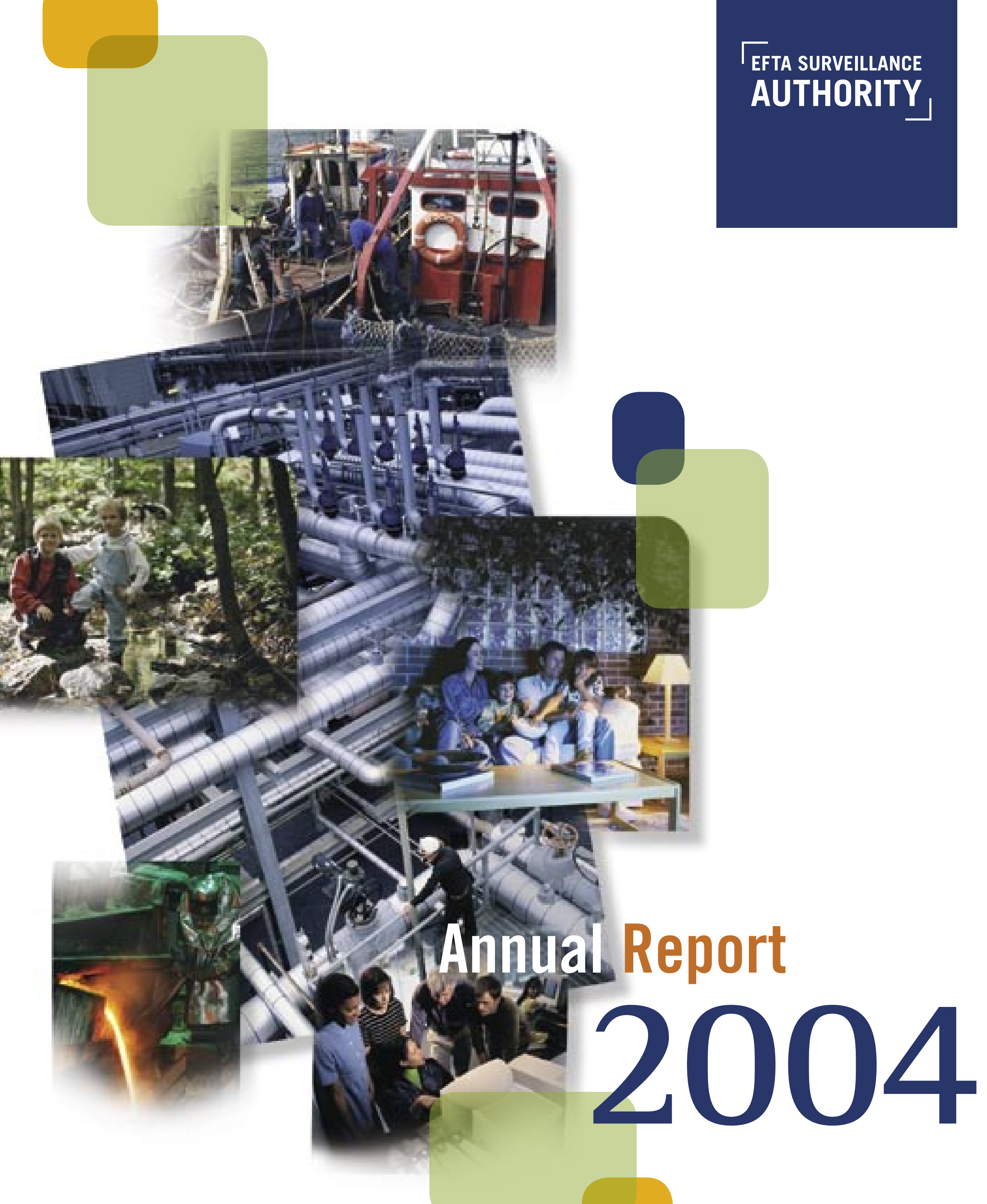
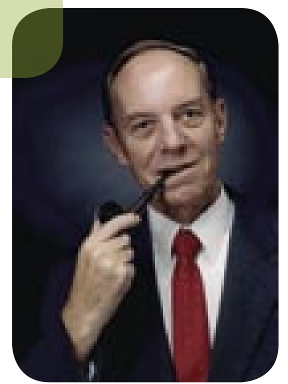
EFTA SURVEILLANCE AUTHORITY



Annual Report 2004

Annual Report 2004

FOREWORD



2004 witnessed the 10th anniversary of the entry into force of the EEA Agreement. For the citizens throughout Europe, however, the most significant event this year was the enlargement of the EU from 15 to 25 States, and the corresponding expansion of the European Economic Area to 28 States. Through the EEA Agreement the three EFTA States, Iceland, Liechtenstein and Norway, take part in the largest Single Market in the world, covering more than 455 million people.

The EFTA Surveillance Authority's challenges remain largely unchanged by the EEA enlargement. Together with the European Commission, the Authority continues to facilitate the smooth functioning of the Internal Market by ensuring that the EFTA States comply with their obligations under the EEA Agreement, and by monitoring compliance with competition rules by private undertakings.

Some of the cases examined by the Authority during 2004 deserve particular mention.

A decision by Norway to introduce a monopoly on the operation of gaming machines received wide public attention in 2004. In the Authority's view, such a monopoly constitutes an unlawful restriction of the freedom of establishment and the freedom to provide services. The Authority did not oppose measures aimed at curbing gambling. However, in the Authority's view the Norwegian Government did not show that its gaming policy was sufficiently systematic and consistent to justify restrictions on the basic freedoms provided for by the EEA Agreement. Moreover, the new legislation would have been disproportionate to the policy objectives Norway wished to achieve; gaming machine ownership as such would not appear to affect the problem of gambling addiction.

In Iceland, veterinary inspections carried out by the Authority have shown a need for continued efforts to ensure that facilities meet the food safety requirements set out in the EEA Agreement.

In 2004, the Authority decided to bring Liechtenstein before the EFTA Court because of residence requirements in its legislation governing the banking sector. The Authority believes that these measures are discriminatory and an unlawful restriction of the freedom of establishment. The EFTA Court has, on two previous occasions, addressed the impact of Liechtenstein residence requirements.

In the field of state aid two decisions to request recovery of unlawful aid have provoked particular attention in the EFTA States. One decision related to a tax scheme in favour of International Trading Companies in Iceland. At the time of writing, this decision had not been followed by appropriate action by Iceland. The Authority has, therefore, brought the matter before the EFTA Court. Another decision on recovery of aid concerned derogations from environmental taxes in Norway. The Norwegian Government and two private parties have appealed this Decision to the EFTA Court. Recovery of aid is fundamental if the state aid rules are to function. The Authority is awaiting the EFTA Court's rulings on these matters.

In 2004, the antitrust reform entered into force in the EU. Parallel rules for the EEA have been delayed due to the failure by the EFTA side to ensure parliamentary approval of the new rules in time. For the moment, the EU and EFTA pillars of the EEA are operating under different competition law regimes. Hence, ensuring equal conditions of competition for businesses in the two pillars is difficult.

Finally, the introduction of new EEA aviation security rules in 2004 means that, in the coming year, the Authority will commence airport inspections in the EFTA States.

The Authority will continue to contribute to a homogenous EEA that will benefit consumers and businesses alike.

Hannes Hafstein, *President*

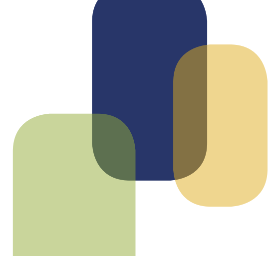


Table of content

Foreword . . . 5

Introduction

The European Economic Area and the EEA Agreement . . . 8
Organisation . . . 11

Internal Market

Surveillance of Internal Market rules . . . 12
Directives are the nuts and bolts of the Internal Market . . . 17
Reasoned opinions in 2004 . . . 19
Food safety in the EEA . . . 20
Notification of chemical substances . . . 22
Improving consumer-product safety . . . 23
Preventing new technical barriers to trade . . . 24
Public Procurement . . . 25
Norwegian alcohol legislation . . . 26
Icelandic rules on eider down: A restriction on export . . . 27
The Finnmark supplement and migrant workers . . . 28
Does Greek or Norwegian law apply to Greek seamen on Norwegian ships? . . . 28
Ensuring free movement of workers for fishermen . . . 29
Recognition of professional qualifications in Liechtenstein . . . 30
Liechtenstein before the EFTA Court due to bankers' residence requirement . . . 31
EFTA Court's Opinion on transfer of undertakings . . . 31
Norwegian monopoly on gaming machines contrary to the EEA Agreement . . . 32
Icelandic Lotteries Act in breach of the freedom to provide services . . . 33
Equal treatment of men and women as regards pay:
Discriminatory rules on survivor's pension in Norway . . . 34
Car taxation and free movement of goods, workers and services . . . 35
EFTA Court reacts to discriminatory tax rules in Norway . . . 36
Ownership restrictions regarding stock exchanges and clearing houses . . . 37
Discriminatory provisions in the field of Financial Services in Liechtenstein . . . 37
Aviation security legislation: New tasks for the Authority . . . 38
Maritime transport: Derogations from EEA rules permitted . . . 39

Competition

Activities in the field of competition 40
Co-operation cases 42
Review of antitrust rules 43
Review of Merger control rules 44
Information gathering powers 45
Electronic communications and media 46
Liberal professions. 48
Steel tubes court case 49

State aid

State aid rules 50
Increasing case load. 52
The “Hurtigruten” contracts 53
Contributions to the social security system in Norway 54
Exemptions from documents duties 55
Environmental taxes in Norway 56
Exemptions from CO_2 and basic heating oil taxes in Norway 57
Aid for energy production from waste 57
Expansion of an aluminium smelter in Iceland 58
International Trading Companies in Iceland 59
deCODE Genetics 59
The sale of the State’s shares in an Icelandic cement producer 60
The Icelandic Housing Financing Fund 61

Introduction

The European Economic Area and the EEA Agreement

2004 marked ten years of functioning of the EEA Agreement. The aim of the Agreement is to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition. It extends the four fundamental freedoms of the Internal Market of the European Community, and a wide range of accompanying European Community rules and policies, to Iceland Liechtenstein and Norway, the EFTA States that are signatories to the Agreement.[1]

As a result of the EEA Agreement, citizens and undertakings in the EFTA States have access to the EU market in generally the same way as persons and undertakings in the EU. The latter have gained access to the markets in Iceland, Liechtenstein and Norway.

The basic provisions of the EEA Agreement are drafted in terms closely resembling the corresponding provisions of the EC Treaty governing the free movement of goods, persons, services and capital, and those on competition and other common rules, such as state aid and public procurement. The Agreement also contains provisions on a number of European Community policies relevant to the four freedoms.[2] It further provides for close co-operation between contracting parties to the Agreement[3] in certain fields not related to the four freedoms.

A DYNAMIC AGREEMENT

Two separate legal systems are, thus, applied in parallel within the EEA. On one side the EEA Agreement applies to relations, both between the EFTA and European Community sides, and between the EFTA States themselves. On the other side, European Community law applies to relations between the EU Member States. For the EEA to pursue its aim of homogeneity the two legal systems must, therefore, develop in parallel and be applied and enforced in a uniform manner. The Agreement thus includes decision-making procedures for the integration into the EEA of new secondary European Community legislation.

The task of ensuring that relevant secondary European Community legislation is extended to the EEA in a timely manner rests, in the first instance, with the EEA Joint Committee, a committee composed of representatives of the Contracting Parties to the Agreement. The Agreement also provides a surveillance mechanism to ensure the fulfilment of obligations under the Agreement and uniform interpretation and application of its provisions.

While introduction of new secondary legislation into the EEA Agreement is entrusted to a single body, the EEA Joint Committee, the surveillance mechanism for which the Agreement provides is arranged in the form of a two-pillar structure, with two independent bodies. The implementation and application of the Agreement within the EFTA Pillar is monitored by the EFTA Surveillance Authority. The European Commission carries out the same task within the European Community Pillar. In order to ensure uniform surveillance throughout the EEA, the Agreement provides for co-operation, exchange of information and consultation between the two bodies on surveillance policy issues and individual cases.

JUDICIAL PROTECTION

The EEA Agreement also has a two-pillar structure for judicial control within the EEA. The EFTA Court exercises competences similar to those of the Court of Justice of the European Communities and the Court of First Instance in areas including the surveillance of observance by the EFTA States of the Agreement and appeals against decisions taken by the Authority.

Both the EFTA Court in the *Icelandic passenger tax case* (E-1/03) and the Court of Justice in *Ospelt* (C-452/01) have underlined that one of the main objectives of the EEA Agreement is to create a homogeneous European Economic Area. The two Courts moreover emphasised the need to ensure uniform interpretation of those rules of the EEA Agreement and the EC Treaty that are identical in substance. The Court of Justice in *Ospelt* highlighted one of the principal aims of the EEA Agreement, which is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. The EFTA Court has also confirmed in *Ásgeirsson* (E-2/03) that the EEA Agreement is to be interpreted in the light of fundamental rights. The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.

During 2004, the EFTA Court recalled in the *Fokus Bank* case (E-1/04) that while, as a general rule, the tax system of an EFTA State was not covered by the EEA Agreement, exercise by the EFTA States of their taxation power must be consistent with EEA law. Furthermore, although EFTA States are at liberty, within the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves, this does not mean that in the exercise of the power of taxation so allocated, they may disregard EEA law.

The impact of third country legislation, particularly third country product approvals, on EFTA States' EEA obligations will be the subject of a judgment of the Court of Justice in the coming year in a case argued in 2004 (*Novartis*, C-207/03 and C-252/03).

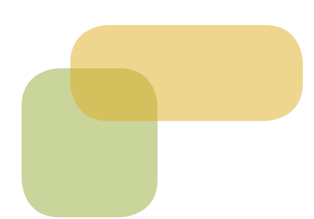
WHAT IS THE EFTA SURVEILLANCE AUTHORITY?

General surveillance

The origins of the Authority are found in Article 108 of the EEA Agreement. The detailed legislative provisions governing its role and obligations are found in the Agreement between the EFTA States commonly known as the "Surveillance and Court Agreement".[4]

A central role of the Authority is to ensure that the provisions of the EEA Agreement, including its Protocols and the acts referred to in the Annexes to the Agreement, are properly implemented into the national law of the EFTA States and correctly applied by their national authorities.[5] This task is commonly referred to as general surveillance. General surveillance cases are either initiated by the Authority itself or as a result of a complaint.[6]

If the Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement, it may, according to Article 31 of the Surveillance and Court Agreement, initiate formal infringement proceedings. However, before such proceedings are commenced, the Authority will use other means to try to ensure compliance by the EFTA State with the Agreement. In practise, the majority of problems identified by the Authority are solved as a result of informal exchanges of information and discussions between the Authority's staff and representatives of the EFTA States.



Where appropriate, before concluding the informal phase – and although the Authority itself would not have taken a formal position on the matter – the Directorate concerned may make enquiries in the matter. These take the form of an informal letter to the EFTA State in question inviting it to provide the Authority with supplementary information on the matter under examination and, where necessary, to adopt the measures necessary to comply with EEA law. If formal infringement proceedings are initiated, the Authority will first send the EFTA State Government concerned a letter of formal notice. This letter identifies the provision of EEA law that, in the Authority's view, has been infringed. The Government is invited to submit its observations on the matter. If the Authority is not satisfied with the Government's answer to the letter, or if no answer is received, the Authority may deliver a reasoned opinion. This document defines the final position of the Authority on the matter, states the reasons on which that position has been based, and requires that the Government take the measures necessary to bring the infringement to an end. Should the Government fail to comply with the reasoned opinion, the Authority may bring the matter before the EFTA Court, whose judgment is binding on the State concerned.

In 2004, the Authority brought one action before the EFTA Court. The case concerned a residence requirement for members of bank management boards in Liechtenstein (E-08/04).

Competition

The Single Market objectives of the EEA Agreement are also upheld through application of the EEA competition rules. The work of the Authority in the field of competition mainly concerns the application of the EEA Agreement directly to individual economic operators. The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty. The competition provisions prohibit, among other things, restrictive practices between businesses and abuses of dominant positions.

The Authority can initiate proceedings against market players. This may result in a decision imposing fines for anticompetitive behaviour. In practise, most cases are resolved informally, with competition concerns identified by the Authority often remedied without the need for formal proceedings, representing an efficient use of resources.

The EC merger control rules apply to the entire European Economic Area through the application of the EEA Agreement. The Authority provides comments and information on mergers handled by the European Commission in cases where EFTA markets are particularly affected.

The Authority may take action in cases of anticompetitive behaviour by public undertakings or undertakings with special or exclusive rights granted by the EFTA States. In such cases, action may be taken not only directly against the undertakings, but also against the State if it has taken measures leading to the anticompetitive behaviour.

State aid

The EEA Agreement's main state aid rule is that aid which distorts or threatens to distort competition and affects trade between the Contracting Parties is prohibited. There are, however, several possibilities for exemption.

New state aid measures must be notified to the Authority prior to implementation. They must not be put into effect before the Authority has decided upon the case. The Authority assesses whether a measure constitutes state aid and, if it does, examines whether it is eligible for exemption. The Authority can, after a preliminary examination, decide that a measure does not contain aid, decide not to raise objections to the measure, or to open a formal investigation procedure.

A final decision on a state aid measure can be positive (approving the aid), negative (prohibiting the aid), or conditional (approving the aid subject to conditions). If the Authority concludes that aid has been granted without the Authority's approval, and that the aid is incompatible with the EEA Agreement, the Authority will, as a rule, order the EFTA State to reclaim the aid from the recipient.

Apart from deciding on all notifed national plans to grant or alter aid, the Authority is also obliged to keep all systems of existing aid in the EFTA States under constant review. It can thus also open a case either, on its own initiative or, after having received a complaint.

1. Switzerland is a member of EFTA, but not a party to the EEA Agreement. For Liechtenstein, the Agreement entered into force on 1 May 1995.
2. Referred to in this Annual Report as horizontal areas, such as labour law, health and safety at work, environment, consumer protection and company law.
3. The contracting parties to the EEA Agreement are Iceland, Liechtenstein, Norway, the 25 EU Member States and the European Economic Community.
4. http://secretariat.efta.int/Web/LegalCorner
5. In addition the EFTA States have entrusted the Authority with the power to monitor the application of the EEA Agreement by the other contracting parties to the Agreement. The Authority can, however, only take formal action against the three EFTA States.
6. Information explaining the proceedings for non-compliance with EEA law may be found on the Authority's website: www.eftasurv.int/procedures/infringement

ORGANISATION

COLLEGE

The Authority consists of three Members (the College). The Members are appointed by common accord of the Governments of the EFTA States for a renewable period of four years. A President is appointed from among the Members, also by common accord of the Governments, for a period of two years. The Members are completely independent in the performance of their duties. They must not seek or take instructions from any Government or other body, and must refrain from any action incompatible with their duties.

During 2004, the composition of the College was:

- Hannes Hafstein, President *(right)*
- Einar M. Bull *(centre)*
- Bernd Hammermann *(left)*

DIRECTORATES

The Authority's work is organised through four Departments; Competition and State Aid Directorate, Internal Market Affairs Directorate, Legal & Executive Affairs Department and Administration Department. The distribution of functions between the Departments during 2004 is outlined on the Authority's website.[1]

PERSONNEL

In 2004, the Authority had a staff of 52, representing 14 different nationalities. A majority (60%) of the staff members comes from the EFTA States. The Authority finds it valuable to also recruit from non-EFTA States as the diversity of cultures, skills and competencies has proven beneficial to the Authority's work. In addition to its normal staff, the Authority also recruits a number of national experts for short time periods. These constitute a supplement to the regular staff. The Authority initiated a trainee programme in 2004, and employed nine national experts and four trainees during the year.

The general personnel situation of the Authority remains difficult in terms of number of positions. The primary workload remains high and new tasks are regularly added to the Authority's field of responsibilities often without an adequate increase of staff. Consequently, the challenges faced by the organisation steadily increase.

Staff turnover in the organisation remains high due to the employment practice of the Authority of awarding employment contracts of three years, renewable once. In 2004, eight staff members left the Authority's service and nine new staff members were recruited. With a high annual turnover rate of staff (15% in 2004) it remains a challenge to the Authority to retain and further develop core competencies. Historically, the average time of staff employment is less than four years. Despite this turnover rate, the Authority enjoys a high level of staff competence and efficiency.

In order to compensate for limited human resources the Authority endeavours to develop its staff, run an efficient organisation, and utilise modern information management systems. The Authority has, during 2004, continued to focus on maintaining and developing staff core competencies. Staff training remains a high priority and most staff has participated in external training within their respective fields of work.

INFORMATION MANAGEMENT

In 2004, the Authority successfully introduced its new information management system. The intention was to better utilise and exploit its information legacy and staff competencies, as well as improve its general case handling routines and procedures. New information management projects have also been initiated. The aim of these projects is to improve the Authority's communication with external partners, in particular as regards notification procedures.

OFFICE PREMISES

In October 2004, the Authority relocated its entire organisation to new functional office premises in Rue Belliard 35, 1040 Brussels.

1. www.eftasurv.int/about/dbaFile3778.html

Internal Market

Surveillance of Internal Market rules

The EFTA Surveillance Authority shall ensure that the Internal Market rules are implemented in a correct and timely manner and applied by the EFTA States. Bearing in mind that the aim of a homogeneous EEA with common rules will not be achieved without uniform implementation, application and interpretation of the rules, the Authority regularly co-operates, exchanges information and confers with the European Commission.

The Authority also aims to maintain a good dialogue with the EFTA States. In fact, most cases that the Authority examines concerning Internal Market rules are solved at an early and informal stage.

THE AUTHORITY WILL START TO MONITOR ELECTRONIC COMMUNICATIONS' REGULATION AND AIRPORT SECURITY

The Internal Market and, hence, the EEA Agreement, is constantly evolving in a dynamic fashion as new rules are enacted or judgements clarify interpretation.

During 2004, the Authority acquired two new fields of responsibility; one concerning electronic communication, the other concerning Aviation Security. Both tasks require a new method of surveillance:

- the new electronic communications regulatory package provides that the Authority shall examine, within strict time limits, certain regulatory measures taken by national authorities;
- aviation security legislation requires the Authority to carry out inspections of airport security.

Co-operation with EU agencies (*e.g.* Aviation Agency, Food Safety Authority and Maritime Agency) is an ongoing issue in aviation and other areas of the Authority's competence. The introduction of new specialised agencies requires a re-evaluation of current Authority working procedures.

CASE HANDLING IN 2004

The Authority registered a total of 291 new cases[1] and closed or finalised 276 cases during 2004. Figures 1 and 2 show how the cases are spread by type. *Own initiative cases* and *complaints* concern cases in which a specific infringement of the EEA Agreement is suspected or alleged. The other case types are routine tasks and examinations, *e.g. food safety inspections*, conformity assessments of national laws and regulations (registered by the Authority as *preliminary examinations*), or control of *draft technical regulations* notified to the Authority, that may or may not reveal shortcomings in the implementation or application of EEA law.

MAIN CATEGORIES OF WORK

1. Implementation control and conformity assessment: the Authority examines whether the required rules are implemented by the EFTA States and, depending on available resources, checks that the national legislation conforms to EEA law.

2. Application control: examination, on the basis of complaints or at the Authority's own-initiative, of the practical application of the EEA Agreement; management and reporting tasks intended to ensure the good function of the EEA Agreement.

3. Food safety inspections: inspections in the EFTA States to ensure that applicable EEA legislation relating to veterinary issues, foodstuffs and feeding stuffs is correctly applied.

4. Notification procedures: approval (or rejection) of draft technical regulations, operation of alert systems regarding food safety and dangerous products, and safeguard measures. The aim is to facilitate the free flow of safe goods to consumers and prevent barriers to trade.

5. Co-operation and information: miscellaneous types of cases, such as co-operation with the European Commission and the EFTA States, providing information to the public upon request or as own initiative, *e.g.* on the Authority's website or in the Annual Report.

Figure 1 > New cases by type and country

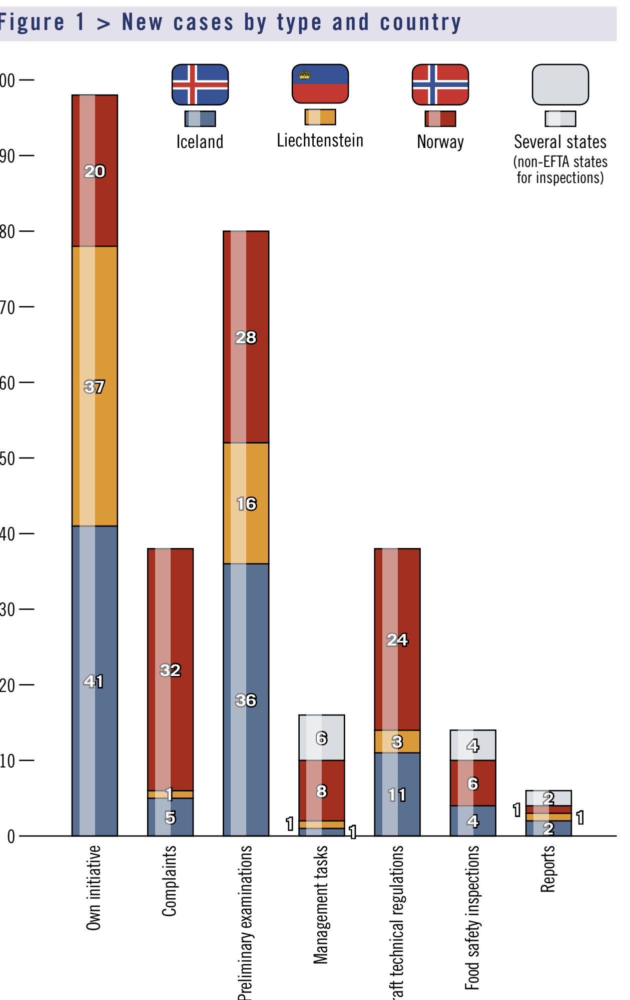
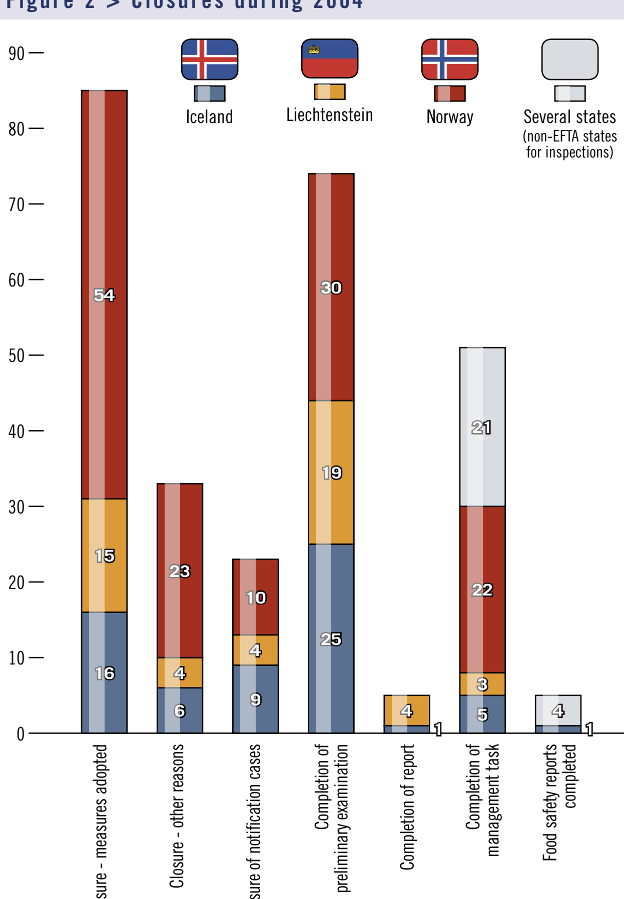


Figure 2 > Closures during 2004



1. "Case" is defined as an assessment relating to the implementation or application of EEA law, as well as all other relevant tasks registered during the year for the purpose of fulfilling the Authority's Internal Market Affairs Directorate's objectives.

MORE CASES INSTIGATED AT THE AUTHORITY'S OWN INITIATIVE

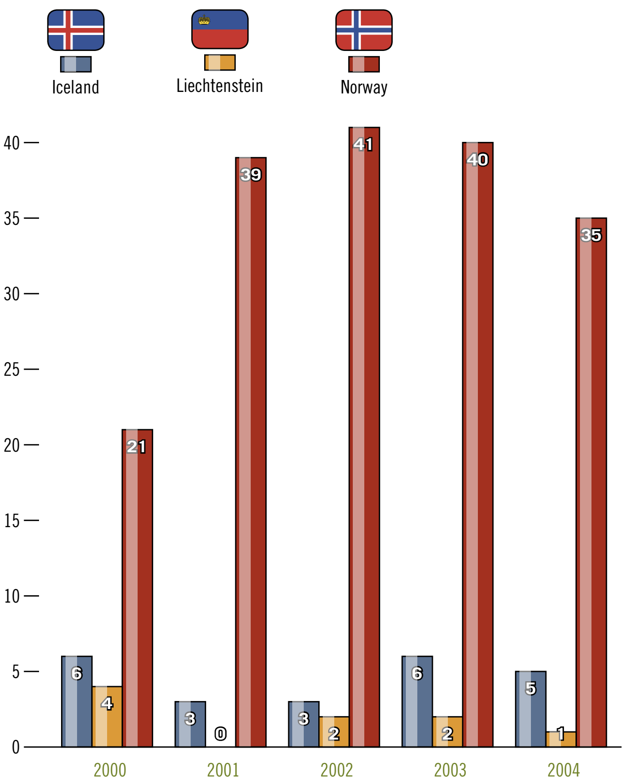
2004 saw an overall increase of 46% in new cases in which infringement of EEA law was suspected, with an increase from 95 to 136 cases compared to 2003. The number of cases of suspected breaches of EEA law by EFTA States instigated at the Authority's own initiative increased by 123%. 69 of 98 own-initiative cases concern the absence of, or partial notification of, national measures intended to implement EEA law. This failure is also reflected in the high number of decisions to commence formal action against the EFTA States, resulting *e.g.* in 103 new formal infringement cases directed against the States concerned, a substantial increase from 2003 (see figure 8).

A summary of all new cases and closures can be consulted at the Authority's website.[1]

COMPLAINTS

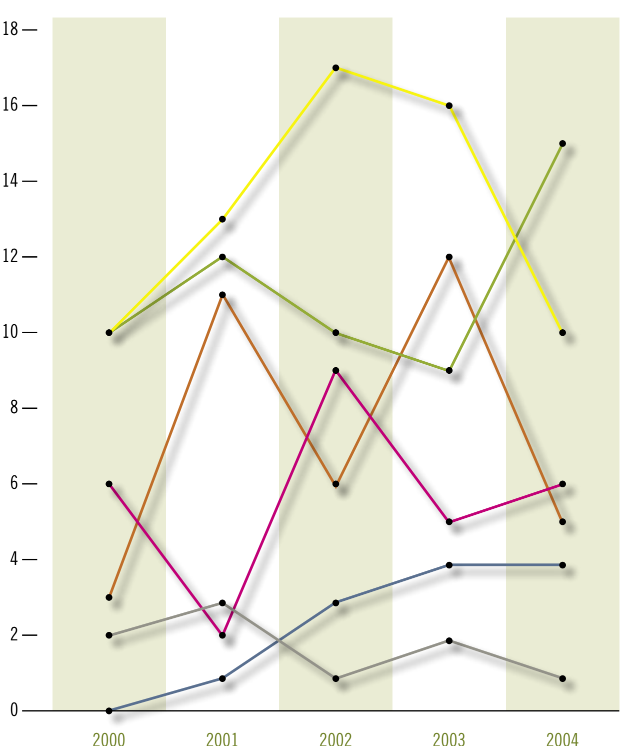
As in previous years, the majority of new complaints (82%) were directed against Norway. Five complaints were directed against Iceland, and one against Liechtenstein. The total number of new complaints decreased slightly from 2003.

Figure 3 > Complaints received 2000-2004 by country



At the end of the year, 112 complaint cases remained open, of which 85% concerned Norway, 13% Iceland, and 3% Liechtenstein.

Figure 4 > Complaints received 2000-2004 by sector



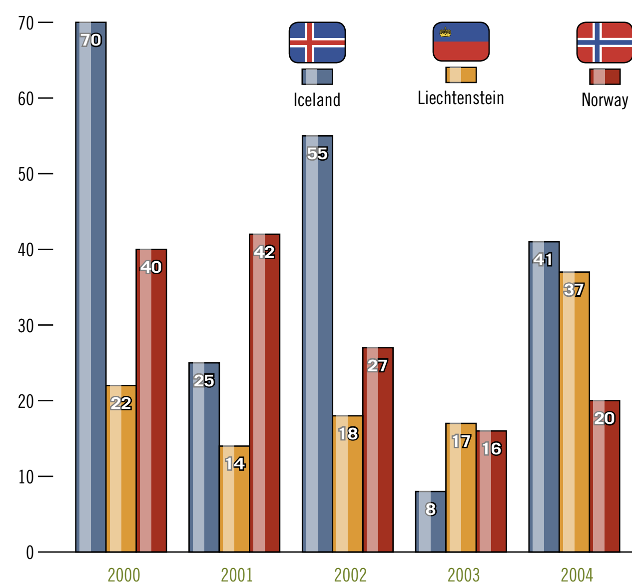
	2000	2001	2002	2003	2004
Free movement of Goods	3	11	6	12	5
Free movement of Persons	10	12	10	9	15
Free provision of Services	6	2	9	5	6
Free movement of Capital		1	3	4	4
Horizontal areas	2	3	1	2	1
Public procurement	10	13	17	16	10
Total	**31**	**42**	**46**	**48**	**41**

1. www.eftasurv.int/information/annualreports/dbaFile6582.html

OWN-INITIATIVE CASES

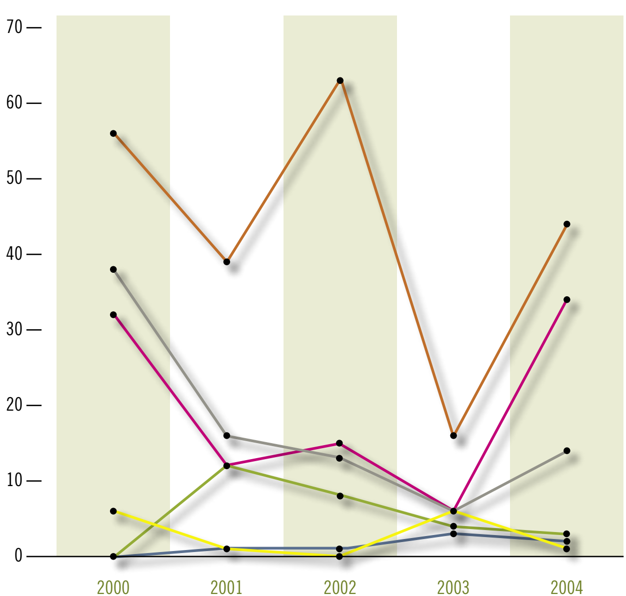
In 2004, the Authority opened 98 new cases of suspected infringement of EEA law at its own initiative. Of these, 70% were so-called non-notification cases, i.e. cases where the EFTA States had not notified the Authority of national laws and regulations intended to implement EEA acts that entered into force during 2004. 42% of the non-notification cases concerned Iceland, 36% Liechtenstein, and 22% Norway. The remaining own-initiative cases relate to suspected breaches of EEA law, either concerning national laws and regulations not in conformity with EEA law, or wrongful application of EEA law.

Figure 5 > Own-initiative cases opened 2000-2004 by country



At the end of 2004, a total of 138 own-initiative cases remained open with the Authority.

Figure 6 > New own-initiative cases



	2000	2001	2002	2003	2004
Free movement of Goods	56	39	63	16	44
Free movement of Persons		12	8	4	3
Free provision of Services	32	12	15	6	34
Free movement of Capital		1	1	3	2
Horizontal areas	38	16	13	6	14
Public procurement	6	1		6	1
Total	**132**	**81**	**100**	**41**	**98**

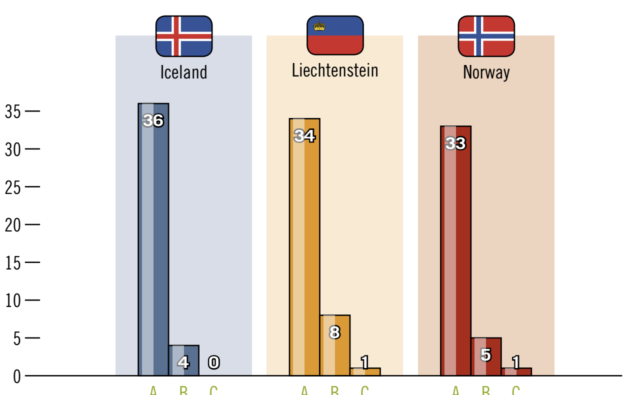
80 new preliminary examinations were registered by the Authority during 2004, mainly to check that national laws were in conformity with EEA directives. This number is comparable to that for 2003 (84 new cases).

Management tasks and reports (see figures 1 and 2) cover activities ranging from the adoption of guidelines relating to product safety to summary reports of national reports in health and safety at work and other tasks carried out at the request of the EFTA States. In 2004, the Authority initiated fewer cases involving management tasks and reports than in 2003, down from 63 to 22. The figure for management tasks in 2003 included food safety inspections. These have been counted separately in 2004.

INFRINGEMENT CASES

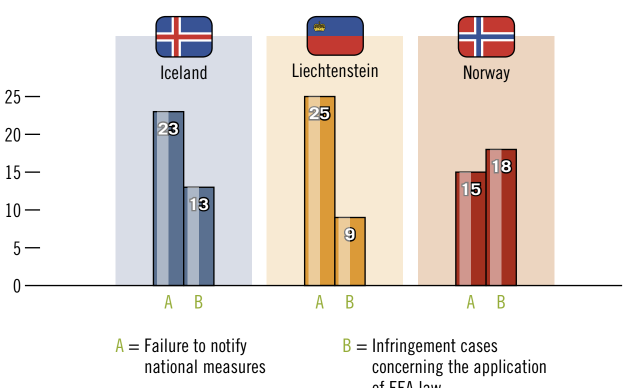
In 2004, the Authority launched its highest number of infringement cases against EFTA States since 2000. Such actions effectively conclude that the relevant State has not complied with its obligations under the EEA Agreement. Figure 7 shows new infringement cases by country. Figure 8 illustrates how, for Iceland and Liechtenstein, a clear majority of new infringement cases directed against them concern failure to notify national measures intended to implement EEA acts within the required time-limit.

Figure 7 > Formal action 2004



A = Letter of formal Notice B = Reasoned Opinion C = Referral to EFTA Court

Figure 8 > Letters of formal notice issued 2004 by type



A = Failure to notify national measures B = Infringement cases concerning the application of EEA law

For a description of formal actions by sector, reference is made to the individual Chapters of this Report.

Most infringement cases are resolved following a letter of formal notice. Only a fraction of cases are referred to the EFTA Court.

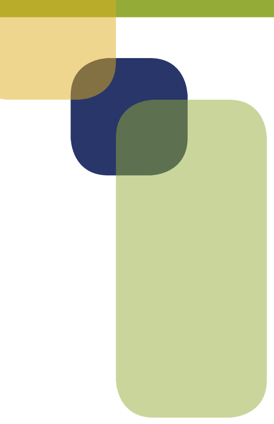
THREE STAGES OF THE INFRINGEMENT PROCEDURE

First, when the Authority, on the basis of information available to it, concludes that a breach of EEA law has taken place, it sends a letter of formal notice to the EFTA State concerned. The EFTA State is usually given two months to submit observations and to take corrective action.

Second, if the Authority is not satisfied that the EFTA State has taken appropriate action to end the alleged infringement, it delivers a reasoned opinion. The EFTA State is usually given two months to comply with the reasoned opinion.

Lastly, if the differences between the EFTA State concerned and the Authority are not resolved following delivery of a reasoned opinion, the Authority may refer the case to the EFTA Court.

The Authority may, at the end of any of these stages, decide to close a case if it is satisfied that the infringement has been corrected or if the allegation of infringement turns out to be ill-founded.



DIRECTIVES ARE THE NUTS AND BOLTS OF THE INTERNAL MARKET

The regulation of the Internal Market is, to a large extent, based on directives. At the end of 2004, more than 1,500 directives were in force in the European Economic Area.

The 28 EEA States are obliged to transpose directives into national law correctly and on time. Every month EC directives are incorporated into the EEA Agreement by way of EEA Joint Committee decisions. Therefore, a continual effort by the EEA States' national administrations is needed.

GENERAL SURVEILLANCE – MONITORING TRANSPOSITION OF DIRECTIVES

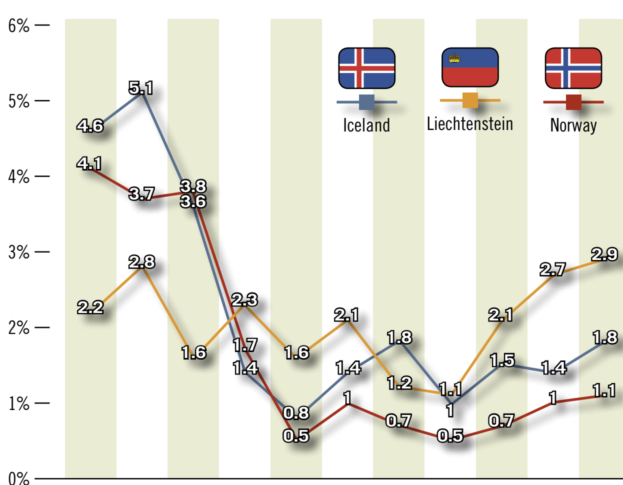
EEA States do not always transpose Internal Market Directives correctly and within the deadlines they themselves have agreed. Late and incorrect transposition affects the functioning of the Internal Market and may deprive citizens and businesses of their rights under the EEA Agreement.

The EFTA Surveillance Authority and the European Commission monitor that the EEA States live up to their obligation to transpose directives into national law properly and promptly within the deadlines set. The biannual Internal Market Scoreboards drawn up by the Authority and the Commission measure the EEA States' success in ensuring correct and timely transposition. In 2004, Scoreboards were published in January and July. In general, the Scoreboards show that the EFTA States do well compared to other EEA States.

By the end of 2004, the total number of directives incorporated into the EEA Agreement was 1,562. Iceland was required to implement 1,360 of these into their national legal order. The corresponding figures for Liechtenstein and Norway were 1,331 and 1,515, respectively. At year's end, Iceland had notified full transposition of 98.2% of the directives applicable to them. For Liechtenstein and Norway the figures were 97.1% and 98.9% respectively.

Figure 1 shows the deficit, expressed in %, of directives that should have been notified by each of the three EFTA States.

Figure 1 > Implementation performance by country



THE LATEST SCOREBOARD FINDINGS: [1]

For the first time since 2001, the EFTA States together fail to meet the interim target of a transposition deficit of less than 1.5%:

- Liechtenstein............**2.7%**
- Iceland.....................**1.4%**
- Norway.....................**1.0%**

The average transposition delays for the three EFTA States lie between four and a half and five months. Transposition of one directive was overdue by more than 16 months.

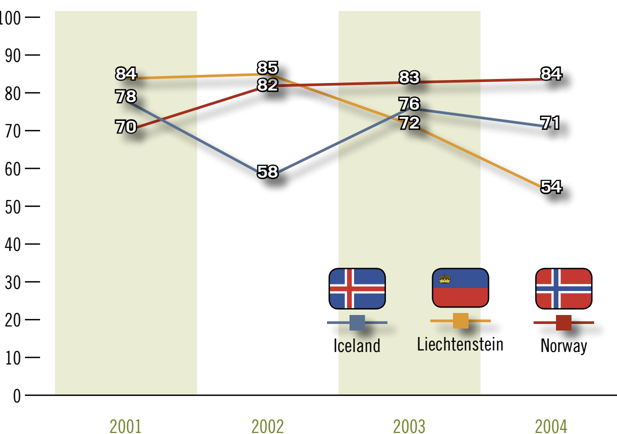
1. The last EFTA Scoreboard was published in January 2005. The figures are based on statistics from November 2004.

   The Scoreboard may be found at: www.eftasurv.int/information/internalmarket

   The EU Scoreboard is available at: http://europa.eu.int/comm/internal_market/score/index_en.htm

Figure 2 shows how many of the directives that were incorporated into the EEA Agreement during 2004 had been transposed at year's end.

Figure 2 > Percentage of new directives for which full implementation was notified during 2004



The implementation figures do not measure the quality of the implementing measures notified by the EFTA States, or the application of these. An assessment by the Authority's Services can reveal problems concerning the conformity of the notified measures with the EEA rules they are intended to implement. Limited resources within the Authority mean that only about one third of the notified acts have been fully checked for conformity with the EEA rules. At the end of 2004, the Authority's Services could, based on such conformity assessment, conclude that 31.8% of the legislation notified by the EFTA States conformed to the EEA Acts that they were intended to implement (34.5% in 2003).

PROBLEMATIC AREAS

In 2004, EEA rules regulating the free movement of goods, in particular technical barriers to trade in dangerous substances and the environment, appeared to present a challenge to all three EFTA States. Furthermore, Iceland failed to transpose directives in the transport sector on time, while Liechtenstein failed to implement a number of directives related to the free movement of capital and financial services and in the fields of audio-visual services and electronic communications services. Norway had failed to transpose certain directives relating to veterinary issues.

SPEEDING UP AND IMPROVING THE QUALITY OF TRANSPOSITION OF DIRECTIVES

In July 2004, the European Commission issued a *Recommendation on the transposition into national law of directives affecting the Internal Market.*[1] The Commission had gathered and analysed information on current practices in Member States, drawing up a list of best practices. The Recommendation should serve as inspiration for Member States, which may apply the practices which they believe will be most effective in their individual legal and administrative context.

The EFTA Surveillance Authority contributed to the preparation of the Recommendation, ensuring that due account was taken of the EFTA States' knowledge and experience.

In order to assist the EFTA States in sustaining good transposition performance, the Authority's Services have drawn their attention to the best practices set out in the Recommendation and encouraged them to consider whether they could further improve the speed and quality of transposition of directives.

THE RECOMMENDATION ON BEST TRANSPOSITION PRACTICES STATES THAT:

- correct and timely transposition should be made a permanent political and operational priority;
- permanent monitoring and co-ordination of the transposition of Internal Market directives at administrative and political level should be ensured;
- it should be ensured that preparations for transposition take place at an early stage and that these have as their aim correct and timely transposition;
- the national administration should work closely with Parliament to ensure correct and timely transposition; and
- action should be taken quickly, visibly and effectively to transpose directives where transposition is late.

Under such broad headlines, the Recommendation lists a series of operational practices – a catalogue of ideas for Member States in order to speed up and improve the quality of transposition of directives.

1. The Recommendation may be found on this website: http://europa.eu.int/comm/internal_market/en/update/strategy

REASONED OPINIONS IN 2004

In 2004 the EFTA Surveillance Authority initiated 103 infringement proceedings against EFTA States. Formal infringement procedures are opened by sending a letter of formal notice to the EFTA State concerned, requesting it to submit its observations on an alleged breach of the EEA Agreement by a specific date.

In light of the reply to the letter of formal notice, or in the absence of a reply, the Authority may decide to deliver a reasoned opinion to the EFTA State. In the reasoned opinion the Authority presents its formal view on the matter and will also require the EFTA State to take the measures necessary to bring the infringement to an end within a specified time period. This is normally two months. The purpose of a reasoned opinion is to give the EFTA State in question a last chance to take corrective measures before the Authority finally decides whether to bring the matter before the EFTA Court.

Some of the 17 reasoned opinions which were delivered by the Authority in 2004 will be presented in more detail in the following Chapters. In addition to these, the Authority also delivered reasoned opinions on the following issues:

ICELAND DELAYS IMPLEMENTATION OF RULES IN THE MARITIME SAFETY FIELD

During 2004, the Authority delivered three reasoned opinions to Iceland regarding non-implementation of Directives in the maritime safety field. These were the Directive on ship-generated waste (2000/59/EC) and two amending Directives to the *Safety on Passenger Ships Directive* (98/18/EC) (Commission Directives 2002/25/EC and 2003/75/EC). Iceland informed the Authority in October that implementing measures on the Directive on ship-generated waste had been taken. Proper implementation of national measures on the two other Directives was still not in place at the end of 2004.

LIECHTENSTEIN LAGGING BEHIND IN FINANCIAL SERVICES

In 2004, six reasoned opinions were delivered to Liechtenstein in the field of financial services. Two reasoned opinions on the Saving Bonus Act and on investment limitations for institutions providing occupational benefits are discussed on page 37. Two other reasoned opinions were delivered in July owing to Liechtenstein's failure to ensure compliance with the *Exchange of Information Directive* (2000/64/EC) and the *Winding up of Insurance Undertakings Directive* (2001/17/EC). An examination of the notified Liechtenstein national legislation revealed that implementing measures regarding several provisions of the *Exchange of Information Directive* were missing. As regards the *Winding up of Insurance Undertakings Directive*, no notification of implementing measures had been received from Liechtenstein.

Finally, two reasoned opinions were delivered to Liechtenstein in December due to its failure to adopt and notify national measures necessary to comply with two amending Directives regarding the *UCITS Directive (Directives 2001/107/EC* and *2001/108/EC regarding amendments to Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities).*

In July 2004, the Authority further delivered a reasoned opinion to Liechtenstein due to that State's failure to ensure full compliance with the *Conditional Access Directive* (98/84/EC). The Directive aims to ensure the legal protection of conditional access systems for pay-TV in the EEA. Liechtenstein had not taken the measures necessary to introduce sanctions to discourage the illicit activities proscribed by the Directive. Following delivery of the Authority's reasoned opinion, Liechtenstein made amendments to its legislation, introducing the required sanctions.

FOOD SAFETY IN THE EEA

Food safety within the EEA is a key public concern and a high priority for European institutions and governments. In 2004, the European Community adopted new regulations on official control of food and feed and new regulations on food hygiene. These basic food safety Regulations will be applicable in the European Union from 2006. The application of these acts in the EFTA States will depend on when and how they will be incorporated into the EEA Agreement. Until then, the legal basis for the EFTA Surveillance Authority's control of implementation and application of EEA legislation on food and feed safety and the inspections in these fields in the EFTA States will be the same as currently laid down in the EEA Agreement.

INSPECTIONS CARRIED OUT IN THE EFTA STATES

In 2004, the Authority carried out 10 inspections, six in Norway and four in Iceland. No inspection was carried out in Liechtenstein. According to the Authority's inspection programme, two additional inspections were planned, but these had to be postponed. Reports from the Authority's inspections, including the EFTA States comments, are published on the Authority's website.[1]

The Authority carried out one inspection in Iceland relating to the *Directive on Fishery Products* (91/493/EEC) and the *Directive on Fish Diseases* (93/53/EEC). During the inspection, the inspection team observed that the Competent Icelandic Authority had approved some of the establishments visited although they did not fully comply with the requirements of Directive 91/493/EEC. Furthermore, the necessary measures were not always taken when establishments did not comply with the legal requirements. Deficiencies related to facilities, procedures, hygiene and production were also observed. Finally, the Authority also concluded that compliance with Directive 93/53/EEC, in particular related to the duties assigned to the national reference laboratories (NRL), could not be assured. As a result of the Authority's inspection the Icelandic Competent Authority has already notified the Authority of some measures taken to correct the deficiencies observed.

An inspection was also carried out in Iceland relating to the application of the *Directive on Bivalve Molluscs* (91/492/EEC). Although improvements were observed since the first inspection in this field in 2002, the Authority concluded that, *inter alia*, compliance with the Directive in relation to designation of NRL's for bacteriological and viral contamination and for algae toxins, and the carrying out of the duties assigned to such laboratories, could not be assured. The Authority also concluded that compliance with the Directive on *Diseases Affecting Bivalve Molluscs* (95/70/EC), in particular related to on-farm registrations, monitoring and sampling, notification to the Competent Authority in cases where presence of any diseases is suspected and procedures for follow-up of such cases, could not be assured. A report from a similar inspection carried out in Norway was finalised at the end of the year and published on the Authority website early 2005.

The Authority carried out an inspection in Norway to assess the application of the *Regulation on Identification and Registration of Bovine Animals and Labelling of Beef* (820/97/EC) and other acts related to the traceability of bovine animals, beef and beef products. In addition, an inspection was carried out in Norway to assess the application of EEA legislation on epidemio surveillance of Transmissible Spongiform Encephalopathies (TSE).

Inspections were carried out in both Iceland and Norway regarding application of the EEA legislation related to border inspection posts. Further inspections are foreseen in Norway in 2005, as all border inspection posts were not visited during 2004.

During 2004, the Authority carried out its first inspections in Iceland and Norway in the field of animal nutrition, related to application of the *Directive on Official Inspections in Animal Nutrition* (95/53/EC) and the *Directive on Establishments and Intermediaries in the Animal Feed Sector* (95/69/EC). Particular focus was put on procedures for approval of establishments, import control/intra community trade, laboratory network and the planning of and criteria for the annual control plan.

The Authority also performed an inspection in Norway within the scope of the *Directive on Milk and Milk Products* (92/46/EEC). Special emphasis was placed on the

laboratory network and follow-up from the last inspection in 2001.

Due to the workload within the Authority, the inspection scheduled for Norway in the field of control measures for fish diseases and for fishery products had to be postponed until 2005. An inspection scheduled for Norway on import control and pesticides was also postponed since some of the relevant legislation had not yet been incorporated into the EEA Agreement.

CO-OPERATION WITH THE FOOD AND VETERINARY OFFICE

It follows from the EEA Agreement and the Surveillance and Court Agreement that, in order to ensure uniform surveillance throughout the EEA, the Authority and the European Commission shall co-operate, exchange information and consult each other on surveillance policy issues and on individual cases. In the field of food safety inspections, this is achieved, *inter alia*, by joint inspections within the EEA.

During 2004, the Authority's inspectors participated in the Commission's Food and Veterinary Office (FVO) inspections in EU Member States related to bivalve molluscs and fishery products, controls on products of animal origin, contingency plans and transmissible spongiform encephalopathies (TSE). Inspectors from the FVO participated in inspections related to TSE in Norway, veterinary border inspection posts in both Iceland and Norway, and fish diseases and fishery products in Iceland.

The Authority and the FVO also exchange information on their inspection programmes for the forthcoming year. The inspection programme for the EFTA States in 2005 was approved in November 2004 and, thereafter, sent to the EFTA States and the FVO.[2]

DECISIONS REGARDING ANIMAL DISEASES

In 2004, the Authority adopted two decisions related to the status of the EFTA States concerning certain diseases affecting aquatic animals. One decision recognises the entire coastline of Norway as an approved zone with regard to the mollusc diseases bonamiosis and marteiliosis, while the other recognises Iceland as approved continental and coastal zone for fish with regard to the fish diseases viral haemorrhagic septicaemia (VHS) and infectious haematopoietic necrosis (IHN). The Authority also adopted a decision approving the scheme submitted by Norway for the withdrawal of all fish from Norwegian farms infected with infectious salmon anaemia (ISA). These decisions have been published in the Official Journal of the European Union.[3]

The Authority received an application for recognition of Norway as free from the disease enzootic bovine leucosis (EBL) and the Norwegian plan for monitoring certain substances and residues thereof in live animals and animal products. However, due to the workload within the Authority, the relevant decisions could not be adopted in 2004.

INCOMPLETE MEASURES ON FOOD SAFETY

Following the reasoned opinions sent to Iceland in Spring 2003 regarding non-implementation of the *Directive on Aquaculture Animals and Products* (91/67/EEC), as amended, at the beginning of 2004 Iceland notified the national measures considered to implement the relevant EEA legislation. However, the Authority found some non-compliance in the notified measures. Iceland has now informed the Authority that the necessary amendments to the Icelandic legislation will enter into force at the latest in March 2005.

RAPID ALERT SYSTEM FOR FOOD AND FEED

The EFTA Surveillance Authority is closely involved in running the Rapid Alert System for Food and Feed (RASFF). This is a system for notification of a direct or indirect risk to human health deriving from food or feed. Operational guidelines were drafted in 2004 to provide an overview of the Authority's role and responsibilities concerning the RASFF system. The intention is to up-date these guidelines on a yearly basis in light of new developments.

Notifications from EFTA States are received simultaneously by the Authority and the Commission. Nevertheless, these notifications are not made available in the CIRCA database[4] until the Authority has assessed them to verify the correctness of the information up-loaded. The CIRCA database contains all information on the notifications and reactions by the 28 EEA States. The information is available and searchable by the Authority and by the EFTA States. Once a notification is made, all participants in the system are automatically informed of the notification by an e-mail from the Commission containing a link to the database. RASFF notifications are either alert or non-alert, depending on the risk to human health related to the case notified and the need to react swiftly (*e.g.* recall of products from the market).

RASFF NOTIFICATIONS 2000-2004

EFTA notifications	2000	2001	2002	2003	2004
Alert	18	35	21	12	46
Non-alert	29	21	35	68	41
Total	**47**	**56**	**56**	**80**	**87**

EC notifications	2000	2001	2002	2003	2004
Alert	133	302	434	454	691
Non-alert	340	406	1,092	1,856	1,897
Total	**473**	**708**	**1,526**	**2,310**	**2,588**

RECOMMENDATIONS ON FOOD AND FEED CONTROL

The Authority issued three recommendations on food and feed control to the EFTA States in 2004. These are:

- recommendation of 30 March 2004 concerning a co-ordinated programme for the official control of foodstuffs for 2004;
- recommendation of 30 March 2004 concerning a co-ordinated monitoring programme for 2004 to ensure compliance with maximum levels of pesticide residues in and on cereals and certain other products of plant origin; and
- recommendation of 31 March 2004 concerning a co-ordinated programme for the official control of feedingstuffs for 2004.

The programmes recommended by the Authority are based on corresponding recommendations issued by the European Commission to the EU Member States. It is up to the EEA States to decide to what extent they participate in the recommended programmes. The Authority also worked on the draft of a Recommendation on the monitoring of background levels of dioxin and dioxin-like PCBs in feedingstuffs. The aim is to generate reliable data across >>

the EEA in order to have a clear picture of the time trends in background presence of these substances in products intended for animal feed.

REPORTS ON FOOD AND FEED SAFETY

The EFTA States are obliged to report their monitoring plans, results from the official control of foodstuffs and feedingstuffs, and the analysis of residues of pesticides and certain contaminants in foodstuffs to the Authority. A number of acts on veterinary issues also contain requirements for the EFTA States to submit information to the Authority on animal health status and the outcome of official controls.

The official control reports on food and feed received in 2004 contain data on the national programmes laying down the nature and frequency of inspections in 2003. They also contain data on participation in the co-ordinated control programmes for the same year. These reports were forwarded by the Authority to the European Commission for further evaluation of control results from the EEA States.

Reports received on pesticide residues contain the results of EFTA States' monitoring of pesticides in 2003 and of their participation in the Authority's Recommendation on a co-ordinated monitoring programme for 2003. The monitoring results were forwarded to the European Commission for inclusion in the annual report on the monitoring of pesticide residues in the EEA. Iceland and Norway also sent the Authority their programmes for monitoring pesticides in 2005.

1. www.eftasurv.int/information/reportsdocuments/vetcontrolmatters
2. www.eftasurv.int/fieldsofwork/fieldgoods/foodvet/dbaFile6504.html
3. OJ C 319, 23.12.2004 and simultaneously in Icelandic and Norwegian in the EEA Supplement to the OJ No 64, 23.12.2004.
4. The CIRCA database is an Internet-based communication tool among the national RASFF contact points, the Authority and the RASFF team within the Commission.

NOTIFICATION OF CHEMICAL SUBSTANCES

The *Dangerous Substances Directive* (67/548/EEC), as amended, introduces a harmonised pan-European notification system for "new" substances, i.e. substances placed on the market for the first time after 18 September 1981. It requires the establishment of the European Inventory of Existing Commercial Chemical Substances (EINECS), listing all "existing" substances on the market by that date. Substances not in EINECS need to be notified as "new" substances and included in the European List of Notified Chemical Substances (ELINCS).

Those notifying new substances have to submit notification dossiers, comprising a predefined set of information, to the national Competent Authority, who evaluates the dossiers and forwards them to the European Chemicals Bureau (ECB). ECB manages dossiers through the New Chemicals Database (NCD) maintained in a secure area at the ECB with authorised access only. Aspects of the dossier information that are confidential are not transmitted or archived in electronic form.

In 1999, Iceland informed the Authority of its intention to participate actively in the work related to notifications of new substances and in the exchange of information in the EEA. In 2000, the Authority initiated a check of the Icelandic procedures for the notification of new substances, in particular the installation of a security system for the safe keeping of confidential information, as required by the EEA Agreement.

In 2004, the Icelandic Environment and Food Agency (EFA) notified the Authority that the national measures concerning security arrangements in handling confidential information were already in place. To clear the issue of the security/confidentiality requirements, the Authority decided to inspect the premises of the EFA, including the equipment designed for storage and handling of confidential information and the procedures applied, to ensure that the measures related to the security standards in handling notifications of new substances were in place and operational.

The Authority's inspection took place in May 2004. Having concluded that Iceland had put in place a system which is operational and ensures proper handling and storage of confidential information, the Authority pursued the matter with the European Commission. The aim is to ensure that the ECB grants Iceland access to the exchange of information related to notifications of new substances in early 2005 and allows it to fully participate in the European notification scheme for new chemical substances from that time.

Norway has already participated in this notification system for several years, while Liechtenstein is not participating.

IMPROVING CONSUMER-PRODUCT SAFETY

On 1 March 2004, the revised *General Product Safety Directive* (2001/95/EC) entered into force in the EFTA States. The purpose of the Directive is to ensure that consumer products placed on the EEA market are safe. The Directive obliges the EEA States to take the measures necessary to enforce the safety requirements for which it provides and to notify any such measures taken. In this respect, the Directive sets up a system for rapid exchange of information (RAPEX) concerning products posing a serious risk to consumers. Any measures or actions taken by the EFTA States are notified to and examined by the EFTA Surveillance Authority.

The revised Directive maintains existing obligations and procedures for information exchange and introduces a number of new or reinforced provisions. One major difference to the previous Directive is that food products are no longer covered by the General Product Safety Directive but have a separate legal basis.[1]

Under the continued RAPEX system, any emergency measures preventing, restricting or imposing specific conditions on the marketing or use of a product constituting a serious or immediate risk to consumers must be notified. Also, any measures concerning consumer products presenting a risk to the health and safety of consumers, even if not a serious one, are to be notified.

In addition to the obligations imposed on the EEA States, the revised Directive obliges producers and distributors to inform consumers of the risks associated with the products they supply. Furthermore, they must notify the competent national authorities if a product they have placed on the market is dangerous.

RAPEX NOTIFICATION PROCEDURE

EFTA notifications (non-food)	2000	2001	2002	2003	2004
Alert	3	2	-	-	2
Non-alert	1	-	-	2	1
Total	**4**	**2**	**-**	**2**	**3**

EC notifications (non-food)	2000	2001	2002	2003	2004
Alert	93	76	84	67	388
Non-alert	38	60	64	59	21
Total	**131**	**136**	**148**	**126**	**409**

SECTOR SPECIFIC PRODUCT SAFETY

In addition to the General Product Safety Directive, each *New Approach Directive*[2] contains a safeguard clause obliging the EEA States to either restrict or forbid the placing on the market and putting into service of dangerous products, or to have these withdrawn from the market.

As a general rule, the safeguard clause procedure is restricted to products which are CE marked, but which have been ascertained by an EEA State to present a substantial hazard even if the products are correctly constructed, installed or maintained, and used according to their intended purpose.

An EFTA State must notify the Authority immediately after having invoked a safeguard clause. Following a notification, the Authority consults the interested parties in order to establish whether the measures taken under the safeguard clause are justified or not.

NOTIFICATION OF SAFEGUARD MEASURES BY NORWAY

In March 2004, the Authority received five notifications of safeguard measures from Norway concerning vehicle tail lifts under the *Machinery Directive* (98/37/EC). According to the Norwegian authorities, tail lifts which are not equipped with two-hand operating systems or other protection devices providing protection in the danger zone between the cargo box and the tail lift fail to satisfy the essential requirements referred to in Article 3 of the Directive. Having consulted the interested parties, the Authority is presently in the process of concluding its assessment regarding the justification of the notified measures.

1. For further information on safety of food products, see article starting on page 20.
2. Through New Approach Directives, harmonisation is limited to essential requirements. Only products fulfilling these essential requirements may be placed on the EEA market. If a product conforms to harmonised standards, it is presumed to conform to the corresponding essential requirement. However, manufacturers are free to choose any technical solution that provides compliance with the essential requirement.

PREVENTING NEW TECHNICAL BARRIERS TO TRADE

The Draft Technical Regulations Directive (98/34/EC), as adapted for the purpose of the EEA Agreement, establishes a notification procedure on draft technical regulations. In 2001, the notification procedure was extended by an amending Directive (98/48/EC) to cover draft rules on Information Society services. The procedure aims at providing transparency and to prevent the creation of the new, unjustified barriers to trade which can arise from the adoption of diverging national technical regulations.

STATISTICS

In 2004, the EFTA Surveillance Authority received notification of 37 draft technical regulations from the EFTA States. Of these, 23 came from Norway, 11 from Iceland and three from Liechtenstein. In one case, the emergency procedure was invoked, which meant that no standstill period applied. Ten of these notifications prompted the Authority to issue comments. The European Commission commented upon 11 of the notifications.

The Authority received 557 notifications from the EU Member States which were forwarded by the European Commission. One of these led the Authority to send comments in the form of a Single Co-ordinated Communication. A Single Co-ordinated Communication is prepared by the Authority in cases where comments are made by the EFTA States in relation to notifications from an EU Member State.

Draft Technical Regulations

Year	EFTA Notifications	Comments from the Authority	EC notifications	Single Co-ordinated Communications
2000	19	3	751	0
2001	22	5	530	1
2002	49	4	508	1
2003	29	5	486	0
2004	37	10	557	1

INFRINGEMENT CASES

During 2003, the Authority initiated infringement procedures against Norway and Liechtenstein for incorrect implementation of the *Draft Technical Regulations Directive*, as amended. The measures chosen for implementing the EEA Acts, an administrative circular and an internal instruction respectively, were not considered by the Authority to be sufficient. Reasoned opinions were sent to the two States in July 2004. Norway adopted a new Act in December 2004 which entered into force in January 2005. The Authority is still waiting for Liechtenstein to adopt sufficient implementing measures.

REFERRAL TO COURT

Following receipt of a complaint, the Authority brought a case against Norway before the EFTA Court in December 2003, concerning the obligation to notify a technical regulation at its draft stage. In 1998, Norway adopted a national regulation regarding type-approval for gaming machines without notifying it to the Authority at its draft stage. In May 2004, the EFTA Court delivered its judgment, E-4/03. It declared that Norway, by adopting the national regulation in question without previously notifying the Authority at the drafting stage, had failed to fulfil its obligations under the *Draft Technical Regulations Directive*. The national regulation was withdrawn shortly after the judgment. It was replaced by a new regulation regarding type-approval of gaming machine, of which a draft had been notified to the Authority according to the Draft Technical Regulation Procedure.

NEW TECHNICAL RULES MUST BE NOTIFIED

According to the Draft Technical Regulation Procedure, the EFTA States shall notify technical regulations concerning products and provisions relating to the Information Society services in draft form to the Authority. Such a notification generally triggers a three months standstill period during which the notifying EFTA State is obliged not to adopt the regulation. This period gives the Authority, the European Commission and other EEA States time to examine the regulation in order to establish whether it contains provisions which might create barriers to trade and/or whether it complies with EEA secondary legislation. Where the draft regulation contains provisions which are considered contrary to the EEA Agreement, comments will be sent to the notifying EFTA State. Once the draft regulation has been adopted, the EFTA States must communicate the definitive text of the regulation to the Authority.

PUBLIC PROCUREMENT

The EEA public procurement rules aim to secure equal treatment of all potential bidders in award procedures initiated by public authorities, bodies governed by public law, and contracting entities operating in the energy, transport and water sector. As a general rule, contracting authorities and entities must publish a call for tender prior to the award of supply, service or works contracts above certain threshold values.[1] *During the award procedure, contracting authorities and entities must, inter alia, apply objective and non-discriminatory criteria, and evaluate all candidates and bids in accordance with the principles of proportionality and equal treatment.*

FEWER COMPLAINTS IN 2004 - ALL AGAINST NORWAY

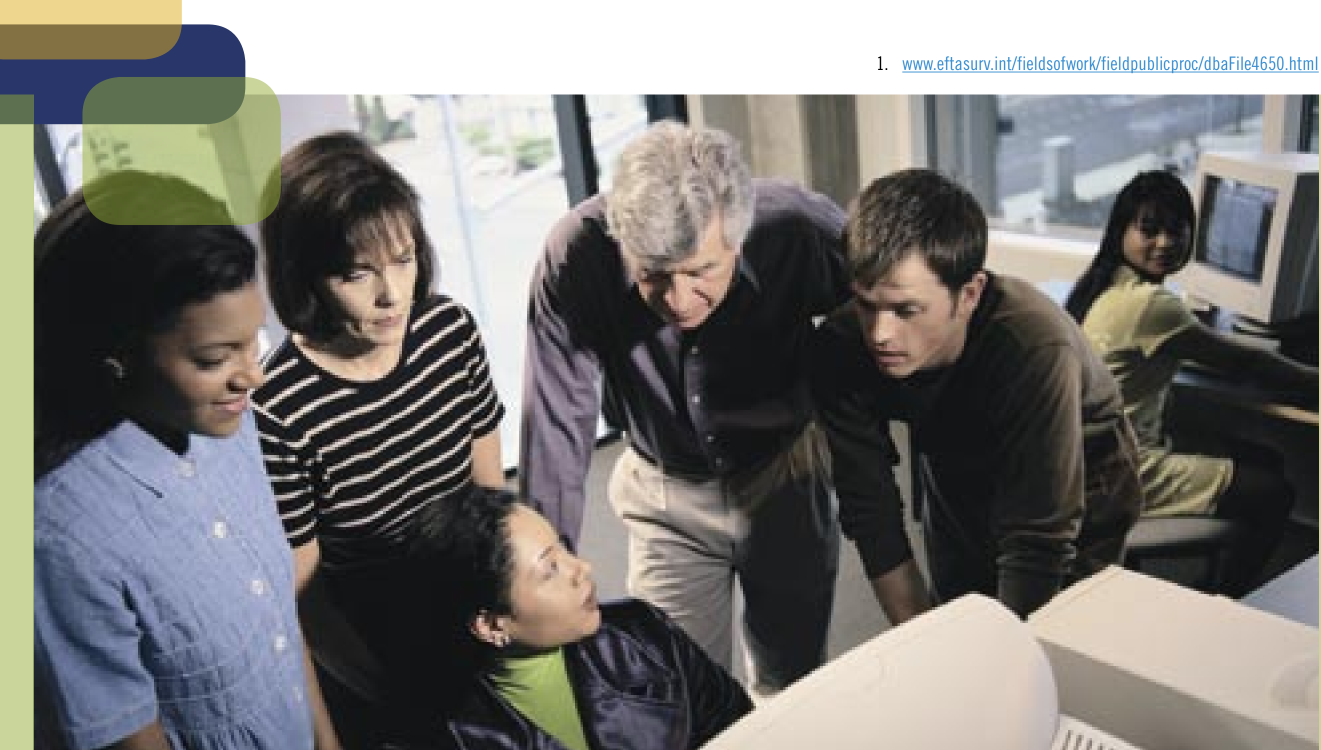
As in previous years, the complaints in the public procurement field handled by the EFTA Surveillance Authority mainly concern Norway. 10 new complaints concerning the application of public procurement rules were received during 2004. All were directed against Norway. However, for the first time since 2000, the field of public procurement was not the sector that attracted the highest number of complaints. A 60% reduction in complaints, from 16 to 10 complaints, put procurement in second place, after complaints concerning freedom of movement of persons, where 15 new complaints were lodged during 2004. The fall in number of complaints may be the result of the creation in Norway in 2003 of a Public Procurement Review Body.

At the end of 2004, 20 public procurement complaints were still open with the Authority, all of which concerned Norway. In 2004, one case of suspected infringement in Iceland was opened at the Authority's own initiative. In all, five own-initiative cases were still open at the end of 2004, all concerning Iceland. Another case concerning Iceland was opened as a preliminary examination on the basis of press reports stating that the EEA public procurement rules had not been applied properly.

No new infringement cases were launched during 2004. By contrast, the Authority finalised its assessment of a number of such cases, resulting in 21 older cases being closed during the year. One of the closures, concerning Liechtenstein, related to the award of a contract in the public transportation sector. One, concerning Iceland, related to the award of contracts in the aviation sector. The rest concerned Norway.

Closures during 2004 included a number of cases concerning outstanding infringement procedures against Norway. Two of the cases related to the so-called Public Administration Network Agreements in Norway. These are framework agreements applicable to the purchase of IT and telecommunications infrastructure in the public sector in Norway. The Authority had initiated an infringement procedure against Norway in 2002, on the basis of two separate complaints claiming that these agreements were incompatible with the EEA public procurement provisions. The Authority concluded that these agreements had resulted in discrimination against potential tenderers. The Norwegian Government initially rejected the Authority's view on the matter. However, following numerous additional exchanges, the Norwegian Government, in 2003, accepted the Authority's legal arguments. The Authority nevertheless chose not to close the cases then. Throughout the reporting period it continued to monitor the situation.

1. www.eftasurv.int/fieldsofwork/fieldpublicproc/dbaFile4650.html



NORWEGIAN ALCOHOL LEGISLATION

PRIVATE IMPORT OF ALCOHOL

According to Norwegian law, import of alcoholic beverages is, as a main rule, only permitted to someone holding a wholesale licence, a production licence or a serving licence. The law thus prevents private individuals from importing alcoholic beverages for private use from another EEA State, despite paying relevant taxes and duties.

Certain kinds of private import are, however, accepted. This includes when a travelling person carries with him a limited amount of alcoholic beverages or when alcohol obtained through inheritance, testament, gift or which form part of the belongings when moving to Norway may be imported following permission from the authorities.

The issue of private import of alcohol has been raised with Norway by the EFTA Surveillance Authority. Norway has argued that the rules on private import follow from the alcohol retail monopoly's exclusive right to sell alcoholic beverages in Norway. They should, therefore, be assessed under Article 16 EEA. In the Authority's opinion, provisions dealing with the importation of goods relate to the free movements of goods and do not concern domestic arrangements laying down exclusive rights for a monopoly to sell alcoholic beverages within the territory. They therefore fall within the scope of Article 11 EEA.

The Authority sent a letter of formal notice to Norway in December 2004 in which it concluded that Norwegian provisions on private import of alcoholic beverages constituted a trade barrier contrary to Article 11 EEA and that Norway had not proved that the measure could be justified on the basis of Article 13 EEA. An answer is expected from Norway in April 2005.

In parallel with these proceedings, the Swedish Supreme Court sent a request for a preliminary ruling to the European Court of Justice concerning the Swedish rules on private import of alcohol, which are very similar to the Norwegian rules described above. Case C-170/04 *Rosengren e.a.*, in which the Authority submitted written observations, concerns the question of whether Article 28 of the EC Treaty concerning free movement of goods, or Article 31 of the EC Treaty, concerning state monopolies, is applicable to rules about private import and whether restrictions on private import are contrary to either of these provisions.

ALCOHOL ADVERTISING

Following the *Gourmet*[1] case from the European Court of Justice concerning the Swedish prohibition on alcohol advertising, in February 2003 the Authority received a complaint against Norway regarding similar Norwegian alcohol-advertising restrictions. Norway informed the Authority that the issue would be assessed as part of a revision of the Norwegian alcohol legislation. In December 2004, this resulted in adoption of certain amendments of the Alcohol Act. However, the rules on advertising of alcohol remained unchanged.

In July 2004, the EFTA Court received a request from the Norwegian *"Markedsrådet"* for an advisory opinion concerning questions related to alcohol advertising, Case E-4/04. The case, in which the Authority intervened, arose from an appeal against a decision to issue a fine against a magazine that had published advertisements for wine. The EFTA Court was first asked whether Article 11 EEA, concerning the free movement of goods, and/or Article 36 EEA, concerning the freedom to provide services, is even applicable in the case taken into account that wine is not a product covered by the EEA Agreement. Second, the EFTA Court was asked whether the general prohibition against alcohol advertising in Norway was contrary to Article 11 EEA and/or Article 36 EEA, or if such a prohibition could be maintained out of concerns for public health.

The Authority is awaiting a judgment in the case in 2005 and will continue its work on the issue taking into account the outcome of the case.

LICENSING SYSTEM, SERVICE REQUIREMENTS AND TECHNICAL SPIRITS

Several complaints against Norway with regard to the alcohol licensing system have led to discussions and correspondence between the Authority and Norway. Concerns have also been expressed by the Authority regarding a double set of requirements and controls on importers of alcoholic beverages imposed by both the Norwegian alcohol supervisory authorities and the Norwegian custom administration.

The above-mentioned revision of the Norwegian alcohol legislation addressed most of the remaining issues. First, it contained an abolition of the existing licensing system for wholesalers. Second, a new system categorising alcoholic beverages solely on the grounds of their alcoholic strength was introduced. This means that the same rules will apply to all alcohol beverages with the same alcohol strength. The amendments to the Alcohol Act are expected to enter into force in July 2005.

Finally, an outstanding issue concerned the Norwegian legislation granting Arcus Produkter AS a monopoly on import, wholesale, retailing and re-distillation of technical spirits. After having brought the issue to Norway's attention it was proposed by Norway to repeal all the exclusive rights of Arcus Produkter AS and replace them by a registration system handled by the customs authorities.

1. Case C-405/98, *Konsumentombudsmannen* v. *Gourmet International Products Aktiebolag* [2001] ECR I-1795.

Icelandic rules on eider down A RESTRICTION ON EXPORT

In late 2003, the Authority received a complaint from an Icelandic producer of eider down. He complained that he was prevented from exporting mechanically cleaned eider down. The Icelandic rules on eider down stipulate that only first class eider down may be exported. No such requirement is made with regard to eider down intended for the domestic market.

In November 2004, after having exchanged views with the Icelandic Government on the case, the Authority sent Iceland a letter of formal notice concluding that the Icelandic rules were in breach of Article 12 EEA. This provision prohibits quantitative restrictions on exports and all measures having equivalent effect. The Authority considered that an infringement of Article 12 of the Agreement had taken place because the Icelandic rules impose more stringent requirements on eider down intended for export than eider down for the Icelandic market. This is the first time the Authority has sent a letter of formal notice due to a breach of the Article 12 EEA. Iceland is expected to reply to the letter of formal notice in early 2005.

ARTICLE 12 EEA

Article 12 EEA prohibits quantitative restrictions on exports and all measures having equivalent effect. It mirrors Article 11 of the Agreement which prohibits such restriction on imports. Both rules have the objective of ensuring free flow of legally marketed products within the internal market. In the case law of the European Court of Justice application of the equivalent Article of the EC Treaty applying to exports, Article 29 EC, has been interpreted more restrictively than Article 28 EC applying to imports. Unlike import measures, which may be contrary to Article 28 EC even though they apply both to domestic and imported products, the Court has required an export measure to be discriminatory in order to be considered a measure having equivalent effect to a quantitative restriction.

THE FINNMARK SUPPLEMENT AND

In a reasoned opinion of July 2004, the EFTA Surveillance Authority concluded that, according to the Social Security Regulation (1408/71/EEC), Norway may not restrict the entitlement of a migrant worker who is covered by Norwegian social security legislation to family allowances, including the regional supplement, due to the fact that her child resides in another EEA State.

The Authority also held that the regional residence requirement constituted indirect discrimination contrary to the *Freedom of Movement of Workers Regulation* (1612/68/EEC). Norway replied to the reasoned opinion in December 2004 disagreeing with the findings of the Authority. Early 2005, the Authority refered the matter to the EFTA Court.

Norway grants a regional family allowance supplement to families residing in the northernmost county of Finnmark or in parts of the neighbouring county of Troms. In 1999, the Authority received a complaint from a frontier worker employed in Finnmark, but residing with her child across the border in Finland. She had been granted family allowances in accordance with the *Social Security Regulation*. The Norwegian authorities, however, rejected her application for the regional supplement because her child did not reside in Finnmark.

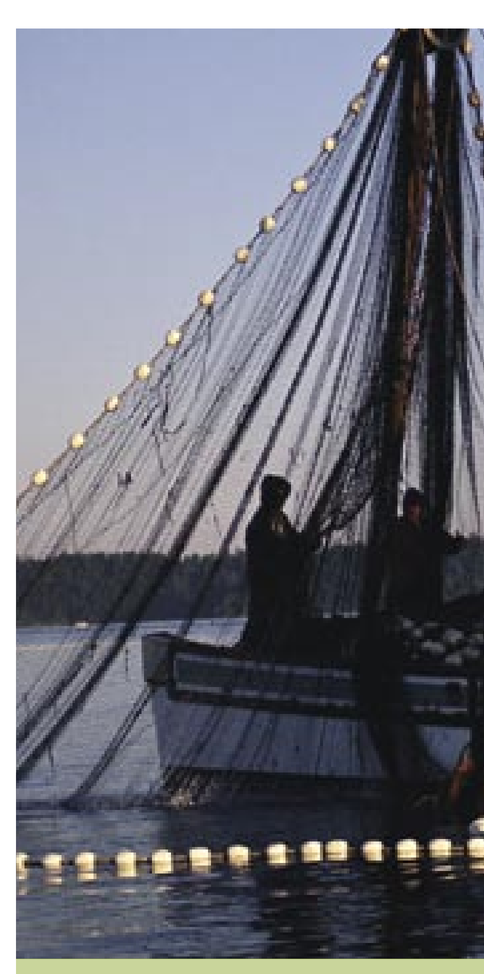
The *Social Security Regulation* applies to regional social security benefits unless these are expressly exempted. Norway has not asked for an exemption

DOES GREEK OR NORWEGIAN LAW APPLY TO GREEK SEAMEN ON NORWEGIAN SHIPS?

The advisory opinion in Case E-3/04, in which the Authority intervened, was rendered by the EFTA Court in December 2004. The national case concerned the question whether Greek or Norwegian social security legislation applied to Greek mariners employed on board Norwegian vessels and whether they were under a corresponding duty to pay Norwegian social security contributions. The question raised before the EFTA Court concerned the kind of documentation that is required when applying the choice of law rules in the *Social Security Regulation* (1408/71/EC). In general, these rules prescribe that the legislation of the state of employment shall apply. Thus the Greek mariners should be subject to Norwegian law. The mariners, however, invoked a rule of exception which prescribes that the home state legislation shall apply to mariners employed on board foreign vessels if they are resident in the home state and employed by an undertaking which is established there.

The Norwegian authorities, however, required official documentation from the Greek authorities stating that the conditions for exemption were fulfilled and that Greek law applied. Such official documentation should preferably be in the form of a so-called E101 form, which has been designed specifically for the purpose of confirming that the home state law is applicable. The Greek mariners did not, however, manage to obtain such official documentation and therefore their claim relied solely on private documentation. This documentation showed that the conditions for exemption from Norwegian law (residence and employer's seat in Greece) were fulfilled.

The EFTA Court ruled that it was not compatible with the choice of law rules in the *Social Security Regulation* to require official documentation from Greece in a situation like the one at hand. In a situation where no E101 form had been issued by Greece, Norway had to apply the choice of law rules and thereby evaluate all evidence presented to it, including unofficial evidence. This was deemed necessary in order to secure legal certainty and the free movement of workers. Should Greek authorities eventually disagree with Norwegian authorities on the matter, this would, according to the EFTA Court, have to be solved directly between the two states, if necessary by referring the matter to the EEA Joint Committee.



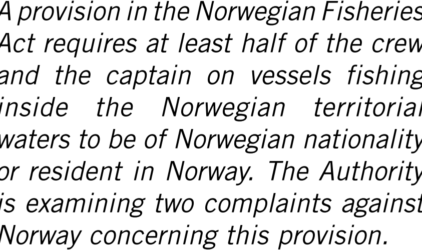
MIGRANT WORKERS

for the regional supplement to the family allowance. According to the Regulation, a migrant worker shall be entitled to family allowances as if his family members were residing in the State of employment.

The *Freedom of Movement of Workers Regulation* lays down the principle of equal treatment between migrant workers and national workers as regards social advantages. In addition to discrimination by reason of nationality, indirect forms of discrimination, such as a national or regional residence requirement affecting migrant workers more than national workers, can also be contrary to the Regulation.

Both Regulations apply only where there is a cross-border element involved. This means that a migrant worker could be treated more favourably than national workers in a given case.

ENSURING FREE MOVEMENT OF WORKERS FOR FISHERMEN



A provision in the Norwegian Fisheries Act requires at least half of the crew and the captain on vessels fishing inside the Norwegian territorial waters to be of Norwegian nationality or resident in Norway. The Authority is examining two complaints against Norway concerning this provision.

In April 2004, the Authority continued infringement proceedings, initiated in 2003, by sending a reasoned opinion to Norway, concluding that nationality and residency requirements in the Act were in breach of Article 28 EEA and Regulation 1612/68 on the free movement of workers.

THE FREE MOVEMENT OF WORKERS IS A FUNDAMENTAL FREEDOM[1]

The free movement for workers entails the abolition of any discrimination, direct or indirect, based on nationality between workers of the EEA States as regards employment, remuneration and other conditions of work and employment. Under the relevant EEA rules, any EEA national, irrespective of his place of residence, has the right to take up an activity as an employed person within the territory of another EEA State. Furthermore, national rules restricting by number or percentage the employment of foreign nationals in any activity must not apply to nationals of other EEA States.

THE QUESTION OF FISHERY POLICY AND FREE MOVEMENT OF WORKERS

The EEA Agreement permits Norway to apply certain restrictions in fishing operations on establishment of non-nationals. The same applies to ownership by non-nationals of fishing vessels. There are, however, no similar provisions deviating from the provisions concerning the free movement of workers.

The Authority considers that although fishery policy as such falls outside the scope of the EEA Agreement, EEA rules on free movement of workers apply to fishermen on board Norwegian fishing vessels, in Norwegian territorial waters and in the Norwegian Exclusive Economic Zone, insofar as those fishermen are workers as defined by EEA law.

Norway has informed the Authority that it plans to review the Fisheries Act. The Authority will continue to examine the issue further in 2005.

1. For further background information, see the Authority's Annual Report 2003.

RECOGNITION OF PROFESSIONAL QUALIFICATIONS IN LIECHTENSTEIN

The rights of EEA nationals to take up employment, establish themselves or to provide services anywhere in the EEA are fundamental principles of EEA law. Regulations which only recognise national professional qualifications present obstacles. They are overcome by rules guaranteeing the recognition of professional qualifications from other EEA States.

THE GENERAL SYSTEM OF RECOGNITION OF PROFESSIONAL QUALIFICATIONS

The *General Systems Directives* (89/48/EEC, 92/51/EEC, 1999/42/EC) set up a general system of recognition of professional qualifications. The basic principle is that a host state may not refuse access to a profession if the person concerned is qualified to practise the same profession in his or her state of origin. Only if there are substantial differences in the levels of qualification can the host state impose compensation measures. The qualifications must be individually compared on the basis of all available evidence. In the case of differences in the duration of the education and training, the host state may demand professional experience. Where there are differences in the matters covered, an individualised test or an adaptation period may be imposed.

In 2001, the EFTA Surveillance Authority initiated conformity assessments of the Liechtenstein national measures implementing the *First General Systems Directive* (89/48/EEC) and the *Second General Systems Directive* (92/51/EEC). It appeared that the Directives were correctly implemented with regard to nearly 50 regulated professions in Liechtenstein. This was not so with regard to the professions of lawyer, patent lawyer, auditor and trustee.

In December 2004, the Authority sent a letter of formal notice concluding that the Liechtenstein legislative framework for these professions was in breach of the Directives.

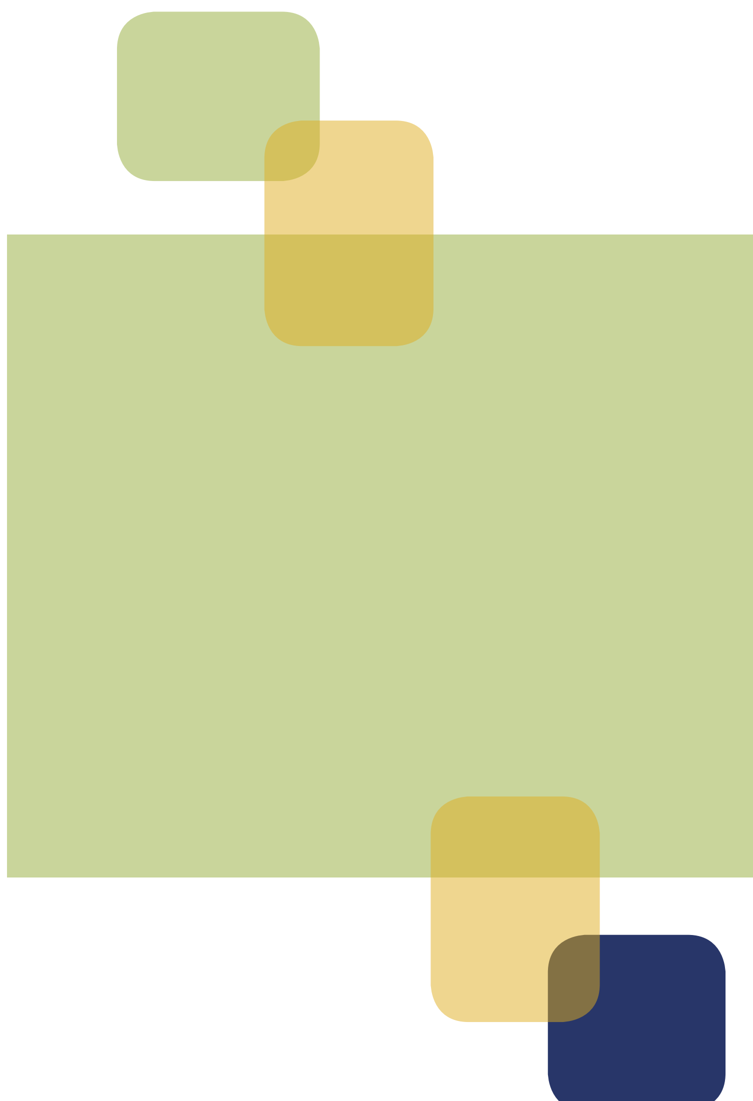
RECOGNITION OF QUALIFICATIONS AS LAWYER, PATENT LAWYER, AUDITOR OR TRUSTEE

For authorisation to pursue the professions of lawyer, patent lawyer, auditor or trustee in Liechtenstein, qualified professionals from other EEA States have to complete an aptitude test without any individual assessment comparing the matters covered by their education and training with those required by Liechtenstein. Although for auditors and trustees it is possible to request an individualised test, the Authority is still of the opinion that this is in breach of the Directives as an individual assessment is not automatic.

From lawyers, auditors and trustees, Liechtenstein demands professional experience without comparing the duration of their education and training with that required. In addition, the length and content of the compensation measures are not within the limits set. Although compensation measures may not be applied cumulatively, Liechtenstein demands both professional experience and imposes an aptitude test with regard to the same applicants.

RESIDENCE REQUIREMENTS

In order to pursue the professions of lawyer, patent lawyer, auditor or trustee in Liechtenstein, the persons concerned must reside in the EEA. By contrast, for admission to the national examinations, applicants must reside in Liechtenstein or pursue certain professional activities there. The Authority considers the latter to be in breach of Article 31 EEA providing for the right of EEA nationals to establish themselves anywhere in the EEA.



LIECHTENSTEIN BEFORE THE EFTA COURT DUE TO BANKERS' RESIDENCE REQUIREMENT

In 2004, the Authority brought a direct action against Liechtenstein before the EFTA Court. Article 25 of the Liechtenstein Banking Act states that at least one member of the management board and of the executive management of banks must be resident in Liechtenstein. The Authority considers this to be in breach of the freedom of establishment for which Article 31 EEA provides. This freedom is one of the fundamental principles of the EEA Agreement. Related residence obligations may only be justified in special circumstances. The EFTA Court has previously concluded, in its Advisory Opinions in cases E-3/98 *(Pucher)* and E-2/01 *(Rainford-Towning)*, both concerning Liechtenstein, that in order to fall within the scope of permitted derogations a residence requirement must be appropriate for securing the objective pursued and be proportionate thereto.

The Liechtenstein Government had previously argued that the residence requirement had no appreciable effect and was necessary for protection of the good functioning and reputation of the banking sector. However, the absence of appreciable effect is irrelevant where a rule constitutes indirect discrimination, as does this. Moreover, while the EFTA Court has held that good functioning and reputation of the banking sector might be a legitimate public policy objective, Liechtenstein has not proved that the residence requirement in Article 25 is a suitable and necessary measure to attain these objectives.

EFTA COURT'S OPINION ON TRANSFER OF UNDERTAKINGS

In 2004, the EFTA Court rendered an Advisory Opinion (E-2/04 *Rasmussen*) in a case concerning the position of employees in a transfer of undertakings within Directive 77/187/EEC. The Court recalled that the object of this Directive was limited to ensuring that employees' employment rights continued to be protected. Whether this has been achieved is a question of fact.

The EFTA Court acknowledged that organisation of employees by teams, as opposed to by formally defined departments, could make it more difficult to identify an entity within the meaning of the Directive. However, this could not render the Directive inapplicable. The Directive could apply where one section of an undertaking was transferred while another section, with which it was previously joined, was not. The Court also concluded that, when tangible assets were an important factor in the performance of the activity and the transferee had the right to use these to continue performing the transferred activities, it was immaterial whether ownership of the assets was transferred.

The EFTA Court rejected a claim that the Directive did not apply where a transfer agreement was signed with one undertaking but part of the transferred undertaking relocated to a second company within the same group. The absence of a direct contractual link between the transferor and the transferee could not preclude the application of the Directive if an overall assessment of the transaction indicated a transfer within the meaning of the Directive.

The EFTA Court concluded that, due to Article 3(1) of the Directive, transfer of an existing employment relationship occurs automatically when a transfer of an undertaking takes place. If an employee objects to this transfer his employment situation no longer falls within the Directive but is, rather, a matter for national law.

NORWEGIAN MONOPOLY ON GAMING MACHINES CONTRARY TO THE EEA AGREEMENT

In summer 2003, the Norwegian Parliament adopted legislation granting Norsk Tipping AS a monopoly on the operation of gaming machines offering money prizes. Norsk Tipping is a state-owned company which enjoys a monopoly on popular forms of gambling such as lotto and football betting. Gaming machines are currently run by private operators and charitable organisations under a licence system. Application of the new legislation would have meant that the majority of existing licences would have expired at the end of 2004 and would not have been renewed.

The EFTA Surveillance Authority received complaints from several private operators who alleged that the legislation infringed the freedom to provide services and the right of establishment, provided for in Articles 31 and 36 EEA. In April 2004, the Authority sent the Norwegian Government a letter of formal notice stating that it considered the legislation to contravene those Articles. In June, the Norwegian Government sent a detailed response where it sought to refute the arguments outlined by the Authority.

REASONED OPINION DELIVERED BY THE AUTHORITY

The Authority was not persuaded by the arguments of the Norwegian Government and delivered a reasoned opinion in October 2004. The Authority concluded that the legislation infringed Articles 31 and 36 EEA.

The Authority did not dispute that the aims of the Norwegian Government, to combat gambling addiction and problems associated with gambling, were laudable and could potentially justify restrictions on the fundamental freedoms ensured by the EEA Agreement. Such restrictions can, however, only be accepted if the State shows that they are non-discriminatory, justified by imperative requirements in the general interest, suitable for achieving their objective and do not go beyond what is necessary to attain it.

The Authority deemed the legislation to be motivated by financial considerations. Furthermore, the Authority was of the opinion that the Government had not shown that its gaming policy was consistent enough to justify a monopoly. In that respect the Authority, in particular, referred to the extensive advertising undertaken by Norsk Tipping. Finally, the Authority considered the legislation to be contrary to the principle of proportionality as the objectives pursued by the legislation could have been achieved by less restrictive means, *e.g.* by imposing stricter requirements on the private operators.

In November 2004, in response to the reasoned opinion, the Norwegian Government reiterated its disagreement with the Authority's conclusions.

PROCEEDINGS IN THE NATIONAL COURTS

In addition to submitting complaints to the Authority some of the affected operators also initiated proceedings before the Norwegian Courts. In October 2004, the Oslo City Court *"Oslo tingrett"* concluded that the disputed legislation infringed Articles 31 and 36 EEA. The view was based on arguments similar to those applied by the Authority. Another important development occurred at the end of November when the Court of Appeal *"Borgarting Lagmannsrett"* suspended the entry into force of the legislation until a final decision by the Court. Shortly after the judgment was rendered, the Norwegian Government announced that all licences for the private operators would be prolonged until 1 July 2005.

ICELANDIC LOTTERIES ACT IN BREACH OF THE FREEDOM TO PROVIDE SERVICES

In November 2004, the EFTA Surveillance Authority delivered a reasoned opinion to Iceland concluding that Article 2 of the Icelandic Act on Lotteries and Prize Draws infringed the EEA Agreement. The Article prohibits all Icelandic residents from trading in or selling tickets for foreign lotteries or other equivalent prize draws, and from undertaking any work related thereto.

Article 2, contrary to Article 36 EEA, inevitably places foreign lottery providers at a disadvantage when trying to market their services in Iceland. The provision also restricts the right of establishment, contrary to Article 31 EEA, excluding a company from another EEA State from offering its services through an agent or representative office in Iceland.

The Icelandic Government has not justified the provision and several times stated that it would be amended.

NORSK TIPPING: COMPETITION AND STATE AID ISSUES

In September 2004, acting on a complaint, the Authority's Competition and State Aid Directorate initiated an investigation of Norsk Tipping´s entry into the market for gaming machines offering money prizes in Norway, which had commenced shortly before. The inquiry of the competition issues focused on Norsk Tipping's practice of requiring outlets featuring its gaming machines to remove any competing machines from their premises. The Authority requested information from Norsk Tipping amongst others regarding the rationale behind such exclusivity provisions and the extent to which they had been employed. In its response, Norsk Tipping explained that the exclusivity provisions had been used in a limited number of contracts and would not be included in any new contracts after the end of 2004. In December, after the Norwegian Government decided to postpone the entry into force of the legal monopoly altogether, Norsk Tipping temporarily withdrew from the gaming machines market. Consequently, it appeared at the end of the year that the competition issues relating to Norsk Tipping's entry to this market had been resolved.

The Authority also received another complaint during 2004 in which it is alleged, amongst other things, that Norsk Tipping enjoys tax advantages. This complaint will be examined under the state aid rules of the EEA Agreement.

Equal treatment of men and women as regards pay
DISCRIMINATORY RULES ON SURVIVOR'S PENSION IN NORWAY

According to the Norwegian Public Service Pension Act, widows whose deceased spouses became members of the Public Service Pension Fund before 1 October 1976 are entitled to full survivors' pensions regardless of whether they have any other income. By contrast, the survivors' pensions of widowers whose spouses became members of the Public Service Pension Fund before the same date are subject to curtailment if the widowers have other income sources. This means that widowers are treated less favourably in comparison to widows in the same situation.

In 2001, the EFTA Surveillance Authority received a complaint against Norway concerning Section 34(3) of the Public Service Pension Act. In July 2004, the Authority sent a supplementary letter of formal notice to Norway.

THE RELEVANT EEA RULES

The Authority found that the difference in treatment between widows and widowers infringed Article 69(1) EEA. This provision provides that EFTA States shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work. The concept of "pay" has been interpreted as including survivors' pension, even though this is not, by definition, paid to the employee but to the employee's surviving spouse. Furthermore, the Authority found that the Norwegian rules were contrary to the *Equal Treatment in Occupational Social Security Schemes Directive*[1] which, in Article 5, provides that there shall be no discrimination on the basis of sex as regards the calculation of benefits.

The European Court of Justice has stated that the Directive has retroactive effect.

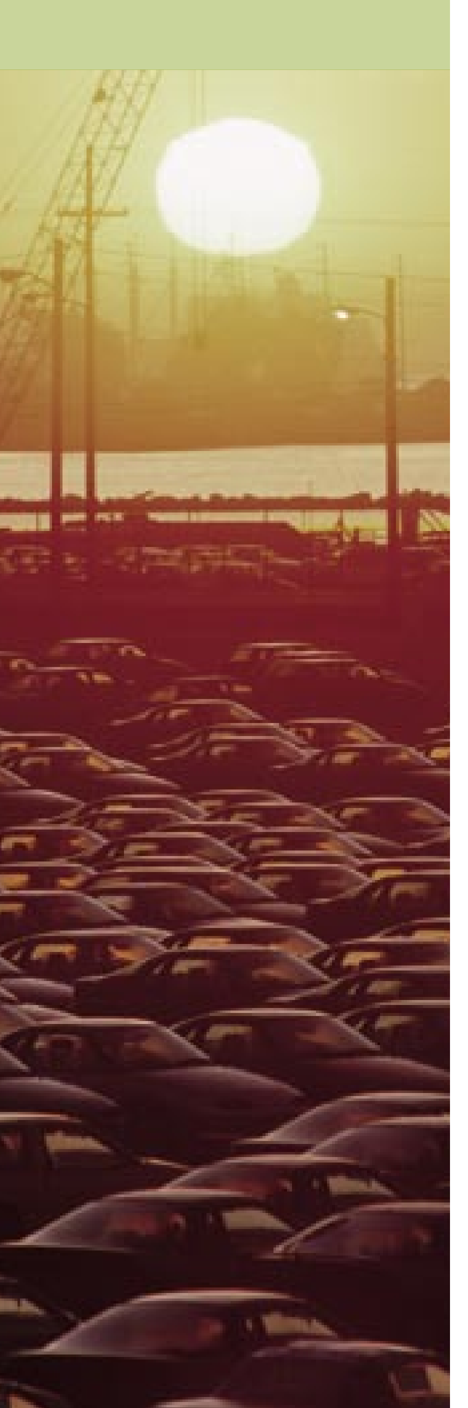
For the EFTA States this implies that equal treatment regarding survivors' pensions can be claimed retroactively. However, only in relation to the deceased spouse's periods of employment subsequent to the date of entry into force of the EEA Agreement.

In its reply in December 2004 to the supplementary letter of formal notice, Norway pledged to amend the Public Service Pension Act. The Authority intends to assess whether the future amendment fulfils the EEA requirements.

1. Directive 86/378/EEC as amended by Directive 96/97/EC.

CAR TAXATION AND FREE MOVEMENT OF GOODS, WORKERS AND SERVICES

The EFTA Surveillance Authority has, in recent years, received a number of complaints regarding car taxation. These relate, in particular, to the Norwegian rules concerning import of foreign registered vehicles and registration tax on imported second-hand vehicles.



TEMPORARY IMPORT AND FREE MOVEMENT OF WORKERS AND SERVICES

Persons considered to be permanently residing in Norway are generally not allowed to import and use foreign registered motor vehicles in Norway. However, under Norwegian Regulation No. 381/1991, temporary import and use may be allowed in certain situations, for short periods of time.

As a general rule, the tax system of an EFTA State is not directly covered by the EEA Agreement. The EFTA States are therefore free, in principle, to exercise their taxation power with respect to import of vehicles, provided they do so in compliance with basic principles of EEA law. To link tax liability to a vehicle's registration and to do so in light of the territoriality principle, of which the "normal residence" of the user of the car is one expression and the place of the principal use of the car is another, has been accepted by the European Court of Justice.

The Authority considers, however, that where the import of a car is temporary and in particular where it involves a company car which is imported by a Norwegian resident who is not the owner of the vehicle, the situation might be different. A company established in another EEA State may wish to assign employees who are considered to be permanent Norwegian residents to provide services in Norway and to provide these with a foreign registered company car. However, the Norwegian rules stipulating that this is possible only where a permit has been granted, may discourage such action. Such permits must be obtained separately on each occasion and are not granted automatically. Moreover, a company established in another EEA State which uses company cars registered in its state of establishment could be discouraged from employing persons considered to be permanently residing in Norway.

In such circumstances, the Authority concluded that the Norwegian rules constitute a restriction on the freedom to provide services and free movement of workers laid down in Articles 36 and 28 of the EEA Agreement. A letter of formal notice addressing this concern was sent to Norway in August 2004.

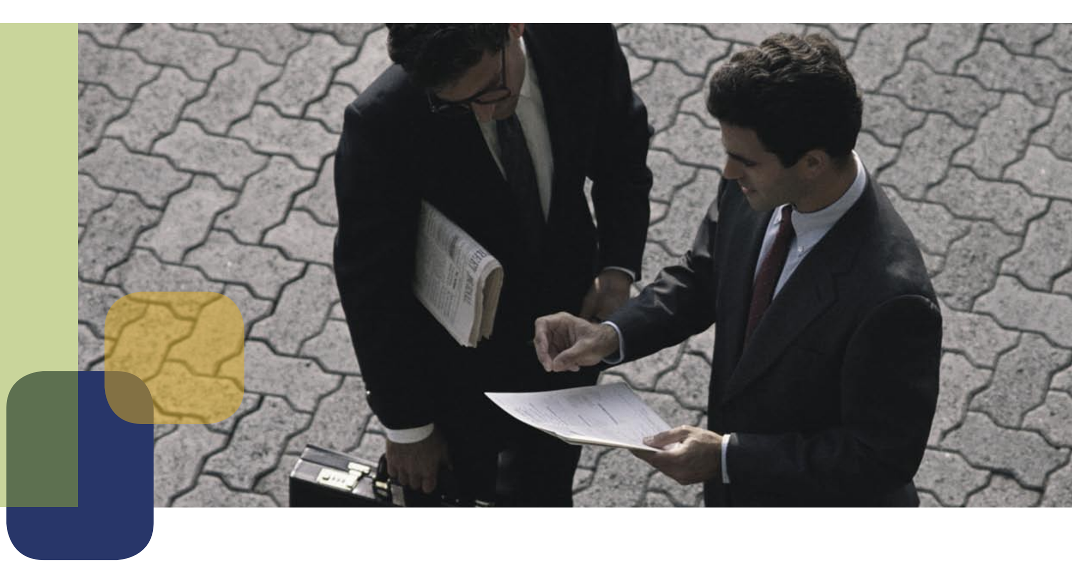
REGISTRATION TAX ON IMPORTED USED VEHICLES

Motor vehicles registered for the first time in the Norwegian motor vehicle registry are subject to a registration tax. Where used imported vehicles are registered, a deduction is made from the registration tax in accordance with a fixed depreciation scale based on the age of the vehicle.

The Authority considers that the percentages contained in the fixed depreciation scale do not reflect with sufficient precision the actual depreciation of vehicles. Furthermore, the Norwegian system of registration tax does not provide a right for the taxpayer to adduce evidence that the fixed scale is inadequate in determining the real value of the imported used vehicle. As the Norwegian system of registration tax is thus not capable of guaranteeing that the tax imposed on imported used vehicles is never higher than the residual tax incorporated in the value of similar vehicles already registered in Norway, the Authority considered the Norwegian system to be contrary to Article 14 EEA and has sent a letter of formal notice to Norway.

In both cases Norway maintains that national legislation is in compliance with the EEA rules. The Authority will continue to investigate the issues in 2005.

EFTA COURT REACTS TO DISCRIMINATORY TAX RULES IN NORWAY



In November 2004, the EFTA Court delivered judgment in Case E-1/04 *Fokus Bank ASA and the Norwegian State*, in which it addressed Norwegian tax provisions concerning taxation of dividends distributed by Norwegian companies. According to a system of imputation tax credit, dividends to shareholders resident in Norway were not subject to tax in the hands of the shareholder. Non-resident shareholders were on the other hand not granted such credit and thereby subject to a withholding tax of 15-25%.

The national proceedings concerned shareholders from Germany and the United Kingdom with holdings in Fokus Bank. In 1997-98, they had allegedly sold their shares to taxpayers resident in Norway immediately before Fokus Bank distributed dividends. Shortly afterwards, the non-resident shareholders exercised options to buy back the shares. By such a "parking" method the shares were in resident shareholders' hands when the dividends were distributed and, hence, no taxes were deducted. After a subsequent audit, the tax authorities did not accept the method and considered the foreign shareholders as the owners of the shares at the time of the distribution of dividends. Although Fokus Bank had distributed dividends to resident shareholders in good faith, the tax authorities considered the bank responsible for withholding the tax accrued on non-resident shareholders. Fokus Bank challenged that decision before national courts. It submitted, *inter alia*, that the differential treatment with respect to the grant of imputation tax credit was contrary to Article 40 EEA. The Frostating Court of Appeal thereafter requested the EFTA Court for an advisory opinion.

The EFTA Court held that the legislation at issue restricted the right to free movement of capital. This was because the differential treatment may have the effect of deterring non-resident shareholders from investing capital in Norwegian companies and of impeding Norwegian companies from raising capital outside Norway. Moreover, the differential treatment constituted discrimination. The Court rejected the argument of the authorities justifying the restriction. It found that resident and non-resident shareholders were in comparable situations with respect to the tax credit. Neither did the Court accept cohesion of the international tax system as a justification. It followed from the preparatory works to the tax act that an important purpose of not granting the tax credit to non-residents was to protect the Norwegian tax base. Finally, the Court held that possible tax advantages in the home state, by way of grant of a tax deduction corresponding to the tax paid in Norway, could not offset the differentiated treatment in Norway. In answering a second question, the Court held that dealing solely with the distributing company when assessing the withholding tax, without notifying the non-resident shareholders, constituted a separate discrimination under Article 40 EEA.

The case is the first before the EFTA Court about direct taxation and fundamental freedoms, a topic that, in recent years, has been subject to comprehensive consideration by the European Court of Justice. The judgment was followed by speculations in the Norwegian press about potential reassessment claims up to NOK 5 billion from non-resident shareholders. The Norwegian Government has, however, so far rejected responsibility for such claims, referring, among other factors, to a statute of limitations under national law.

OWNERSHIP RESTRICTIONS REGARDING STOCK EXCHANGES AND CLEARING HOUSES

In June 2004, the Authority delivered a reasoned opinion to Norway regarding ownership restrictions contained in its national legislation concerning stock exchanges, clearing houses and securities depositories. According to the Norwegian rules, no shareholder can, without an explicit exemption from the Ministry of Finance, own more than 20% of the shares in a clearing house, or 10% of the shares in a stock exchange or securities depository. The legislation, furthermore, contains limitations on voting rights. In the Authority's opinion, these provisions constituted an unjustified restriction on the free movement of capital.

The Authority received a reply from the Norwegian Government in September 2004, in which it was maintained that the provision did not conflict with EEA law. The main argument presented by Norway was that the provisions were justified as they are necessary in order to ensure the independence of providers of infrastructure services and the good functioning of the markets. The Authority will now consider whether to bring the matter before the EFTA Court.

DISCRIMINATORY PROVISIONS IN THE FIELD OF FINANCIAL SERVICES IN LIECHTENSTEIN

INVESTMENT LIMITATIONS FOR INSTITUTIONS PROVIDING OCCUPATIONAL BENEFITS

In Liechtenstein, institutions responsible for providing occupational benefits are subject to limitations on investments. Investments in other EEA States are limited compared to investments in equivalent objects seated or located in Liechtenstein (and Switzerland).

The Authority considers this regime liable to dissuade the mentioned institutions from investing their assets in other EEA States. Furthermore, companies in other EEA States might find it more difficult to raise capital from Liechtenstein institutions. The relevant provision, therefore, constitutes a restriction on the free movement of capital. It is also discrimination within the meaning of Article 40 EEA.

The Liechtenstein Government has pointed out that the competent Liechtenstein Authority is authorised to deviate from the mentioned investment rules. As demands for deviations are generously granted, it argues that the system does not constitute a restriction on capital movements.

However, the possibility to grant exemptions cannot, as such, justify a restrictive rule. In any event, the fact remains that the requirement of prior approval applies at a lower threshold to investments abroad than domestic investments, thus constituting differential treatment between domestic and cross-border investments. Consequently, even if the requirement of prior approval pursued a legitimate aim, it is set out in a discriminatory manner. The Authority, therefore, in its reasoned opinion delivered in December 2004, found the investment rules and limitations applicable to institutions providing occupational benefits, which are laid down by the Ordinance to the Act on Occupational Benefits, contrary to Article 40 EEA and to the Capital Movements Directive (88/361/EEC).

THE SAVING BONUS ACT

The Saving Bonus Act in Liechtenstein establishes a saving bonus scheme. According to this, individuals fulfilling certain criteria who follow a defined saving scheme for a specified period of time may receive a bonus from the Liechtenstein State. However, only Liechtenstein nationals residing in Liechtenstein are eligible to benefit from the system. A non-Liechtenstein EEA national who is resident in Liechtenstein is not entitled to participate in such a saving scheme and receive a bonus.

Furthermore, savings under the scheme must be deposited with a Liechtenstein financial institution. This rule makes it impossible for non-Liechtenstein financial institutions to provide this particular kind of saving product on the Liechtenstein market.

The Liechtenstein Government has not submitted any grounds for justification of the discriminatory system. Instead it has argued that the national provisions do not affect trade in the EEA to an appreciable extent, and that, in any case, the restrictive effects are too uncertain and indirect to hinder the exercise of fundamental freedoms.

Whether a national provision has restrictive effects is irrelevant where the rule is discriminatory. Moreover, it is settled case law, both of the EFTA Court and the European Court of Justice, that *any* restriction, however minor, of the basic EEA freedoms is prohibited. Consequently, in its reasoned opinion, delivered in November 2004, the Authority found the nationality requirement contrary to Articles 4, 28, 31 and 36 EEA.

Aviation security legislation
NEW TASKS FOR THE AUTHORITY

The attacks on 11 September 2001 demonstrated a need for improved consistency in international co-operation in the field of civil aviation security. All over the world people are exposed to the same threat. Preventive measures taken at one airport concern all and should not be left solely to the judgment of local or national authorities. As a consequence of this, the European Community has established a civil aviation security policy based on legal instruments to give legal force to already existing international rules and mechanisms in the area. The same civil aviation security rules are, therefore, now applied at all airports in EU Member States. During 2004, these rules were also taken into the EEA Agreement.

The *Aviation Security Framework Regulation* (2320/2002/EC) as amended (849/2004/EC), together with several implementing Regulations[1], establishes the appropriate security measures to be taken by the EEA States and economic operators to prevent acts of unlawful interference against civil aviation. In order to verify that each national security system functions according to this aim, the Framework Regulation also requires that the EEA States create an appropriate quality control system to monitor the effectiveness of the national security measures.

The Authority's work in the field of civil aviation security includes control of implementation and application of the relevant EEA law. To ensure that the rules are complied with, *Commission Regulation 1486/2003 regarding inspections in the field of civil aviation security* provides for Authority inspections in EFTA States and at EFTA airports. In this respect, the Authority and the European Commission will co-operate, exchange information, consult each other, and even participate in each others inspections. The intention is that inspectors from the Commission shall participate as observers during the Authority's inspections in the EFTA States. The Authority's inspectors shall participate as observers during the Commission's inspections in the EU Member States. In order to perform the tasks with which it has been entrusted in this field, the Authority started the recruitment process to engage specially trained inspectors in the field in December 2004.

1. *Regulation on common basic standards on aviation security* (622/2003/EC) as amended (68/2004/EC); *Regulation on quality control programmes* (1217/2003/EC); and *Regulation on security restricted areas* (1138/2004/EC).

MARITIME TRANSPORT
DEROGATIONS FROM EEA RULES PERMITTED

According to certain EEA acts, mainly governing safety, EEA States may, on certain conditions and often based on local circumstances, apply stricter or more moderate safety standards than those prescribed in EEA legislation. When EEA States wish to apply such derogations they are obliged to follow specific procedures. The Authority must be notified of the planned derogation and assess it on the basis of the requirements laid down in the relevant Act. The Authority submits its draft conclusions to a Committee consisting of representatives from the EFTA States and chaired by the Authority. The Committee then gives its opinion on the Authority's conclusions. If the Committee is in agreement with these conclusions, a final decision is taken by the Authority. If not, the Authority will submit its proposal to the Standing Committee of the EFTA States for a final decision on the matter.

In 2004, the Authority processed three such cases in the maritime sector. One case was a follow up from a previous notification from 2003 in which Iceland applied for additional derogations from the safety measures laid down in the *Safety on Passenger Ships Directive* (98/18/EC). The case was not finalised by the end of 2004. Two cases were initiated by Norway and concerned derogations from the *Registration on Passenger Ships Directive* (98/41/EC). That Directive provides that EEA States may exempt passenger ships, *inter alia*, from the obligation to communicate the number of persons on board to the shore-based services of the ship owner. The measures proposed by Norway in these cases fulfilled the safety requirements of the Directive which stipulate that the maritime service in question is of less than one hour and is operated in sheltered sea areas, near places of refuge and search-and-rescue facilities. The notifications were, therefore, accepted by the Authority and the Committee, and finalised by the end of 2004.

Competition

Activities in the field of competition

In both the fields of antitrust and of merger control major reforms took place in the EU in 2004. The Authority was actively involved in the incorporation into the EEA Agreement and into the Surveillance and Court Agreement of these reforms.

Due to Iceland's inability to take measures to fulfil constitutional requirements, the antitrust reform could not enter into force in the EEA in 2004. The Authority, therefore, had to rely on its old rules when enforcing the EEA antitrust provisions throughout the year. The main part of the merger control reform was in place in the EEA shortly after its entry into force in the EU. Other parts of the reform were not, however, yet in force at the end of the reporting period.

At the beginning of 2004, there were 21 competition cases pending with the Authority concerning the activities of market players in the EFTA States. Seven new cases were opened during the reporting period and a total of nine cases were closed. At the end of the reporting period there were still 19 antitrust cases pending, including some complex cases in which the Authority is carrying out in-depth examinations.

At the start of 2004, there were six pending cases involving potential application of State measures in contravention of the EEA competition rules. Four such cases were closed during the year and two new cases opened. Consequently, four cases were pending at the end of 2004.

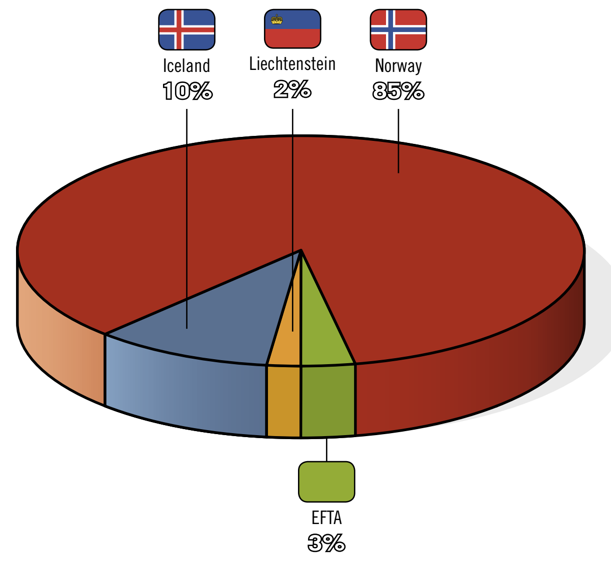
The Authority's activities in the field of competition in 2004 included two inspections at the premises of undertakings in Norway. One of these inspections was undertaken at the request of the European Commission.

Moreover, the Authority paid particular attention to the electronic communications and media sectors in the EFTA States since these sectors are subject to important developments of EEA interest.

In 2004, the Authority also launched a stocktaking exercise regarding liberal professions. The purpose of this exercise is to review the level of regulation of professional services in the EFTA States.

The Authority continued its close co-operation with the European Commission both in individual cases and on general competition policy issues. At the end of 2004, one mixed merger case and 31 mixed antitrust cases handled by the Commission were pending.

The Authority's Article 53/54 EEA cases 1994-2004



THE COMPETITION RULES OF THE EEA AGREEMENT

Application of the EEA competition rules contributes to achievement of the Single Market objectives of the EEA Agreement. In contrast to the Authority's activities in other areas which are directed to the EFTA States, the competition rules contained in Articles 53 to 60 EEA mainly concern individual economic operators.

The substantive competition rules of the EEA Agreement are virtually the same as those of the EC Treaty and include:

- a prohibition on agreements or practices that distort or restrict competition (Article 53 EEA);
- a prohibition on the abuse of a dominant position by market players (Article 54 EEA);
- the requirement that prior clearance be obtained for certain large mergers and other concentrations of undertakings (Article 57 EEA); and
- restrictions on certain state measures that may result in infringement of Articles 53 and/or 54 EEA (Article 59 EEA).

The Authority and the European Commission together apply the EEA competition rules to enforce a level playing field for the commercial activities of companies present in the European Economic Area. This territory currently covers 28 States with an Internal Market of some 455 million consumers. The power of the two Authorities to apply these rules to territories extending beyond the national boundaries of individual EEA States is vital to the combat of illegal behaviour by companies with increasingly geographically widespread economic activities.

The EEA Agreement requires that the Authority and the European Commission co-operate to develop and maintain uniform surveillance throughout the European Economic Area in the field of competition and to promote homogeneous implementation, application and interpretation of the EEA competition provisions.

The Authority enjoys the same enforcement powers as the European Commission. The procedural rules relevant to the application of the EEA competition rules by the Authority are set out in the Surveillance and Court Agreement.

The EEA Agreement is a "dynamic" agreement. Its Annexes and Protocols, in particular, are adapted over time to incorporate the Community competition acquis. The Surveillance and Court Agreement is, likewise, amended to incorporate new procedural rules.

Non-binding competition acts, such as guidelines and notices, are adopted by decision of the Authority for application to the EFTA pillar.

The Authority's website provides further information on the EEA legal framework in the field of competition at:
www.eftasurv.int/fieldsofwork/fieldcompetition

CO-OPERATION CASES

The Authority and the European Commission co-operate in the handling of individual cases which affect both EFTA States and EU Member States. Responsibility for handling such cases is divided between the Authority and the Commission in accordance with the attribution rules in Articles 56 and 57 EEA.

In order to ensure uniform application and enforcement of the EEA competition rules, the EEA Agreement emphasises the need for close and constant co-operation between the Authority and the European Commission. The detailed co-operation rules set out in the Protocols to the EEA Agreement entail an extensive exchange of information in individual cases, giving rights for the authority not handling the cases to comment and to take part in hearings and Advisory Committee meetings.

Apart from co-operation in individual cases, the Authority also takes part in multilateral expert meetings on competition at EU level, where general policy issues of EEA relevance are discussed. Further, the Authority has extensive co-operation with the European Commission with regard to sector inquiries (see page 47).

MIXED MERGER CASES IN 2004

In 2004, the Authority was involved in 14 merger cases handled by the European Commission:

- CVC Group / ANI Printing Inks
- Microsoft / Time Warner / Contentguard / JV
- Statoil / SDS
- Sonoco / Ahlstrom / JV
- Continental / Phoenix
- Hella / Behr / Plastic Omnium / JV
- GlaxoSmithKline / Sanofi-Synthelabo
- Saint-Gobain / Dahl International
- Sampo / IF Skadeförsäkring
- Sanofi-Synthelabo / Aventis
- Sony / BMG
- Telenor / Sonofon
- GE / Amersham
- Oracle / Peoplesoft

The new referral procedures introduced by the revised Merger Regulation were used for the first time in the *CVC Group / ANI Printing Inks* case. This was a referral to the Commission from Norway and from eight EU Member States after a reasoned submission from the parties. The Authority acted as the link between the Commission and the Norwegian Competition Authority.

MIXED ANTITRUST CASES IN 2004

The Authority was also involved in several cases handled by the European Commission in the field of antitrust in 2004.

As regards co-operation cases falling within the competence of the Commission, the Authority focuses on cases where EFTA aspects are of particular importance. One such case concerns Tomra Systems ASA, a company with its headquarters in Norway and the world's largest manufacturer of reverse vending machines. Following information gathered by the Authority in 2001 at Tomra's premises on behalf of the Commission, the Commission, in 2004, adopted a statement of objections against Tomra. The Commission took the preliminary view that Tomra has abused a dominant position in several EEA States including Norway. In particular, it criticised Tomra for entering into exclusive purchase agreements with customers of reverse vending machines and for the use of loyalty rebates. By virtue of the co-operation rules of the EEA Agreement, the Authority provided input to the Commission's case in 2004 and supported the issue of the statement of objections. The Authority will continue to co-operate closely with the Commission in 2005 regarding this case.

Of other cases in which the Authority were involved in 2004, the European Commission made public reference to the following:

- PO / The Football Association Premier League Limited
- FAPL+Sky
- Microsoft Windows 2000
- Choline Chloride
- Copper plumbing tubes
- BUMA, GEMA, PRS, SACEM (Santiago Agreements)
- Telenor Broadband Services / Canal+ / Canal Digital
- ALROSA + DBCAG + City and West East
- Coca-Cola
- Morgan Stanley Dean Witter / Visa International
- PO / Thread
- Europay (membership rules)
- Deutscher Fussball-Bund (DFB)

REVIEW OF ANTITRUST RULES

The modernisation package, consisting of *EC Council Regulation 1/2003, Commission Regulation 773/2004* (implementing Regulation) and six explanatory notices, entered into effect in the EU Member States in May 2004. This landmark reform substantially modifies the way the rules on competition laid down in Articles 81 and 82 EC are enforced. The implementation of the modernisation reform in the EEA was, however, delayed.

The necessary amendments to the EEA Agreement and the Surveillance and Court Agreement were agreed in 2004. They entail, amongst other things, decentralised application of Articles 53 and 54 EEA in the EFTA States, greater involvement of national courts in the enforcement of those provisions, and closer co-operation between the Authority and the national competition authorities of the EFTA States. A high level of co-operation between the Authority and the European Commission is maintained, ensuring homogeneous application of the rules in the whole EEA. Decentralised application of Articles 53 and 54 EEA by the EU Member States is not part of the reform.

STATE OF PLAY IN THE EEA AT THE END OF 2004

- In September 2004, the EEA Joint Committee decided to incorporate Regulation 1/2003 into the EEA Agreement. The EFTA States agreed on amendments to the Surveillance and Court Agreement to reflect the changes brought about by this Regulation.
- In December 2004, the EEA Joint Committee decided to incorporate the EC Implementing Regulation into the EEA Agreement. The EFTA States agreed on the necessary amendments to the Surveillance and Court Agreement in this respect.
- The incorporation of Regulation 1/2003 into the EEA Agreement can only become law after all the EFTA States have notified fulfilment of national constitutional requirements. As Iceland had not notified fulfilment of such requirements, the reform had not entered into force in the EEA by the end of 2004.
- The Authority intends to adopt related explanatory notices in the first half of 2005.

The reform had not entered into force in the EEA at the end of the reporting period. This was because national constitutional requirements had not been notified by Iceland. The absence of simultaneous entry into force of the modernisation package in the EU and in the EEA creates discrepancies in the powers and functions of the Authority and the Commission in the field of competition. This situation leads to legal uncertainty for market players.

In 2004, the Authority continued to give high priority to the preparation of the EEA legal framework required by the changes to the EC competition rules. Although the Authority is not formally involved in the adoption of EEA Joint Committee Decisions, it must be consulted on amendments to the Surveillance and Court Agreement. In practice, since the decisions adopted by the EEA Joint Committee and the amendments to the Surveillance and Court Agreement are closely interrelated, the Authority was regularly consulted on the drafting of all the legislative instruments incorporating the modernisation package into the EEA. The Authority contributed substantially to the rules governing the way in which Articles 53 and 54 EEA will be applied in the future.

In 2004, the Authority allocated a significant amount of its resources to drafting explanatory notices similar to those adopted by the European Commission. Some of the Commission's notices need to be substantially adapted to reflect the specificities of the EFTA Pillar. The Authority's notices will deal with the following aspects of the new regime:

- handling of complaints;
- co-operation within the EFTA network of competition authorities;
- informal guidance that can be sought from the EFTA Surveillance Authority;
- the "effect on trade" criterion;
- the application of Article 53(3) EEA; and
- co-operation between the Authority and the national courts of the EFTA States.

Finally, the Authority also examined some, more practical, implications of the modernisation reform. These include the establishment of new procedures for co-operation with the national competition authorities of the EFTA States.

REVIEW OF MERGER CONTROL RULES

The review of the EC merger control regime was finalised on the EU side in 2004 through the adoption of the new *revised Merger Regulation* (Council Regulation (EC) No 139/2004) and of the *Implementing Regulation* (European Commission Regulation (EC) No 802/2004).

With a view to secure simultaneous entry into force of the revised *Merger Regulation and Implementing Regulation* in the EEA, the Authority dedicated resources to the incorporation of these acts into the EEA Agreement. This work started in 2003 and continued in 2004. In addition to extensive consultations with the EFTA States on the changes to the Surveillance and Court Agreement, the Authority also took part in the discussions with the EFTA States and the European Commission on amending the EEA Agreement.

The main part of the *revised Merger Regulation* entered into force in the EEA in June 2004. The revised Merger Regulation, *inter alia*, clarifies the substantive test for challenging a concentration and reinforces the "one-stop shop" concept through streamlining the system for referral of cases (see box).

The incorporation of the remaining parts of the reform into the EEA Agreement was delayed, and the changes to the Surveillance and Court Agreement corresponding to the main part of the Merger Regulation had not yet entered into force at the end of 2004. As constitutional requirements had not been fulfilled in Norway and Iceland, the entry into force in the EFTA States of the remaining part of the revised Merger Regulation (inspections and post notification referrals) was also delayed. Work on the incorporation of the Implementing Regulation into the EEA Agreement was still ongoing at the end of the reporting period.

REFERRAL OF CASES

The incorporation of the revised *Merger Regulation* into the EEA Agreement has introduced a more streamlined system for referral of cases between the European Commission and the EFTA States. This ensures that the more appropriate authority examines a particular concentration:

- prior to notification of a concentration which does not have a community dimension, but which is capable of being reviewed in at least three EU Member States and one or more EFTA States, the parties can send a reasoned submission to the Commission asking that it examine the concentration. If none of the EEA States concerned objects, the Commission will have sole competence over such cases[1]; This procedure was used for the first time in the *CVC Group / ANI Printing Inks case*;

- prior to notification of a concentration with a Community dimension, the parties can send a reasoned submission asking that the concentration be examined in whole or in part by an EFTA State;

- after notification of a concentration without a Community dimension, an EFTA State can join a request made by one or more EU Member States asking the Commission to examine the concentration (not yet in force at the end of 2004); and

- after notification of a concentration with a Community dimension, the Commission can refer a notified concentration, in whole or in part, to an EFTA State in which the concentration threatens to significantly affect competition in a market within that EFTA State.

A concentration can also be referred from one or more EFTA States to the Authority pursuant to the Surveillance and Court Agreement.

1. If an EU Member State objects, all EEA States will retain their competence to deal with the case. If only an EFTA State objects, the Commission will still acquire sole competence of the case within the EU but the EFTA States will retain their competence.

INFORMATION GATHERING POWERS

The gathering of relevant information normally forms a large part of an antitrust investigation. The Authority has extensive powers to perform this task. In most cases the Authority gathers information by way of written requests. Where necessary, the Authority can also undertake on-the-spot inspections of companies' premises to examine books and business records.

GATHERING OF INFORMATION BY WRITTEN REQUESTS

In carrying out its duties under the EEA competition rules the Authority may obtain all necessary information from the Government and competent authorities of the EFTA States and from undertakings and association of undertakings.

Information can be requested from undertakings suspected of an infringement and from third party undertakings, for instance customers or competitors of undertakings suspected of an infringement. All undertakings and associations of undertakings in the European Economic Area are obliged to provide the information requested by the Authority. Fines can be imposed if information is not supplied, or is incorrect or misleading.

In several of the cases investigated in 2004, information was obtained from undertakings by way of information requests. Information requests might sometimes be viewed as an unnecessary administrative burden for an undertaking not under suspicion of an infringement. However, the Authority's investigation can be critically dependant on information provided by such undertakings, in particular when detailed market investigations must be carried out. Generally, it should be in the interest of undertakings that fair and undistorted competition be maintained in the markets in which they operate. They should, therefore, have an interest in providing the information requested by the Authority.

In some instances the Authority may decide to collect information on a voluntary basis. This was the case in the stocktaking exercise concerning the liberal professions in the EFTA States in 2004 (See page 48).

TWO INSPECTIONS CARRIED OUT IN 2004

The Authority may carry out necessary inspection of undertakings and associations of undertakings located in the EFTA States. More often than not inspections are undertaken at the premises of undertakings suspected of having infringed the EEA competition rules. Nevertheless, it must be underlined that inspections are a preliminary step in antitrust investigations. They do not mean that the company inspected is guilty of anti-competitive behaviour, nor do they prejudge the outcome of the investigation itself.

In May 2004, the Authority, at the request of the European Commission, carried out an unannounced inspection at the premises of Norske Skogindustrier ASA in Norway.[1] The Commission undertook simultaneous inspections in EU Member States. The inspections were carried out with a view to ascertaining whether there was evidence of cartel agreements and related illegal practices amongst EEA producers of publication paper and amongst acquirers of recovered paper. The information obtained by the Authority in Norway was transferred to the Commission for further examination.

In June 2004, the Authority inspected the premises of Norway Post, the incumbent postal operator in Norway.[2] This inspection was carried out in the context of two cases under investigation by the Authority for some time. In the first case, the Authority is examining agreements which Norway Post has entered into with certain retail groups for the establishment of Post in Shop (Post i Butikk). At issue are clauses that might obstruct other suppliers in the market for parcels sent by mail-order and e-commerce companies to private consumers from developing their own networks of delivery outlets. In the second case, which concerns the same market, the Authority is assessing whether Norway Post has granted unlawful rebates to its customers. Both cases remained under examination at the end of the reporting period.

1. See press release PR(04)14: Statement on EFTA Surveillance Authority inspection in Norway.
2. See press release PR(04)18: Statement on EFTA Surveillance Authority inspection in Norway.

ELECTRONIC COMMUNICATIONS AND MEDIA

REGULATORY FRAMEWORK RELIES INCREASINGLY ON EEA COMPETITION LAW

From 2004, the EEA electronic communications sector has been marked by increased application of EEA competition law. The sector will be regulated by both the modernised EEA competition rules and the new sector-specific Internal Market rules. This convergence justifies the continued focus the EFTA Surveillance Authority placed on this sector in 2004.

The new regulatory framework for electronic communications services and networks entered into force in the EEA on 1 November 2004. Although work on the market reviews to be carried out by the national regulatory authorities (NRA) is under way in Iceland and Norway, the Authority will receive the first notifications of draft national regulatory measures in 2005. During 2004, the Authority has been preparing to handle those notifications.

The correct definition of relevant markets and identification of market dominance have been at the core of the Authority's antitrust work in the electronic communications sector in 2004. For the first time, the new sector-specific rules are also based on principles of EEA competition law. Electronic communications markets are to be defined along the lines of a competition law market analysis. Regulation is only imposed on economic operators with significant market power, which is identical to market dominance under competition law. Under the new sector-specific rules, the Authority's eCOM Task Force has a duty to review draft national measures from NRAs in the EFTA States as to the correctness of their definition of relevant product and services markets and findings of significant market power in line with the EEA competition rules.

THE eCOM TASK FORCE

The new regulatory framework has created new duties for the Authority. To meet these, the Authority set up an eCOM Task Force. Its Internal Market Affairs Directorate and Competition and State Aid Directorate have joint responsibility for the Task Force. The eCOM Task Force is charged with the processing of notifications of draft national regulatory measures by the EFTA States NRAs.

In 2004, the Authority's eCOM Task Force conducted a number of pre-notification meetings with the Norwegian and the Icelandic NRAs. Pre-notification meetings have proven a very useful forum to discuss procedural and methodological issues, as well as issues of substance related to draft national measures. The Authority looks forward to continuing this valuable informal exchange with the NRAs.

ESTABLISHMENT OF THE EFTA COMMUNICATIONS COMMITTEE

In June 2004, the Authority convened the first meeting of the *EFTA Communications Committee Assisting the EFTA Surveillance Authority*, an advisory committee established pursuant to the new regulatory framework. The Committee's primary role is to deliver opinions on proposed measures put forward by the Authority. These include recommendations and guidelines and any negative or "veto" decisions concerning draft measures notified by NRAs in the EFTA States. The European Commission and representatives of the EU Member States are invited to participate as observers in the meetings of the Committee.

ADOPTION OF RECOMMENDATIONS AND GUIDELINES BY THE AUTHORITY

On 14 July 2004, following consultation with the general public and the national authorities in the EFTA States, the Authority adopted several soft law measures. The measures adopted consist of a *Recommendation on relevant product and services markets susceptible to ex ante regulation, Guidelines on market analysis and the assessment of significant market power and a Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive.* The Recommendation on Article 7 procedural aspects was adopted after favourable consultation of the EFTA Communications Committee. Thus the legal framework for the implementation of the new sectoral rules has been completed.

THE eCOM ONLINE NOTIFICATION REGISTRY

The Authority has created an eCOM Online Notification Registry to facilitate the administration of the notification procedure under the Framework

TRANSPOSITION OF NEW FRAMEWORK – INFRINGEMENT PROCEDURE INITIATED AGAINST LIECHTENSTEIN

Iceland and Norway have notified the Authority of full implementation of the new regulatory framework. In December 2004, the Authority initiated infringement proceedings against Liechtenstein for that State's failure to implement the new framework in a timely manner. The Authority continues to monitor the application of the new rules in the EFTA States and the prompt discharge of obligations incumbent on them, such as the initial market reviews to be carried out.

Directive and to help ensure transparency and the exchange of information. The Registry, which contains all public documents and procedural information relating to draft regulatory measures notified by NRAs in the EFTA States, is accessible by the general public through the Authority's website.

ACTIVE CO-OPERATION WITH EEA AUTHORITIES

The ongoing co-operation between the Authority and national competition and national regulatory authorities in the EFTA States and the European Commission has increased the Authority's knowledge of the markets. Examples of this co-operation are the parallel cases dealing with international mobile roaming rates applied in Norway (co-ordinated investigations by the Norwegian post and telecom regulator and the Authority). The Authority has examined inter-operator prices that Telenor and NetCom apply to foreign mobile operators. Following the introduction of new tariffs in June 2004, the Authority also reviewed the prices charged to Norwegian customers. The investigation is ongoing. Contact is also maintained with all other regulators, including the Commission.

In order to ensure homogeneity throughout the EEA, the eCOM Task Force also co-operates with the European Commission and participates in the work of the Communications Committee and the European Regulators Group.

MEDIA POSES IMPORTANT QUESTIONS

In 2004, the Authority continued to look into the broadcasting sector in Norway. A complaint claiming anti-competitive effects of the envisaged digital terrestrial television (DTT) licence in Norway raised issues relating to the relevant market concerning different media distribution platforms such as terrestrial, satellite and cable television. The complaint was filed in March 2004 and is being investigated, although the DTT licence was not awarded in 2004. The competitive effects of a new exclusive agreement for satellite distribution of TV2 by Canal Digital AS in Norway remained under the Authority's scrutiny in 2004.

The Authority's latest sector inquiry deals with availability of content services to new media platforms. In 2004, the Authority sent two rounds of extensive questionnaires to 21 companies – mobile operators, broadcasters, content aggregators and sports associations in Iceland, Liechtenstein and Norway. The goal of the inquiry is to identify actual and potential obstacles to the competitive provision of sports content services by new media such as third generation mobile phones. Exclusivity and bundling of rights that lead to market foreclosure are among the major obstacles to competition that are presently being investigated by the Authority.

SECTOR INQUIRIES IN THE EEA

The modernised EEA competition rules require competition enforcement agencies, such as the Authority, to adopt a pro-active stance. Sector inquiries serve as a tool to initiate market investigations even in the absence of complaints and glaring individual infringements of the EEA competition rules.

In March 2004, the Authority embarked on a new sector inquiry which probes the competitive provision of sports content to third generation mobile phones. This is the fourth sector inquiry launched by the Authority, and follows the investigations opened in 1999 into *leased lines* (closed in 2003), *mobile roaming* (closed in 2004) and *unbundling of the local loop* (still open for monitoring purposes). All the sector inquiries conducted by the Authority have been carried out in parallel with the European Commission.

The use of sector inquiries enables comparative information to be gathered across industry sectors for all the EFTA States, or the entire EEA if carried out concurrently with the European Commission. The objective is two-fold:

1. to understand market dynamics and characteristics, in particular for new and emerging markets; and

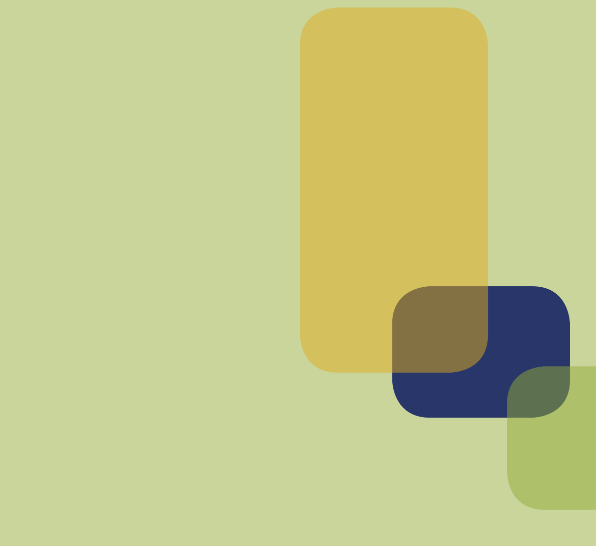
2. to identify any actual and potential competition infringements.

The findings of a sector inquiry are usually announced at a public hearing with the participation of the national authorities of the EEA States and the European Commission, as well as interested economic operators. Non-confidential final reports may be published by the Authority. A sector inquiry may also result in individual investigations into suspected anti-competitive practices by individual companies.

For example, in 2004, on the basis of information gathered in the leased lines sector inquiry, the Authority examined potential competition issues relating to the ownership and operation of a new submarine cable (FarIce) connecting Iceland, the Faeroe Islands and Scotland. The cable is jointly owned by all the major telecoms operators in Iceland and the Faeroe Islands. The Authority seeks, among other things, to ensure that access to the cable is not limited to the detriment of competing service providers and consumers in Iceland. The examination will continue in 2005.

1. Further information on the eCOM Task Force and its tasks is available at www.eftasurv.int/fieldsofwork/fieldservices/telecoms/ecom
2. Measures available at: www.eftasurv.int/fieldsofwork/fieldservices/telecoms/ecom/dbaFile5538.html
3. An individual case Mobile Roaming Norway was opened in 2003 as a result of the international mobile roaming sector inquiry.
4. More details can be found at www.eftasurv.int/information/pressreleases/2004pr/dbaFile4920.html

LIBERAL PROFESSIONS



In 2004, the Authority launched a stocktaking exercise concerning the competitive conditions of the liberal professions in the EFTA States. The professions investigated were lawyers, accountants, pharmacists, architects and engineers.

Liberal professions are occupations that require special training in the liberal arts or sciences. The competition rules of the EEA Agreement apply to members of the liberal professions in the same manner as any other economic activity. However, the liberal professions tend to be characterised by legislation or self-regulation by professional bodies that may restrict competition. The types of competition problems most commonly encountered in connection with regulation of liberal professions are restrictions on entry into the profession, price regulation, restrictions on advertising and similar business activity, and restrictions on the way in which the business may be organised.

Regulation of this kind is often imposed in order to protect the public. The rationale of this is that, due to the specialised nature of professional services, the buyers of these services are rarely in a position to assess their quality. Public interest in maintaining an adequate quality standard for the provision of particular services can also be a consideration, as well as the fact that a professional's work may affect parties other than the buyer of the services.

While regulation may be justified to some extent by such considerations, it may in other instances contravene the competition provisions of the EEA Agreement. For example, a decision by a professional association that fixes prices for the services of its members may often restrict competition and contravene Article 53 (1) EEA. Further, Article 3 (2) EEA requires the EFTA States to abstain from any measure which could jeopardise the attainment of the objectives of the EEA Agreement, one of which is undistorted competition, cf. Article 1 (2) (e) EEA.

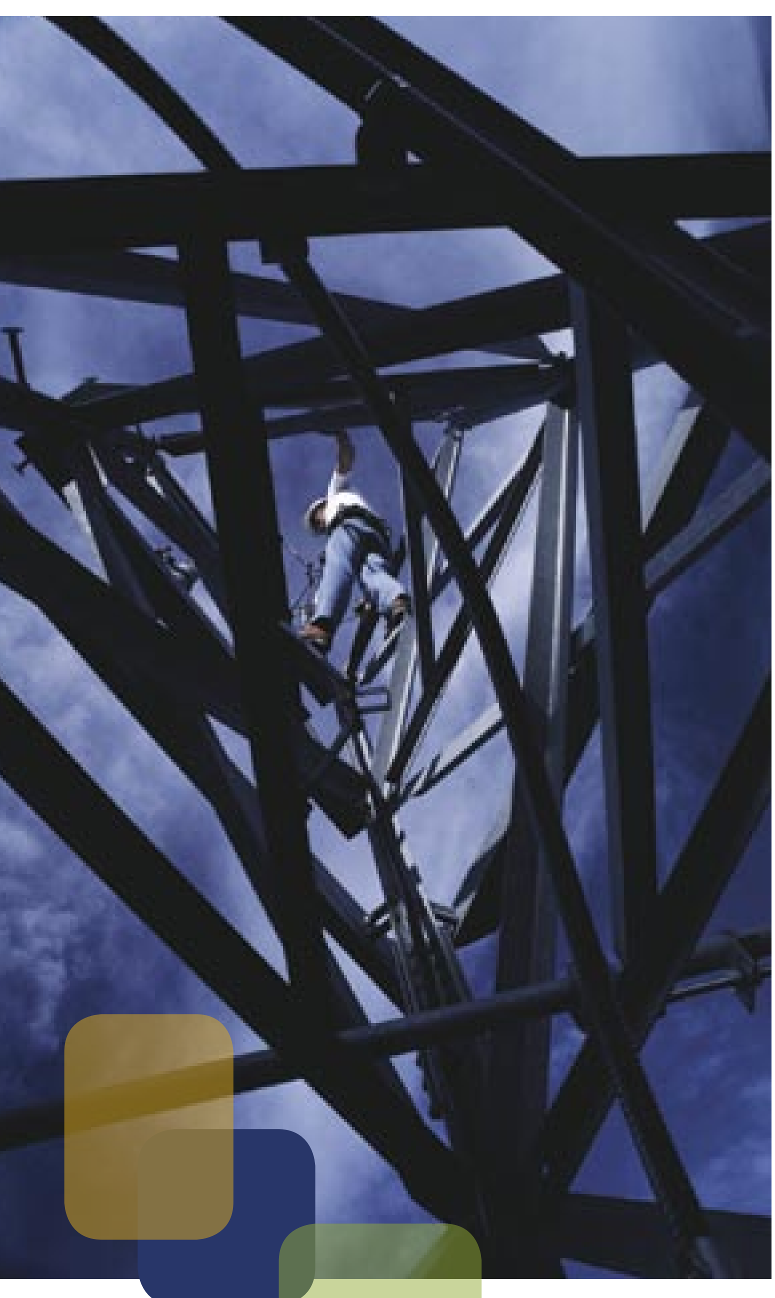
The European Commission has recently conducted a review of the level of regulation of professional services in the EU Member States. In April 2004, the Authority launched a similar stocktaking exercise. It sent questionnaires to professional associations in each EFTA State. The questionnaire included questions relating to the nature of regulation of the relevant profession, entry restrictions and qualification requirements, restrictions on conduct and organisation, and the scope of reserved activities.

In order to ensure a homogeneous approach to professional services in the EEA, and to make it possible to compare the situation in EFTA States to that of the EU Member States, the Authority decided to conduct its fact-finding exercise using a similar methodology to the Commission. For that purpose, the Commission permitted the Authority to use the questionnaire employed in its analysis of professional services in the ten new EU Member States.

On the basis of the replies to the questionnaire, the Authority intends to analyse the level of regulation in each profession within the different EFTA States. The Authority's findings will be published in a report during the course of 2005.

STEEL TUBES COURT CASE

In July 2004, the European Court of First Instance delivered judgment in the "steel tubes case", in which the EFTA Surveillance Authority had intervened and submitted observations regarding the relationship between the competition rules in the EEA Agreement and in the EC Treaty.



THE INVESTIGATION BY THE AUTHORITY AND THE EUROPEAN COMMISSION

The origin of the case was an investigation by the Authority under the EEA Agreement of possible anti-competitive practices in the Norwegian offshore oil industry. In 1994, as part of that investigation, the Authority requested the European Commission to carry out inspections in the EU Member States where the companies' concerned were located. The Commission's inspections were founded on two legal bases: first, Article 53 EEA and the Authority's decision requesting that the inspections be carried out; and, second, Article 81 of the EC Treaty and the Commission's powers to enforce that provision.

The Authority's investigation subsequently revealed that the practices at issue had a significant effect on trade between EU Member States, such that the European Commission was competent under the EEA Agreement to handle the case. The Authority therefore transferred its case to the Commission. In 1999, the Commission issued a decision imposing fines on several steel tubes producers for infringement of Article 81 of the EC Treaty.

THE JUDGMENT OF THE EUROPEAN COURT OF FIRST INSTANCE

The steel tube producers challenged the decision and argued before the European Court of First Instance that the European Commission had infringed the EEA Agreement when it extended its investigation to Article 81 of the EC Treaty at the time of the inspections. The Court, however, ruled in favour of the Commission, supported by the EFTA Surveillance Authority on this point.

The European Court of First Instance noted that the EEA Agreement did not deprive the European Commission of its competence to apply Article 81 of the EC Treaty to an anti-competitive agreement.

The EEA Agreement establishes a "one-stop-shop" for the application of the competition rules applicable as from the investigation stage. Thus each of the two authorities, the European Commission and the Authority, is under an obligation to cease handling the matter and to transfer its file to the other authority if it determines that the other authority is the competent authority. The European Court of First Instance found, however, that the "one-stop" concept did not apply from the start of the investigation if it is not possible at that stage to determine which authority is competent.

The European Court of First Instance concluded, moreover, that the European Commission was competent, at all times, to conduct inquiries based on Article 81 of the EC Treaty concerning the anti-competitive agreements ultimately penalised in the contested decision. Thus, the fact that the Authority had already launched an investigation based on Article 53 EEA concerning possible practices of a similar nature in the Norwegian market did not prevent the Commission from acting under Article 81 of the EC Treaty.

1. Joined cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. et al* v. *Commission of the European Communities*, not yet reported, paragraphs 459 to 493.

State aid

State aid rules

The role of the EFTA Surveillance Authority is to verify whether state aid measures envisaged or taken by the EFTA States are in compliance with the EEA Agreement. This role is similar to the role that the European Commission plays in relation to the EU Member States.

The state aid provisions laid down in the EEA Agreement and in the Surveillance and Court Agreement are described in further detail in the box on page 51. In addition to these rules, the Authority issues a series of Guidelines on how it interprets and applies the state aid rules. These Guidelines are mentioned briefly in the box on page 52. A full presentation of these can be found on the Authority's website.[1]

1. www.eftasurv.int/fieldsofwork/fieldstateaid

STATE AID PROVISIONS

Article 61(1) EEA lays down the general principle that state aid is prohibited, save as otherwise provided in the EEA Agreement. Public support measures are caught by the general prohibition of state aid only if the conditions laid down in Article 61(1) EEA are fulfilled. The conditions are that:

- the support must be granted by the State or through State resources in any form whatsoever;
- it must favour certain undertakings or the production of certain goods (the so-called "selectivity" criterion);
- it must distort or threaten to distort competition; and
- it must affect trade between the Contracting Parties.

The EEA Agreement contains several possibilities for exemption from the general prohibition on state aid, in particular in Article 61(2) and (3). The provision which plays the greatest role in the Authority's state aid practice is Article 61 (3) (c) of the EEA Agreement. This concerns "aid to facilitate the development of certain economic activities or of certain economic areas". This Article covers not only sectoral and regional aid measures, but also measures which follow horizontal objectives (i.e., research and development, environment, etc.). The EEA Agreement contains further exemption possibilities concerning compensation for the discharge of a public service obligation where these concern undertakings entrusted with operation of the services of general economic interest referred to in Article 59 (2) EEA and, specifically in the field of transport, pursuant to Article 49 EEA.

The rules on state aid procedures are laid down in Protocol 3 to the Surveillance and Court Agreement. EFTA States are under an obligation to notify any plans to grant new aid to the Authority. The EFTA State concerned must not put the aid into effect until the Authority has approved it. Incompatible aid that has been paid out in breach of the notification obligation shall be recovered from the aid beneficiary.

According to Article 62 EEA, the task of ensuring compliance with Article 61 EEA is divided between the Authority and the European Commission. The Authority is competent when aid is granted by an EFTA State. The Commission is competent if aid is granted by an EU Member State. In fulfilling its tasks, the Authority is entrusted with powers and functions similar to those of the Commission.

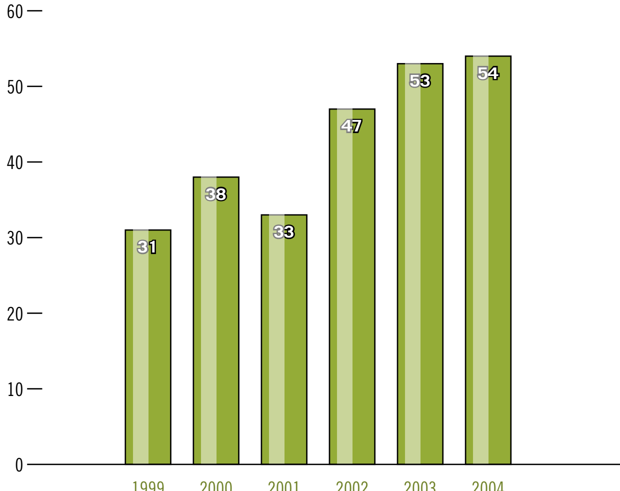
The relevant provisions of the EEA Agreement and the Surveillance and Court Agreement governing state aid can be found in the state aid section of the Authority's website: www.eftasurv.int/fieldsofwork/fieldstateaid/legaltexts

INCREASING CASE LOAD

The last years have seen an increase in the number of state aid cases. The high inflow of new cases continued in 2004.

29 new cases were opened and 28 cases were closed. Of the 29 new cases registered, 11 were notifications of new aid, eight were complaints, five were own initiative cases, four were opening of formal investigation procedures and one was adoption of appropriate measures. 54 cases were pending at the end of the year. These figures do not include the adoption of new State Aid Guidelines (see figure). Copies of the College Decisions described below (as well as other decisions) can be found on the Authority's website (www.eftasurv.int/fieldsofwork/fieldstateaid/stateaidregistry).

Figure > State aid case load increasing: Number of state aid cases pending at the end of the year



STATE AID GUIDELINES

In January 1994, the Authority adopted a consolidated document on Procedural and Substantive Rules in the Field of State Aid, also called the State Aid Guidelines.[1] The purpose of the guidelines is to provide national administrations and enterprises with information on how the Authority interprets and applies the provisions of the EEA Agreement governing state aid. They also ensure uniform implementation, application and interpretation of Articles 61 and 62 EEA.

The guidelines have since been amended or supplemented 49 times to accord with the frameworks and guidelines issued by the European Commission in the field of state aid. The Guidelines contain, inter alia, rules concerning horizontal aid (for example, state aid and business taxation, aid for research and development, aid for environmental protection, and state guarantees), rules on aid to public enterprises, rules on sectoral aid and rules on regional aid.

In 2004, the State Aid Guidelines were amended nine times. The first amendment concerned a new communication on the manner in which the Authority deals with professional secrecy in state aid decisions (Chapter 9C). In the field of regional aid, the multisectoral framework on regional aid for large investment projects (Chapter 26A) was amended by introducing new rules for the synthetic fibres industry and the motor vehicles sector, while the old multisectoral framework (Chapter 26) was deleted. The Authority further adopted new provisions on state aid to shipbuilding (Chapter 24B), to maritime transport (Chapter 24A) and to public service broadcasting (Chapter 24C). Finally, new provisions on aid for rescue and restructuring firms in difficulty have been adopted (Chapter 16).

In July 2004, the Authority adopted new detailed procedural provisions which were addressed to the EFTA States. The Authority's decision introduces new forms for notifications and annual reports by the EFTA States. It also sets out provisions for the calculation of time limits in state aid procedures and of the interest rate for the recovery of unlawful aid. Due to these new provisions, various procedural chapters of the Guidelines became obsolete and were therefore repealed.

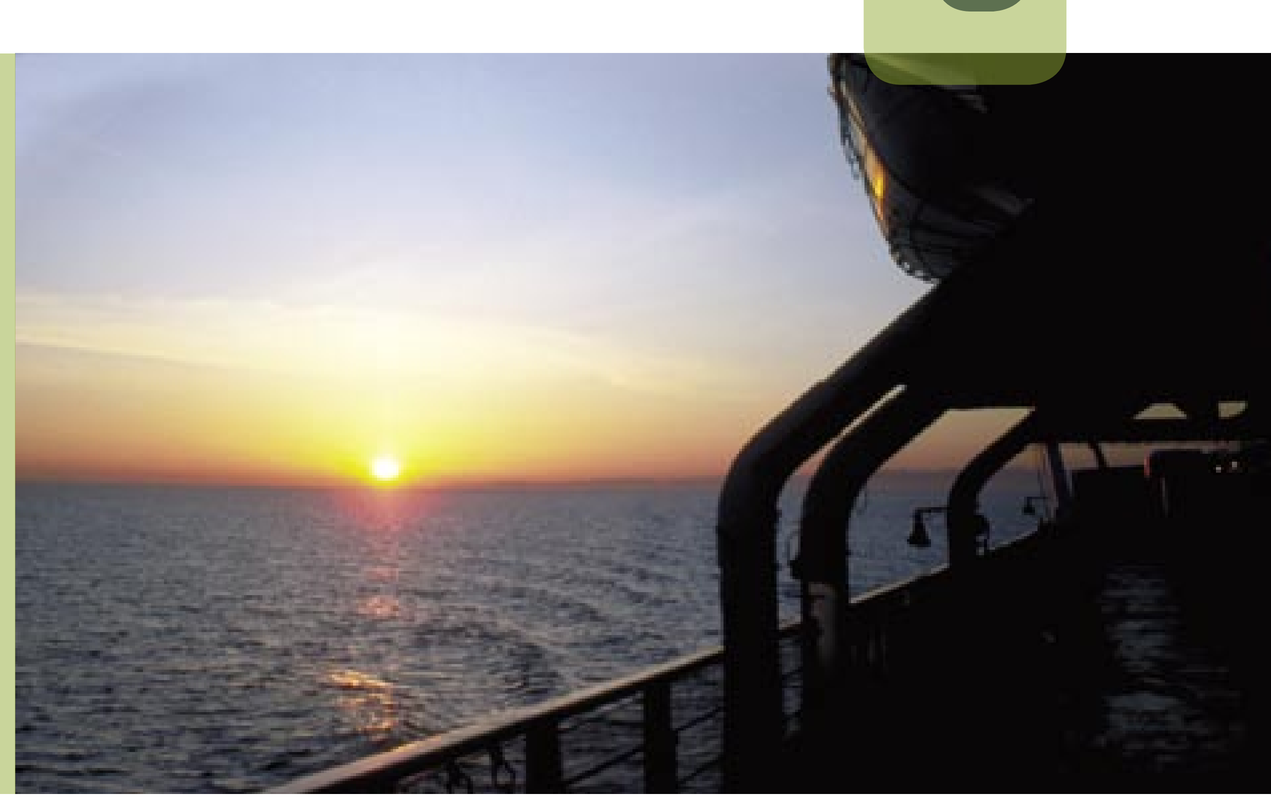
1. The State Aid Guidelines are published on the website of the Authority: www.eftasurv.int/fieldsofwork/fieldstateaid/guidelines

THE "HURTIGRUTEN" CONTRACTS

In 2004, the Authority initiated a formal investigation procedure with regard to Norway's intention to prolong existing contracts (the so-called "Hurtigruten" contracts) with operators of maritime transport services along the Norwegian coast. As the Norwegian authorities subsequently withdrew the notification, the case was closed.

In 2004, maritime transport services on the coastal route between Bergen and Kirkenes were operated by the two maritime companies *Ofotens og Vesteraalens Dampskibsselskab ASA* and *Troms Fylkes Dampskibsselskap ASA* under an existing contract with the Norwegian State. The contract, which was approved by the Authority in 2001, provided for a compensation of the public service function of these companies. It was set to expire on 31 December 2004. A new contract should only be awarded after an open, transparent and non-discriminatory procedure for the provision of maritime transport services. However, as the Norwegian authorities were not certain whether a new operator chosen by this award procedure would be able to take over the services on 1 January 2005, they notified the Authority in April 2004 of Norway's intention to continue the existing contract for up to two years.

The Authority had doubts as to the compatibility of the contract extension and the public service compensation with the EEA Agreement. It could not ascertain whether the compensation did not involve any overcompensation with regard to a real public service need. The Authority opened a formal investigation procedure in August 2004. However, as the tender procedure in September 2004 resulted in one offer by the incumbent operators with whom new contract negotiations were to start, the Norwegian authorities did not consider a prolongation of the existing contract necessary. They therefore withdrew the notification in question. In October 2004, the Authority consequently closed its investigation of the notification.



CONTRIBUTIONS TO THE SOCIAL SECURITY SYSTEM IN NORWAY

A formal investigation was opened regarding an aid scheme notified by Norway. This scheme foresees the application of reduced rates for social security contributions to certain economic sectors considered not to be affected by intra-EEA trade.

In April 2004, the Norwegian authorities notified the Authority of their intention, from January 2005, to apply regionally differentiated rates of social security contributions to certain economic sectors in specific geographical zones in Norway. The reduced rates proposed by Norway corresponded to those applicable for the same geographical areas until the end of 2003. In a prior decision, the Authority had considered these rates to be incompatible aid, although in November 2003 it approved a gradual phasing out of the differentiated tax rates in the course of a three year period.

The notification submitted by Norway covered more than 200 specified economic sectors according to the standard industrial classification (NACE). These sectors were considered not to be exposed to intra-EEA trade. For this reason, the Norwegian authorities considered that one of the cumulative conditions for a measure to constitute state aid within the meaning of Article 61(1) EEA, *i.e.* the effect on trade, was not fulfilled.

However, the Authority considered that the method used by the Norwegian authorities to identify sectors does not ensure compliance with the jurisprudence on Article 61 (1) EEA. Furthermore, in line with its previous decision of November 2003 referred to above, the Authority had doubts about the compatibility of the proposed scheme with the rules of the EEA Agreement. Consequently, in October 2004, the Authority decided to open a formal investigation procedure.

When the Authority's decision to initiate a formal investigation is published in the Official Journal of the European Union and the EEA Supplement thereto, interested parties are invited to submit their comments within one month of publication. Publication is expected to take place in the first quarter of 2005.

EXEMPTIONS FROM DOCUMENTS DUTIES

In June 2004, the Authority decided to open a formal investigation procedure concerning state aid, in the form of exemptions from document duties and registration fees, provided for in the establishment of the Norwegian company Entra Eiendom AS.

During the period 1999-2000, the Norwegian authorities reorganised the Directorate of Public Construction and Property. It transferred ownership and titles to part of the real estate directly owned by the State to Entra, a new limited liability company. Entra is owned 100% by the Norwegian State.

According to Norwegian law, the registration of transfer of ownership of real estate creates an obligation to pay document duties. The tax rate is 2.5% based on the sales value of the property. In addition, registration of transfer of title in the real estate registry is subject to a registration fee of NOK 1.480 per document registered.

When Entra was established, the Norwegian Parliament passed a special Act whereby re-registration in the real estate registry was to be done as a change of name of the property holder. A change of name does not trigger an obligation to pay document duties and registration fees. Entra was thus exempted from the obligation to pay document duties and registration fees. According to information submitted by the Norwegian authorities, payable excise duties for the transfer of titles to the real estate received by Entra would have amounted to NOK 80.6 million.

The Authority had doubts as to the compatibility with the functioning of the EEA Agreement of the exemption from document duties and registration fees adopted in connection with the establishment of Entra. Consequently, it initiated a formal investigation procedure. A final decision will probably be taken in the course of 2005.

1. The Authority's Guidelines Chapter 15.

ENVIRONMENTAL TAXES IN NORWAY

On 30 June 2004, the Authority issued two decisions concerning derogations from environmental taxes in Norway. In its first decision, the Authority found that the Norwegian system of total tax exemption from electricity tax in favour of the manufacturing and mining industries, as well as for undertakings in Finnmark and North Troms, that existed until 31 December 2003, constituted aid incompatible with the EEA Agreement and that the aid should be recovered. This decision was subsequently challenged before the EFTA Court.

In its second decision, the Authority found that the new Norwegian system for these industries of reduced rate of electricity tax is compatible with the EEA Agreement, as it exceeds the minimum tax rate applicable in the European Community. The Authority, furthermore, accepted a full tax exemption for electricity used in, inter alia, electrolytical processes.

The first decision terminated the Authority's investigation of certain derogations from environmental taxes, such as the electricity tax, the CO_2 tax and the SO_2 tax, which the Authority had started in 2002. The Authority doubted that the tax exemptions complied with the Authority's Environmental Guidelines which Norway had accepted in 2001. The decision declared that the unpaid electricity tax for the manufacturing and mining industry and for certain undertakings in Finnmark and North Troms had to be recovered for the period from 6 February 2003 (when the Authority's decision to open the formal investigation procedure was published) until 31 December 2003 (when the tax was abolished completely for undertakings). The tax rate to be applied to such recovery should equal the minimum rate of 0.5 Euro per MWh stipulated by the *EC Energy Tax Directive*.

The Authority found that recovery regarding the total tax exemption from the CO_2 tax on coal and coke used for energy purposes in the cement and leca as well as the reduced rate of the CO_2 tax on mineral oils in favour of the paper and pulp industry was not necessary. Whilst the latter exemption was considered to be compatible with the state aid rules because the reduced rate stayed above the Community minimum, the derogation from the CO_2 tax for the cememt and leca industry, which was incompatible with the state aid provisions, ended in 2002, *i.e.* before the recovery period.

The exemption from the CO_2 tax for coal and coke used as raw material and reducing agents resulted from the inherent aim of the tax system and was thus found not to constitute state aid. The abolition of the SO_2 tax on the use of coal, coke and emissions from oil refineries was also considered not to be state aid.

At the end of August 2004, three separate applications were filed with the EFTA Court, seeking the annulment of the Authority's conclusions in relation to the derogation from the electricity tax. The applications were lodged by the Norwegian State, by *Prosessindustriens Landsforening* and others, and jointly by two Norwegian companies. All three applications argue, first, that the derogation from the electricity tax does not constitute state aid and, second, should the Court conclude differently on this point, that the aid would not be subject to recovery, since it constitutes existing aid. The applications entered the EFTA Court's register under Case Nos. E-5/04, E-6/04 and E-7/04. The EFTA Court decided to join these cases. It is expected that the EFTA Court will rule on these cases in 2005.

The second decision dealt with the new electricity tax system which entered into force on 1 July 2004. The Authority found that it could accept the tax reductions granted in this system to the manufacturing and the mining industries, given that levels stayed above the minimum tax rate that is stipulated for the European Community by the *EC Energy Tax Directive*, for a period of 10 years. The Authority also authorised reduced rates, which were equally above the minimum, for undertakings in North Troms and Finnmark until the end of 2006. Furthermore, an explicit tax exemption from the new tax system for the use of electricity in chemical reduction, electrolytic processes as well as in mineralogical and metallurgical processes was accepted as being justified by the inherent aim of the Norwegian tax system.

EXEMPTIONS FROM CO_2 AND BASIC HEATING OIL TAXES IN NORWAY

The Norwegian Government notified to the Authority state aid in the form of tax relief from the CO_2 tax on mineral oils and the basic heating oil tax for the Norwegian paper and pulp industry. The Authority decided not to raise objections to the notified aid measure.

The tax relief constitutes aid according to the state aid provisions of the EEA Agreement as it gives the industry concerned an estimated benefit of approximately NOK 144 million per year. The Authority assessed the compatibility of the aid under its Environmental Guidelines.

In 2005, the paper and pulp industry will pay half of the *CO_2 tax on mineral oils*. The paper and pulp industry will also have the benefit of a full exemption from the *basic heating oil tax*. The Authority considered the two taxes calculated jointly, as they in fact function as one tax with two components on mineral oil. This is also in line with the European Commission's practice.

Taken together, the total tax amount paid by the paper and pulp industry still remains higher than the Community tax minimum, as stipulated by the *EC Energy Tax Directive*. The tax relief is limited in time from 1 January 2005 until 31 December 2010. It thus lies within the 10 year frame called for by the Environmental Guidelines. On the basis of these facts the Authority decided not to raise objections to the notified state aid measure as it retains an incentive for the paper and pulp industry to further improve environmental protection.

AID FOR ENERGY PRODUCTION FROM WASTE

In July 2004, the Authority closed its formal investigation proceedings with regard to an aid scheme notified by Norway for the use of energy from final waste treatment plants

The Norwegian Government had notified its intention to grant direct state support to waste incineration plants and landfills for the use of energy produced in the waste treatment process to the Authority. On the basis of the information provided, the Authority had doubts as to the compatibility of the aid measures with the EEA Agreement and, in particular, the Authority's Environmental Guidelines. Its decision to open the formal investigation procedure was published in April 2004.

By letter of 28 June 2004, Norway informed the Authority that the intended scheme would not be implemented and withdrew its notification. The Authority consequently closed its formal investigation procedure.

EXPANSION OF AN ALUMINIUM SMELTER IN ICELAND

In October 2003, the Authority received notification of the grant of state aid in relation to an expansion of the aluminium smelter, Norðurál hf., situated at Grundartangi, Iceland. The aid was granted through derogations from various tax and fee measures. The expansion will increase the capacity of the smelter from 90,000 tonnes per annum to 240,000 tonnes per annum, with a possible increase of up to 300,000 tonnes per annum. In the notification, the Icelandic authorities guaranteed that the total amount of aid granted would not exceed 49.9 million EUR. The notification was not, however, complete.

The Icelandic authorities provided supplementary information in May and July 2004. However, as further information is necessary in order to assess the case under Article 61 of the EEA Agreement the Authority has requested the Icelandic authorities to respond to information requests in this regard.

The Icelandic authorities previously notified grant of state aid to the original construction of the Norðurál aluminium smelter in 1997. This state aid was granted through tax and fee derogations and approved by the Authority in 1998 (174/98/COL).

INTERNATIONAL TRADING COMPANIES IN ICELAND

The formal investigation procedure regarding the tax scheme in favour of International Trading Companies in Iceland was concluded in 2004. The Authority found that the scheme constituted incompatible state aid and requested the Icelandic authorities to recover any aid granted under this scheme.

In February 2004, the Authority adopted a negative decision closing the formal investigation procedure opened in December 2001 with respect to various tax measures in favour of International Trading Companies (ITCs) in Iceland.

In March 1999, the Icelandic Government had adopted specific legislation with the aim of promoting the establishment of International Trading Companies in Iceland. According to this specific fiscal legislation, ITCs are subject to payment of lower corporate income tax than that generally applicable to any taxable undertaking in Iceland. They were also fully exempted from payment of net wealth tax and partially exempted from payment of stamp duties.

Following the formal investigation procedure, the Authority concluded that the tax regime applicable to ITCs fulfilled the criteria as to what constitutes state aid laid down by Article 61(1) EEA. On the basis that the Icelandic Government had not notified these measures to the Authority and implemented them without prior approval, they constituted unlawful state aid. Furthermore, they could not be considered compatible with the rules of the EEA Agreement.

For these reasons, the Authority concluded that the tax scheme in favour of ITCs in Iceland constituted state aid incompatible with the EEA Agreement. It enjoined the Icelandic Government to ask for the recovery of the sums granted to the beneficiary companies in the form of reduced or non existent payments since 1999, together with corresponding interest.

1. The time to comply with the Authority's decision was set to two months. By February 2005, Iceland had still not made the necessary legal changes to stop the aid nor taken measures to recover unlawful aid already granted. The Authority decided therefore to bring the matter before the EFTA Court.

DECODE GENETICS

In April 2004, the Authority closed its formal investigation of the notified guarantee which Iceland had intended to grant to deCODE Genetics Inc. (US)

The Authority had considered that the State guarantee constituted state aid. This aid would have allowed deCODE to borrow money on the market at conditions more favourable than without the proposed State guarantee. This would give deCODE a financial benefit and strengthen its position in relation to competitors. The Authority had doubts regarding the compatibility of such aid with the functioning of the EEA Agreement. It had, therefore, opened the formal investigation procedure in July 2003.

By letter dated 14 April 2004, Iceland informed the Authority that there was no longer a need for the State guarantee, which had not, so far, been granted. As Iceland withdrew its notification to the Authority, the case was closed.

THE SALE OF THE STATE'S SHARES IN AN ICELANDIC CEMENT PRODUCER

The EFTA Surveillance Authority decided to open a formal investigation procedure into the privatization process of the formerly 100%-owned State undertaking Sementsverksmiðjan.

In August 2003, the Icelandic authorities notified the Authority of their intention to sell the State's shares in Sementsverksmiðjan, the only producer of cement established in Iceland. The sale must be viewed against the background of the entry in the market of Aalborg Portland, which exports cement to Iceland from its factory in Denmark, and the subsequent losses accumulated by Sementsverksmiðjan. On 2 October 2003, a group of investors bought Sementsverksmiðjan.

The Icelandic authorities were of the opinion that no state aid was involved in the sales process because they had called for a tender to find a partner with whom the sale would be negotiated. Moreover, the price paid by the investors for the undertaking was higher than its liquidation value. The Authority, however, had doubts as to whether the sale was carried out according to principles that ensured that the State obtained a price corresponding to the market value of the company. The Authority's doubts were mainly due to the fact that the negotiation process was based on an estimated liquidation value of the company although the company was to be sold as going concern, *i.e.* the Government would only sell on condition that operations continue. For these reasons the Authority decided to open the formal investigation procedure in December 2004.

The Authority's decision to initiate a formal investigation will be published in the Official Journal of the European Union and the EEA Supplement thereto. Interested parties are invited to submit their comments within one month of publication.

THE ICELANDIC HOUSING FINANCING FUND

On 11 August 2004, the Authority adopted a decision declaring the Icelandic Housing Financing Fund ("HFF" or "HFF system") compatible with the state aid rules in the EEA Agreement.

The objective of the HFF is to promote access to affordable house financing on equal conditions throughout the entire Icelandic territory, through the grant of loans to individuals. The HHF also provides for special allocation of funds to increase the possibility of acquiring or renting housing on manageable terms.

Although the Authority concluded that the HFF system involved state aid, it decided that the aid could be declared compatible according to Article 59(2) EEA.

The derogation in Article 59(2) EEA permits EEA States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights or other privileges which may hinder the application of the rules of the EEA Agreement, in particular those on competition and state aid. However, such restrictions may not exceed what is necessary to ensure the performance of the particular tasks assigned to the undertakings concerned and should not affect the development of trade to an extent contrary to the interests of the EEA States.

The Authority concluded that the HFF was entrusted with services of general economic interest, given the social and universal dimension of the housing loans. The Authority was also of the view that the costs to HFF of rendering the service of general economic interest were not overcompensated. The state aid was limited to what was necessary for the HFF to perform the specific service in question. Finally, the Authority was of the opinion that the HFF financing mechanism did not affect the development of trade to an extent contrary to the interests of the EEA States.

On 23 November 2004, an appeal against the Authority's decision (E-9/04) was lodged with the EFTA Court by the Bankers' and Security Dealers' Association of Iceland. In that appeal, the EFTA Court is requested to annul the Authority's decision regarding the HFF. The Appellants argue, *inter alia*, that the Authority wrongfully interpreted and applied Article 59(2) EEA. The EFTA Court is expected to rule on the appeal in 2005.

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Additional information on the EFTA Surveillance Authority and its tasks is available on the Authority's website: www.eftasurv.int

The electronic version of the EFTA Surveillance Authority Annual Report may be found at: www.eftasurv.int/information/annualreports
The electronic version includes two annexes. Both annexes concern cases handled by the Internal Market Affairs Directorate. The first annex lists all open cases at 31 December 2004. The second annex lists all cases closed in the course of 2004.

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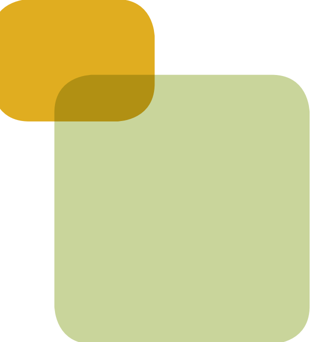

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