EFTA Surveillance Authority

Annual Report 2007

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EFTA SURVEILLANCE
AUTHORITY

Foreword

With the latest enlargement of the European Union to 27 Member States and the corresponding expansion of the European Economic Area to 30 states, Iceland, Liechtenstein and Norway are taking part in the Single Market, whose total population is now 500 million. This brings along a wide variety of opportunities for both inhabitants and undertakings. However, to make the Internal Market a reality requires a level playing field and dynamic development of relevant regulation. Last year, 416 legal acts were incorporated into the EEA Agreement. The EFTA Surveillance 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.

The statistics in this report demonstrate that 2007 was a busy year for the Authority. The special effort to close old cases continued throughout the year. The number of cases that are more than three years old dropped from 142 to 47 in 2007.

The Authority has the mandate to monitor the EEA Agreement in a consistent and coherent manner. The high number of letters of formal notice and reasoned opinions in 2007 is dominated by an increasing number of infringement cases related to delays in incorporation of regulations. Last year the Authority increased focus on tackling this problem, as reflected in the statistics, and is now devoting more resources to the issue of regulations.

Changes in political focus in the EEA influence the Authority's workload and priorities. In 2007, energy, the environment and climate change were high on the political agenda, and thus increased the Authority's tasks, e.g., those relating to emissions trading systems.

Twice a year, and in parallel with the European Commission, the Authority publishes the Internal Market Scoreboard. The Scoreboard indicates how well EEA EFTA States perform with regard to the implementation of directives. With an average transposition deficit of 1.7% at 10 November 2007, all the EFTA States rank below the average in the EU, *i.e.*, 1.2%. Hopefully this negative trend will be turned around in 2008.

Per Sanderud
President

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Chapter 1 Introduction

Agreement on the European Economic Area

The purpose of the EEA Agreement is to create one common internal market between the 27 EU Member States and the three EEA EFTA States Iceland, Liechtenstein and Norway[1]. In short, the agreement seeks to ensure the free movement of goods, persons, services and capital, as well as equal conditions of competition for undertakings, and non-discrimination against individuals in all 30 EEA States.

The EEA Agreement is based on the timely implementation and uniform application of common rules governing the Internal Market throughout the European Economic Area, now consisting of 30 EU and EEA EFTA States. A two pillar system of supervision facilitates the agreement. Iceland, Liechtenstein and Norway are supervised by the EFTA Surveillance Authority while the European Commission is responsible for the EU Member States.

The principle of homogeneity in the European Economic Area is to be achieved by the incorporation of EC legislation into the EEA Agreement. When an EC legal act is deemed to be relevant for the functioning of the Internal Market, and thus falling within the material scope of the EEA Agreement, the EEA Joint Committee takes a decision on the appropriate amendments of the EEA Agreement *"with a view to permitting a simultaneous application"* of legislation in the EU and the EEA EFTA States. EC legal acts adopted by the EEA Joint Committee become part of the EEA Agreement hereinafter referred to as EEA Acts.

The role of the EFTA Surveillance Authority

It is the task of the EFTA Surveillance Authority to ensure that Iceland, Liechtenstein and Norway respect their obligations under the EEA Agreement. The Authority has been granted surveillance powers corresponding to those of the European Commission. Located in Brussels, the Authority consults with the Commission on many cases to ensure homogenous application of relevant directives and regulations.

General surveillance activities

There are two major objectives of the surveillance activities of the Authority: one is to ensure timely and correct incorporation of EEA Acts into national legislation when a decision on implementation has been made by the EEA Joint Committee; the other is to make sure that the basic rules and principles of the EEA Agreement, such as the four freedoms and prohibition against discrimination, are respected by the EEA EFTA States.

The Authority has the power to initiate formal infringement proceedings against an EEA EFTA State if it considers that the State has failed to fulfil an obligation under the EEA Agreement. However, the Authority will also make use of a range of other informal means in order to ensure the necessary compliance with the Agreement.

1. Even though an EFTA State, Switzerland is not party to the Agreement on the European Economic Area.

In fact, the majority of problems identified are solved in informal dialogue and exchange of information between the Authority and the EEA EFTA States without any enforcement process being initiated.

Infringement proceedings

If formal infringement proceedings are initiated, the Authority sends a *letter of formal notice* to the government of the EEA EFTA State concerned, explaining which provision of the EEA law, in the Authority's view, has been infringed. The Government is invited to submit its comments on the matter. If the Authority is not satisfied with the Government's answer, or if no answer is received, the Authority may, as the next step of the procedure, deliver a *reasoned opinion*. In this document, the final position of the Authority on the matter is defined, and the Government is given a deadline to take the measures necessary in order to bring the infringement to an end. If the State should fail to comply with the reasoned opinion, the Authority may decide to bring the matter before the EFTA Court, whose judgment is binding for the State concerned.

Competition

The single market objectives of the EEA Agreement are also upheld by the EEA competition rules, which in substance are virtually parallel to those of the EC Treaty. The rules are directed towards individual economic operators in the EEA EFTA States and, among other things, prohibit restrictive practices between businesses and abuses of dominant positions in any given market.

The Authority has been given the power to initiate proceedings against market players and it may impose fines for anti-competitive behaviour. However, most cases are resolved informally, with the concerns identified by the Authority being remedied without the need for formal proceedings.

Moreover, EC merger control rules are incorporated into the EEA Agreement, and are therefore applicable to the entire European Economic Area. The Authority provides comments and information on mergers handled by the European Commission in cases where markets in one or more of the EEA EFTA States are particularly affected.

State aid

The EEA Agreement contains provisions drafted to reflect, to the extent possible, the corresponding provisions on state aid in the European Community. The main rule is that aid that distorts or threatens to distort competition and that may adversely affect trade between the EEA States is prohibited. There are several possibilities for exemption to this rule, however, providing that certain conditions are met.

Any new measure to granting state aid must be notified to the Authority prior to implementation, and it must not be put into effect before the Authority has decided upon the case. After a preliminary examination, the Authority must decide whether the notified measure involves state aid, or whether it is clear that it is eligible for exemption from the general examination. If no clear conclusion can be drawn, the Authority is obliged to open a formal investigation procedure.

A final decision on the notified measure is then taken after the formal investigation has been concluded. The decision can be either positive (approving the aid), negative (prohibiting the aid) or conditional (approving the aid, subject to conditions). If the Authority concludes that unlawful aid has been granted, it, as a rule, orders the EEA EFTA State to reclaim the aid from the recipient.

The Authority is also obliged to keep all systems of existing aid in the EEA EFTA States under constant review. If breaches of the rules are found, either through investigation by the Authority or based on complaints, cases might be opened against the State in question.

Organisation of the Authority

The College

The EFTA Surveillance Authority is headed by a College consisting of three Members. They are appointed by common accord of the Governments of the EEA EFTA States for a renewable period of four years. A President is appointed for periods of two years from among the Members, also by common accord of the Governments. Following the departure of Bjørn T. Grydeland, on 12 August 2007, Per Sanderud was appointed President of the Authority with effect from 20 August 2007. The Members are independent in the performance of their duties, and must not seek or take instructions from any Government or other body. They must refrain from any action which would be incompatible with their duties.

Each College Member has responsibility for certain areas of work. The allocation of responsibilities is agreed upon among the Members themselves. During 2007, the composition and division of responsibilities of the College was as follows:

Members	Field of Activity
Per Sanderud (President)	Administration
	Co-ordination and general policies
	External relations
	Legal & executive affairs
	State aid
Kurt Jäger	Free movement of persons
	Free movement of services
	Free movement of capital
	Horizontal areas (*e.g.* social policy, consumer protection, the environment, statistics, company law)
Kristján Andri Stefánsson	Free movement of goods
	Competition
	Public undertakings
	State monopolies
	Public procurement

The budget and accounts

The activities and operating expenses of the Authority are financed by contributions from Iceland, Liechtenstein and Norway. The three EEA EFTA States contribute 2%, 9% and 89%, respectively, to the Authority's budget. In December 2006, the 2007 budget was adopted, and represented an increase of 6.2% in contributions from the EEA EFTA States compared to the previous year, including a 1.7% increase in wages.

In June 2007, the Audit Report by the EFTA Board of Auditors (EBOA) for the financial year 2006 was handed to the EEA EFTA States. The audit certificate stated that:

a) the financial statements give a true and fair view of the financial position as at the end of the period and the results of the operations for the period;
b) the financial statements were prepared in accordance with the stated accounting principles;
c) the accounting principles were applied on a basis consistent with that of the preceding financial year; and
d) transactions were in accordance with the Financial Regulations and Rules and the legislative authority.

In December 2007, the Authority's Statement of Accounts for the financial year 2006 was approved by the EEA EFTA States, and the Authority discharged of its responsibilities for the same period.

The Authority's 2008 budget was adopted in December 2007. The increase in contributions from the EEA EFTA States is 2.33% compared to the 2007 budget, including a 1.1% wage increase for staff members. The recruitment of an additional food safety inspector was approved.

The Authority's budget for 2007 (and 2008, adopted in 2007) is broken down as follows:

Budget	Budget 2007	Budget 2008
Chapter 1 - Salaries	4 467 685	5 753 970
Benefits, allowances & turnover costs	3 916 200	2 782 873
Chapter 2 - Travel, training, representation	730 700	784 816
Chapter 3 - Office accommodation	1 104 700	1 133 322
Chapter 4 - Supplies and services	1 297 400	1 323 317
Total expenditures	11 516 685	11 778 298
Chapter 5 - Financial income and expenditures	4 000	4 000
Chapter 6 - Contributions and other income	24 000	18 000
Contributions from the EEA EFTA States	**11 488 686**	**11 756 298**
Total income	11 516 685	11 778 298

Staff

In 2007, the Authority had 59 employees, including College Members, representing 15 different nationalities. Half of the staff members come from the EEA EFTA States. Norwegians constitute the largest group, with 34%, followed by Icelanders with 14%.

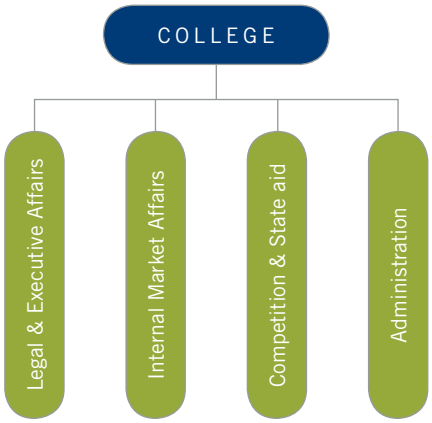
In accordance with staff regulations established by the EEA EFTA States, staff are employed for a three year period, normally renewable only once (as a result, no

staff member has a contract which extends beyond 2011). Staff turnover was 25% in 2007. In addition to staff members on fixed-term contracts, the Authority also employed 3 temporary officers, 2 national experts and 5 trainees.

Public relations

During the course of the year, College Members and staff gave presentations on the EEA Agreement and the work of the Authority to visitors and at conferences and seminars for an audience numbering several thousand persons. The visiting groups were composed of, *inter alia*, elected representatives, professional associations, trade unions, and students.

Organisation chart



Developments within cases during 2007

At the end of 2007, the Authority had 662 pending cases[2], an increase of 59 compared to the previous year. This development can be explained by the increased focus put on the incorporation of regulations, which in Iceland and Norway have to be incorporated into national law in order to have effect. A renewed effort to tackle the backlog of regulations not being transposed on time has led to a substantial increase in the number of own-initiative cases being opened by the Authority, in particular against Iceland. A clear reduction in the number of pending cases older than 3 years was recorded in 2007. Seven percent of the total case load now consists of such old cases, down from 23% at the end of 2006. A detailed review of important cases and new developments within the sectors is to be found in the chapters Internal Market, Competition and State aid, respectively.

The Authority may exercise discretion in opening cases, and, in addition to matters brought to its attention by complaints, the Authority frequently opens cases on its own initiative. Two hundred and sixty four (55%) of the 483 new cases opened during 2007 were own-initiative cases. For the purposes of this introduction, the Authority has classified the cases handled by its departments in the categories used in the tables and figures on the following pages. In the chapters that follow, a more detailed classification is used to provide information on each department's activities. The work and use of resources associated with individual cases vary considerably depending on the substantive and legal issues at stake. The number of cases cannot, therefore, be seen as a decisive indicator of work load.

Complaints

The Authority examines complaints directed against the EEA EFTA States or economic operators in these States. Complaints are written communications sent to the Authority by economic operators and individuals reporting measures or practices which they consider not to be in conformity with EEA rules. Thirteen percent of new cases registered during 2007 were complaints. However, in terms of pending cases at year-end, complaints make up 22%. Figure 1 (see page 11) illustrates that the vast majority of complaints are directed towards Norway.

2. "Case" here means an assessment relating to the implementation or application of EEA law, or to other relevant tasks registered during the year for the purpose of fulfilling the Authority's obligations under EEA law. Such cases do not necessarily lead to the initiation of infringement procedures against EEA EFTA States or undertakings.

Notifications

This covers draft technical regulations, telecommunications market notifications, or state aid measures taken by the EEA EFTA States. Following an initial examination, the Authority may raise objections or initiate formal investigations or infringement proceedings against the EEA EFTA States. Around 14% of pending cases at year-end were notification cases.

Obligatory tasks

Obligatory tasks are cases which are opened on the basis of obligations of the Authority arising from the EEA Agreement or secondary legislation. Such tasks include on-the-spot inspections relating to food and feed safety, or aviation security, but also cover various reports and notices issued by the Authority in all areas of EEA law. Sixteen percent of pending cases at year-end related to obligatory tasks.

Own-initiative cases

Finally, the Authority opens cases on its own initiative. Such cases are initiated, for example in the event of non-transposition by Iceland and Norway of regulations that have been incorporated into the EEA Agreement. The Authority may also seek to determine whether EEA law has been correctly implemented and applied, *e.g.*, by verifying the adoption of national laws meant to implement EEA legislation or conformity assessment of said laws. The latter covers, for example, examinations of individual award procedures for procurement, state aid or concessions where the Authority, on the basis of official documents, sector inquiries, press reports or anonymous sources thinks such examinations are warranted. There was an increase in the number of own-initiative cases opened in 2007. This increase was almost entirely due to the increased focus put on the incorporation of regulations in Iceland and Norway. A clear majority of the pending cases at the end of 2007 were own-initiative (see figure 2).

Tables 1 to 6 show developments within cases over the period 2005-2007, by case type, field of work and State, respectively.

Figures 2 to 4 illustrate the number of pending cases at the end of 2007, by case type field of work and State, respectively.

Figure 5 illustrates developments by field of work, expressed in number of pending cases per field of work at year-end for the years 2005-2007.

Table 1 Case development by case category / Cases opened

	2005	2006	2007
Complaint	57	48	65
Notification	68	52	54
Obligatory tasks	82	98	103
Own-initiative	167	141	264
Total	**374**	**339**	**486**

Table 2 Case development by case category / Cases closed

	2005	2006	2007
Complaint	46	64	71
Notification	59	54	44
Obligatory tasks	82	97	103
Own-initiative	153	187	209
Total	**340**	**402**	**427**

Table 3 Case development by field of work / Cases opened

	2005	2006	2007
Competition	14	16	7
Free movement of capital	7	4	4
Free movement of goods	187	119	229
Free movement of persons	23	9	21
Free movement of services	84	109	131
Other areas	17	21	26
Public procurement	9	8	6
State aid	33	53	62
Total	**374**	**339**	**486**

Table 4 Case development by field of work / Cases closed

	2005	2006	2007
Competition	14	20	4
Free movement of capital	0	3	2
Free movement of goods	179	147	179
Free movement of persons	18	36	28
Free movement of services	55	97	133
Other areas	23	36	23
Public procurement	14	18	19
State aid	37	45	39
Total	**340**	**402**	**427**

Table 5 Case development by State / Cases opened

	2005	2006	2007
Iceland	107	94	234
Liechtenstein	40	41	20
Norway	184	163	201
EEA/Third countries	43	41	31
Total	**374**	**339**	**486**

Table 6 Case development by State / Cases closed

	2005	2006	2007
Iceland	77	119	140
Liechtenstein	44	45	44
Norway	171	189	203
EEA/Third countries	48	49	40
Total	**340**	**402**	**427**

Figure 1 Complaints 2005-2007

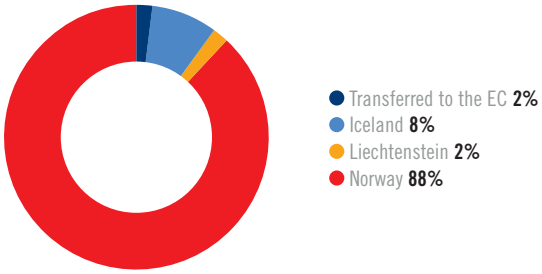


Figure 2 Pending cases at end of 2007 by category

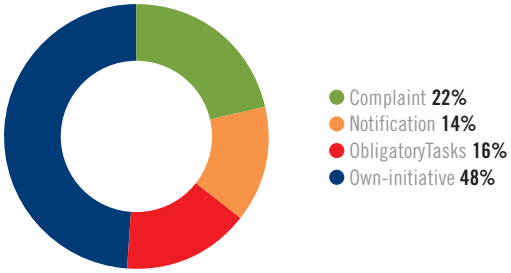


Figure 3 Pending cases at end of 2007 by field of work

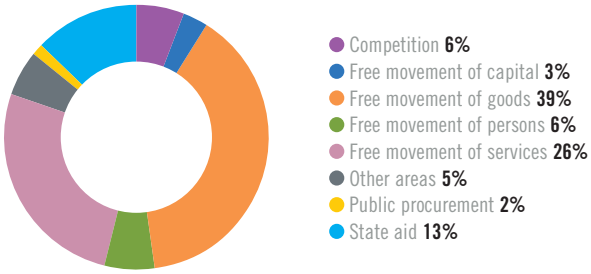


Figure 4 Pending cases at end of 2007 by State

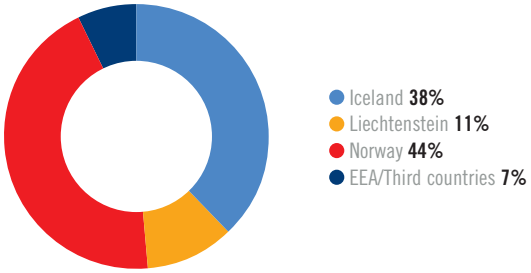
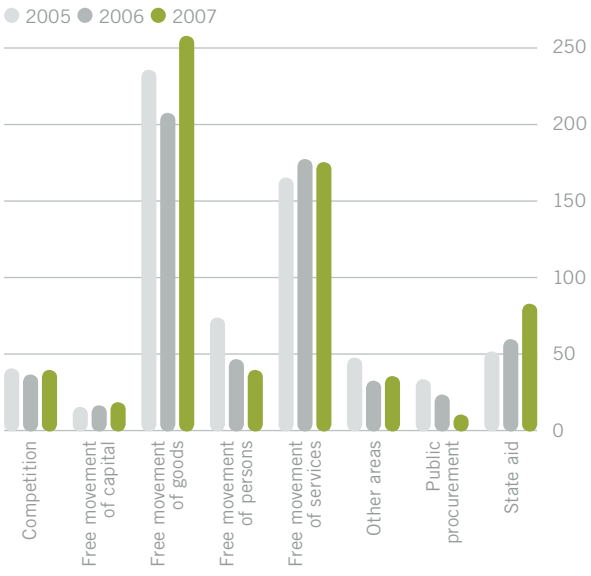


Figure 5 Case development per field of work for pending cases 2005-2007



As cases may concern more than one State, the total number of cases, when sorted by State, is not equal to the sum of cases per State. The category labelled "EEA" represents cases relevant to all States (*e.g.* guidelines etc.), or third countries (*e.g.* joint EU/EEA inspections in third countries).

Also, the figures used in this report for the years 2005 and 2006 differ somewhat from the figures used in previous annual reports. This is due to a change in the internal case handling routines and the way cases are registered within the Authority.

Chapter 2 Internal Market

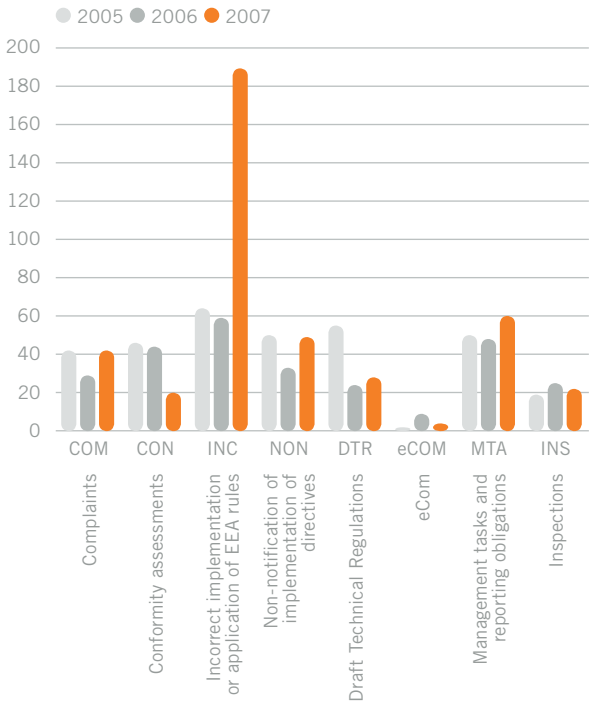
Case handling 2007

The task of the Authority's Internal Market Affairs Directorate (IMA) is to monitor the EEA EFTA States' obligation to make the Internal Market rules part of their internal legal order and to apply the rules correctly. The Internal Market rules concern the four freedoms, *i.e.* free movement of goods, persons, services and capital, and horizontal provisions that cover matters such as health and safety at work, labour law, equal treatment of men and women, consumer protection, the environment and company law.

New cases

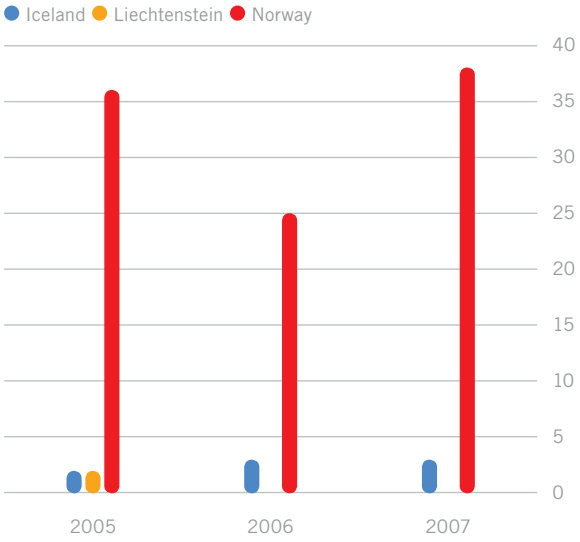
A total of 414 new cases were opened by the Authority within the field of the Internal Market during 2007. This represents a 53% increase compared to cases opened in 2006. A significant number of the cases (about 40%) concern failure by Iceland to incorporate regulations into its internal legal order in a timely manner.

Figure 1 New cases / Case types



Compared to 2006, the number of new complaints increased in 2007 from 29 to 42. As in previous years, the majority of the new complaints, *i.e.* 38 (90%), were directed against Norway, whereas 3 complaints were received against Iceland and none against Liechtenstein. At the end of 2007, 92 complaint cases remained open and thus under examination by the Authority within the field of the Internal Market.

Figure 2 New cases / Complaints by State



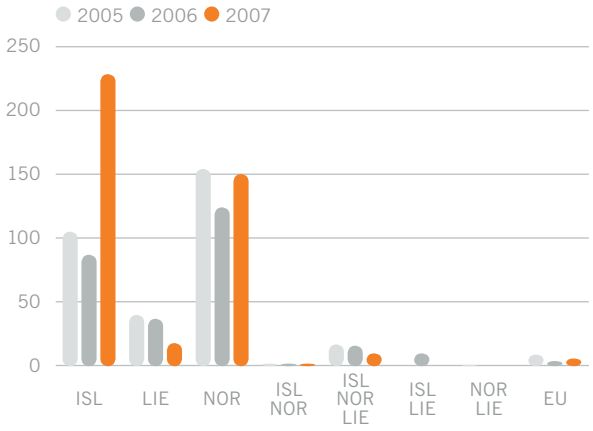
The majority of new cases in 2007 were opened on the Authority's own initiative in order to assess compliance of national legislation or practice with Internal Market rules (258 cases). Such cases are opened by the Authority where it has information suggesting that EEA law may have been infringed. However, the cases do not necessarily lead the Authority to initiate formal infringement proceedings, as the cases might be solved informally or be proven unfounded. Furthermore, cases are opened on the Authority's own initiative where Iceland or Norway has failed to incorporate EEA regulations into national law. Of the 258 cases opened on the Authority's own initiative in 2007, a large portion related to an apparent failure by Iceland to, in a timely manner, make regulations part of its internal legal order.

In 2007, the Authority opened 49 non-notification cases due to the EEA EFTA States' failure to implement directives in a timely manner.

The Authority initiated 20 conformity assessment cases during 2007 in order to assess whether national rules were in conformity with the EEA Agreement.

In contrast with the two previous years, the majority of new cases opened in 2007 concerned Iceland (228 cases). Most of these cases relate to the failure by Iceland to incorporate regulations into its internal legal order. The corresponding figures for Norway and Liechtenstein are 150 and 18 respectively. The number of new cases which concern two or more of the EEA EFTA States decreased compared to previous years.

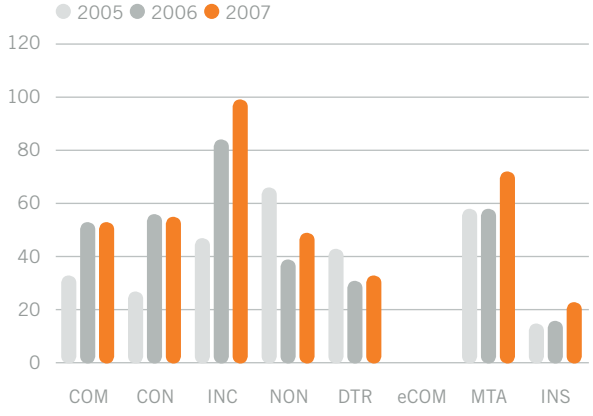
Figure 3 New cases / States



Closed cases

Over recent years, the total number of cases being dealt with by the Authority within the field of the Internal Market has been increasing. Despite this, the Authority has managed to expedite an increasing number of cases. During 2007, a total of 384 Internal Market cases were closed, which represents a 14% increase of closures compared to 2006.

Figure 4 Closures / Case types



TYPES OF CASES[1] HANDLED BY IMA

COMPLAINTS (COM)

Anyone may submit a complaint against any of the EEA EFTA States. The Authority examines all complaints falling within its competence and passes on to the European Commission any complaints which fall within the competence of the Commission.

OWN-INITIATIVE CASES

Non-notification of implementation of directives (NON)

Non-notification cases are opened when an EEA EFTA State has failed to notify the adoption of national measures to implement directives by the compliance date.

Conformity assessments (CON)

Conformity assessment cases are opened on the Authority's own initiative in order to carry out a systematic assessment of the conformity of national measures notified by an EEA EFTA State with the EEA Act (directive or regulation) implementing such an act.

Incorrect implementation or application of EEA rules (INC)

Where the Authority has information that national legislation or practice might not be in compliance with EEA rules, and decides to examine the issue further, an incorrect implementation/ application case is opened at the Authority's own initiative. This could be for example regarding incorrect implementation of EEA rules, national rules or practices that are incompatible with EEA rules or wrongful application of EEA rules or a failure to incorporate EEA regulations into national law.

NOTIFICATIONS

Draft Technical Regulations (DTR)

The Authority examines draft technical regulations, which the EEA EFTA States are obliged to notify to the Authority according to the so-called Draft Technical Regulations Directive. Such regulations concern products and information society services.

eCom (ECOM)

The national regulatory authorities in the EEA EFTA States have an obligation to notify draft regulatory decisions to the Authority in a number of specified instances within the field of electronic communication before they can be adopted and come into effect in the national markets. The Authority has a duty to examine the draft measures in order to ensure their compatibility with EEA law.

OBLIGATORY TASKS

Management tasks and reporting obligations (MTA/REP)

Management tasks and reporting obligations include various administrative tasks concerning, for example, assessments relating to the telecommunications sector, or the adoption of guidelines relating to product safety, the summary reports of national reports on health and safety, or the calculation and publication of thresholds applicable in the field of public procurement.

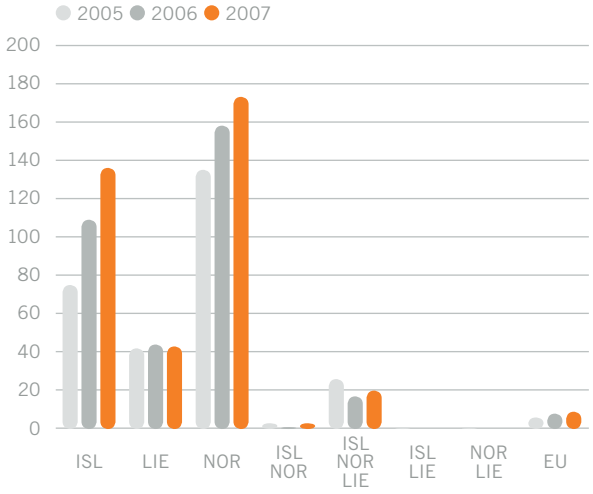
Inspections (INS)

The Authority performs on-the-spot investigations to verify that the EEA EFTA States comply with their obligations relating to, for example, food and feed safety, aviation and harbour security.

1. "Case" means an assessment relating to the implementation or application of EEA law, or to other relevant tasks registered during the year for the purpose of fulfilling the Authority's objectives or duties within the field of the Internal Market. A case does not therefore need to be related to an alleged infringement of EEA rules, but can also concern administrative tasks performed by the Authority.

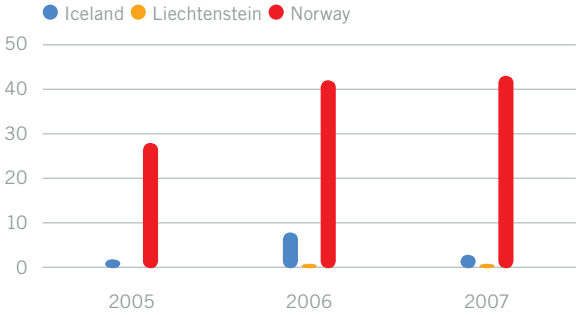
Of the cases that were closed in 2007, 173 concerned Norway, 136 Iceland, and 43 Liechtenstein.

Figure 5 Closures / States



Exactly the same number of complaint cases (53) were closed in 2007 as in 2006. At the end of 2007, there were 92 complaint cases pending, *i.e.* 10% fewer than the 102 complaint cases pending at the end of 2006.

Figure 6 Closures / Complaints by State

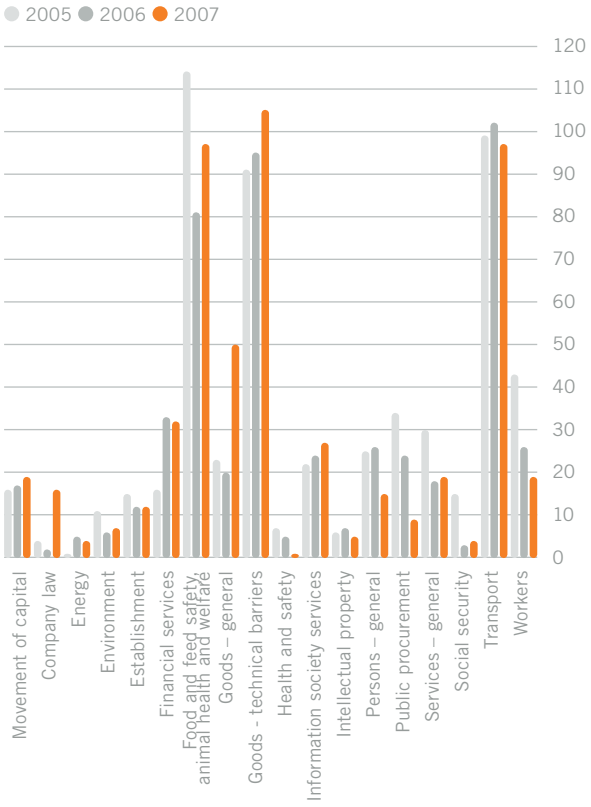


Pending cases

At the end of 2007, the Authority's Internal Market Affairs Directorate was examining 538 cases, which is 31 cases more than at the beginning of the year. Out of the pending cases, 92 were initiated on the basis of complaints. The remaining 446 cases were initiated either to carry out tasks entrusted to the Authority by EEA legislation (*i.e.* reporting tasks, examination of draft technical regulations, food safety and aviation security inspections), or on the Authority's own initiative to determine whether the EEA EFTA States comply with their EEA obligations.

The sectors with the highest number of pending cases are transport (97), goods/technical barriers to trade (105), food safety (96), and goods/general (50). The case load increased heavily: company law (14 more cases), food safety (16), goods/general (30) and goods/technical barriers to trade (10).

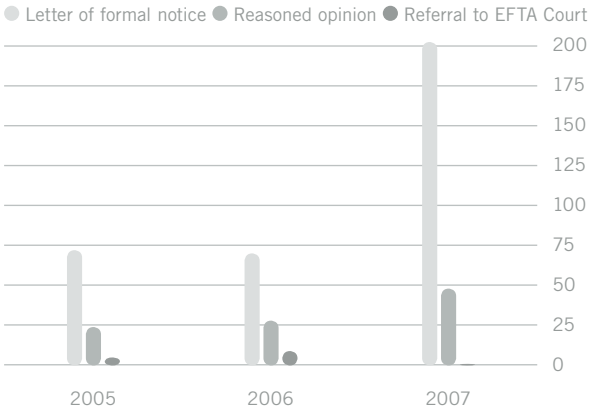
Figure 7 Pending cases / Sectors



Formal infringement proceedings

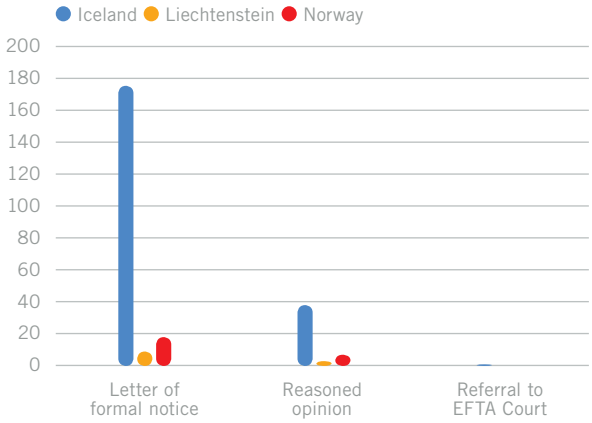
In 2007, there was a sharp increase of 135%, *i.e.* from 107 to 251, in formal infringement actions taken by the Authority (LFN, RDO, EFC) compared to 2006. The number of new infringement cases opened (by issuing letters of formal notice) increased by 189% in 2007. Also, the number of reasoned opinions (*i.e.* the second stage of infringement proceedings) increased by 71%. Only one case was referred to the EFTA Court in 2007.

Figure 8 Infringement actions



Of the new infringement cases initiated in 2007, 85% were directed against Iceland, 5% against Liechtenstein, and 10% against Norway.

Figure 9 Cases subject to infringement actions by State



Of the new infringement proceedings launched in 2007, 1/5 related to the failure by the EEA EFTA States to make *directives* part of national law and 3/4 concerned failure by Iceland and Norway to make *regulations* part of national law. Of the 48 reasoned opinions delivered in 2007, most related to failure by Iceland to transpose EEA regulations into national law (60%).

Most infringement actions in 2007 concerned one of five sectors, namely food safety (84), transport (48), goods/technical barriers to trade (41), company law (28) and goods/general (26). Infringement actions increased in the following sectors compared to the previous year: food safety (by 64 actions), transport (28), company law (28), goods/general (26), goods/technical barriers to trade (25), information society (2), and workers (2). Infringement actions in all other sectors decreased significantly.

Selected infringement cases within the Internal Market field are described in individual reports later in this chapter.

Implementation of EEA directives

By the end of 2007, the total number of directives incorporated into the EEA Agreement was 1 683. Iceland was required to implement 1 445 of these directives, Liechtenstein 1 418 and Norway 1 605. At the end of the year, Iceland had notified full implementation of 97.2% of the directives. For Liechtenstein and Norway, the figures are 97.9% and 98.6%, respectively.

The *Implementation Status Database* available on the Authority's website[2] contains information on all directives referred to in the annexes to the EEA Agreement for which the deadline for implementation has expired, the notified status of implementation (full, partial, no implementation) and the titles of the national implementing measures. The database is updated daily.

Twice a year, the Authority publishes, in parallel with the European Commission, the Internal Market Scoreboard.[3] The Scoreboard indicates how well the EEA EFTA States perform with regard to implementation of directives.

With an average transposition deficit of 1.7% at 10 November 2007, the EEA EFTA States were above the average transposition deficit of the EU Member States (1.2%) as well as the interim target of 1.5% set by the European Council as the highest acceptable transposition deficit so far:

Iceland: 2.2% Liechtenstein: 1.6% Norway: 1.3%

The implementation figures do not reflect the quality of the implementing measures notified by the EEA EFTA States, or how they are applied. An assessment by the Authority can reveal problems concerning the conformity of the notified measures with the EEA rules they are intended to implement. Due to the Authority's limited resources, only around one third of the notified acts have been made subject to a full conformity assessment.

Incorporation of EEA regulations

According to Article 7 of the EEA Agreement, regulations that are incorporated into the EEA Agreement shall "as such" be made part of the internal legal order of the EEA EFTA States. Pursuant to the constitutional laws of the three EEA EFTA States, regulations are already part of the Liechtenstein legal order once they have been incorporated into the EEA Agreement through an EEA Joint Committee decision, but Iceland and Norway are obliged to adopt legal measures in order to make regulations as such part of their internal legal orders. This usually requires a prior translation of regulations into the national language and subsequent publications. However, due to the fact that regulations do not contain a provision setting out an obligation to notify incorporating measures, the Authority regularly has to request Iceland and Norway, pursuant to Article 6 of the Surveillance and Court Agreement, to notify the national measures taken to incorporate regulations.

The Authority considers that the high number of cases concerning delay in the incorporation of regulations constitutes a considerable problem and challenge for the smooth functioning of the EEA Agreement. The matter has been brought to the attention of the Icelandic and Norwegian authorities respectively. Furthermore, the Authority is devoting more enforcement resources to the issue of regulations.

2. The Implementation Status Database is available at www.eftasurv.int/information/implementationstatus.
3. The latest Internal Market Scoreboard for EEA EFTA States was published in February 2008. It shows the implementation status of directives as of 10 November 2007. The EEA EFTA Scoreboard can be found at www.eftasurv.int/information/internalmarket.

Activities in the field of the environment

Tackling climate change – The Emissions Trading Scheme

The aim of the EU Emissions Trading Scheme (EU ETS) is to help EU Member States to achieve compliance with the commitments made under the Kyoto Protocol to limit or reduce their greenhouse gas emissions at the least cost to the economy. The Emissions Trading Directive[4] has established a scheme for greenhouse gas emissions allowance trading within the Community on the basis of national allocation plans (NAPs). This trading system for CO_2 emissions currently covers energy-intensive activities (such as combustion plants, oil refineries, coke ovens, iron and steel plants, and factories making cement, glass, lime, brick, ceramics, pulp and paper), which commonly generate high levels of CO_2 emissions.

The Emissions Trading Directive and its implementing measures were incorporated into the EEA Agreement by decision of the EEA Joint Committee of 26 October 2007. This enables the EEA EFTA States to participate in the EU ETS for the trading period 2008-2012, which corresponds to the first commitment period under the Kyoto Protocol. The EFTA Surveillance Authority has been granted several tasks in this respect, including the assessment of the NAPs notified by the EEA EFTA States.

One of the core tasks in the run-up to the implementation of the EU ETS is the preparation of NAPs by the EEA States. NAPs are plans that set out how each EEA State intends to allocate CO_2 emissions allowances under the EU ETS. In their plans, the EEA States must fix both the total number of allowances to be created on their territory for the trading period and the allocation made to each installation covered by the scheme. In addition, the limit on use of credits from Kyoto's project-based mechanisms (joint implementation and clean development mechanism) by these installations must be indicated.

The Authority evaluates the NAPs of the EEA EFTA States against the 12 criteria listed in the Emissions Trading Directive, in close co-ordination with the European Commission.

The combustion plants in Iceland falling within the scope of application of the Emissions Trading Directive could be exempted, provided that Iceland demonstrates to the Authority that it undertakes other measures to achieve the same results in terms of reduction of greenhouse gas emissions. As a consequence, Iceland would not be required to submit a NAP.

Liechtenstein submitted its NAP to the Authority in the autumn of 2007. Having concluded its assessment, the Authority notified to Liechtenstein on 31 December 2007 its decision approving the Liechtenstein NAP without raising any objections.

In 2008, the Authority will take a decision on the Norwegian NAP. Furthermore, the Authority will have to assess applications from Norway for the unilateral inclusion of additional activities and gases in the EU ETS.

4. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC.

Activities in the field of environment

Urban waste water treatment

The Urban Waste Water Treatment Directive[5] aims at protecting the environment from the adverse effects of urban waste water discharges and discharges from certain industrial sectors, by setting specific requirements concerning the collection, treatment and discharge of waste water.

The obligations for the municipalities differ depending on their size and their location, especially concerning the level of treatment of the waste water required before discharge into the receiving waters. In large municipalities, urban waste water is generally subject to secondary treatment before discharge. However, in exceptional circumstances, when it can be demonstrated that more advanced treatment will not produce environmental benefits, discharges into less sensitive areas may be subject to less stringent requirements. In such circumstances, the EEA EFTA States are required to submit the relevant documentation to the EFTA Surveillance Authority, showing that the discharges receive at least primary treatment and that they will not adversely affect the environment so that the Authority may grant a derogation.

In September 2004, the Authority received a request from Norway for a derogation concerning the discharges into the Trondheim fjord (identified as a less sensitive area) of urban waste waters from the Høvringen waste water treatment plant in the agglomeration of Trondheim. Additional information was submitted in February 2006 and May 2007. Having examined the documentation submitted by Norway, the Authority decided, on 19 December 2007, to grant a derogation with the following strict requirements:

- the waste water shall be subject to an appropriate treatment, which shall increase the current retention of suspended solids of the incoming waste water, including heavy metals and micro-pollutants, to achieve a reduction of such suspended solids by at least 80% before discharge into the fjord, to limit the contamination of the receiving waters and therefore the environmental impact of urban waste water;
- a complementary strategy shall be developed to reduce the load of heavy metals and micro-pollutants in the sewage system, with the aim being to identify and solve at the source the problem of contamination of urban waste water, thereby reducing the amounts of contaminants in both the sewage sludge and the discharges into receiving waters.

The Norwegian competent authority will monitor both the required treatment level at the Høvringen plant and the strategy developed to reduce the load of heavy metals and micro-pollutants in the sewage system. The requirements will be reconsidered in the future, if the strategy to treat at source proves to be an efficient way to reduce the level of contamination sufficiently.

5. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment.

Freedom of establishment

The Waterfall case

On 26 June 2007, the EFTA Court delivered its judgment in Case E-2/06 concerning provisions of the Norwegian Industrial Licensing Act, which provide that undertakings that are defined as "public undertakings" are granted concessions for acquisition of waterfalls for energy production without time limitation. Other operators, including all foreign undertakings, are granted time-limited concessions. They are also subject to the requirement that property rights to waterfalls and all related installations, the power plant and appurtenant machinery, shall be transferred to the State without compensation at the end of the concession period (system of reversion).

The Norwegian government, supported by the Government of Iceland, submitted that the disputed provisions fell outside the scope of the EEA Agreement as they concern the management of natural resources. The Court found that the Agreement applied and that Article 125 EEA is to be interpreted to the effect that, although the system of property ownership is a matter for each EEA State to decide, the said provision does not have the effect of exempting measures establishing such a system from the fundamental rules of the EEA Agreement, including the rules on free movement of capital and freedom of establishment. The Court furthermore held that the differentiation entailed in the contested rules constituted indirect discrimination against foreign operators contrary to both free movement of capital and freedom of establishment. The Court considered the rules to have a negative effect on the value of the investment of private and foreign investors in hydropower production, due to the fact that they have a shorter time to get a return on their investment than Norwegian public undertakings.

An EEA State's right to decide whether hydropower resources and related installations are in private or public ownership is, as such, not affected by the EEA Agreement. Therefore, the Court held that Norway may legitimately pursue the objective of establishing a system of public ownership over these assets. However, the Court rejected that the Norwegian regime aimed at establishing such a system. The Court held that the Norwegian regime, as it existed at the time of the judgment, aims at achieving a certain level of public control of the hydropower sector rather than achieving public ownership. The Court found that although acquiring public control could not qualify as a mandatory requirement capable of justifying the restriction in question, public control is a means of achieving the legitimate objectives of public security in relation to security of energy supply and environmental concerns. However, the Government of Norway failed to demonstrate that ownership control is necessary in order to meet these aims, which can be achieved by other less restrictive but equally effective means. On that basis the Court held that Norway had infringed the EEA Agreement.

Freedom of establishment

Gaming cases before the EFTA Court

In 2007, the Authority was involved in two important cases concerning the compatibility of national restrictions on gambling services with the fundamental freedoms of the EEA Agreement.

The gaming machine case, E-1/07

In a judgment delivered 14 March 2007, the EFTA Court dismissed an application by the Authority for a declaration that the monopoly for the state-owned Norsk Tipping AS to operate gaming machines in Norway was contrary to the rules of the EEA Agreement on freedom of establishment and freedom to provide services. The case attracted considerable interest and Belgium and Iceland intervened in support of the position of the Norwegian Government. Furthermore, Finland, Greece, Hungary, the Netherlands, Portugal, Sweden and the European Commission submitted written observations to the EFTA Court.

The Court held that the exclusion of private operators who before legislative amendments in 2003 had been able to operate gaming machines on behalf of charitable organisations, restricts both the freedom of establishment and freedom to provide services. In its assessment of whether the restrictions could be justified, the Court stated that, although the Contracting Parties are free to set the objectives of their policy on gaming and to define the level of protection sought, the restrictive measures that they impose must nevertheless serve legitimate aims and be proportionate thereto. The Court found that the main objective of the legislation was the legitimate aim of fighting gambling addiction. According to the Court, the aim of securing revenue for humanitarian and socially beneficial causes was only ancillary to this main objective.

With regard to the principle of consistency under EEA law, the Court held that where an EEA State has chosen to fight gambling addiction through the reduction of gambling opportunities by the introduction of a state monopoly, it may not at the same time endorse or accept measures, such as extensive marketing, which could lead to an increase in gambling opportunities. Despite Norsk Tipping being one of the biggest marketers in Norway, the Court emphasised that the gaming machines were more dangerous in terms of leading to gambling addiction than other games offered on the Norwegian market. Thus, although other games offered by Norsk Tipping were capable of creating gambling addiction, the marketing of such other games was not relevant in the context of consistency. The Court added that in any event, a consistent and systematic approach to fighting gambling addiction must also encompass an effective control of the exclusive right holder's activities once the contested legislation has entered into force.

With regard to proportionality, the Court held that Norway had failed to demonstrate that less far-reaching measures would not be equally effective in preventing gambling related crimes such as money-laundering and embezzlement. The Court found it, however, reasonable to assume that a monopoly operator in the field of gaming machines, subject to effective control by the competent public authorities, would tend to accommodate the fight against gambling addiction better than commercial operators. The Court found it plausible to assume that in principle the State can more easily control and direct a wholly state-owned operator than private operators. Finally, the Court stated that the effectiveness of public control and enforcement of a genuinely restrictive approach to gaming machines were the focal point of the proportionality assessment in the case. In a situation where the reform of the gaming machine regulation in Norway had not yet taken effect, the Court could not base itself on the general assumption that public control and policy enforcement would not satisfy these requirements.

The Ladbrokes case, E-3/06

The Ladbrokes case, which is currently pending before a Norwegian Court, saw a record number of 10 EEA States, in addition to the Authority and the European Commission, intervening before the EFTA Court. The case was initiated by Ladbrokes Ltd., which is the world's largest bookmaker company, established in the United Kingdom.

By its action, Ladbrokes essentially challenges the Norwegian regulation of the entire gambling and betting sector, namely (1) the Gaming Act, which establishes a monopoly for the state-owned company Norsk Tipping for the operation of games such as Lotto and sports betting; (2) the Totalisator Act, which is the legal basis for the exclusive right of operation of horserace betting granted to Norsk Rikstoto, and (3) the Lottery Act, which provides that minor money games such as Bingo and scratch cards may only be operated by non-profit organisations with a humanitarian or socially beneficial purpose.

In its advisory opinion delivered 30 May 2007, the EFTA Court held that all games of chance provided in return for payment constitute economic activities falling within the scope of EEA fundamental freedoms. A system based on exclusive rights completely denies private operators access to the respective markets and thus restricts the freedom to provide services and the right of establishment. In order to be justified, the legislation needs to be based on legitimate objectives of overriding general interest. In that respect, the Court accepted the aims of fighting gambling addiction, crime and malpractice as being legitimate.

The aim of fighting gambling addiction must, however, reflect a concern to bring about a genuine diminution in gambling opportunities. The motive of financing benevolent or public-interest activities cannot in itself be regarded as an objective justification for restrictions on free movement. The aim of preventing gambling from being a source of private profit can serve as justification only if the legislation reflects a moral concern. If a state-owned monopoly is allowed to offer a range of gambling opportunities, the legislation at issue cannot be said to genuinely pursue this aim. With regard to the suitability/consistency of the legislation the Court explained that exclusive rights may only serve as a suitable means to combat gambling addiction if the exclusive rights-holder is required to operate in a way which serves to limit gambling opportunities in a consistent and systematic manner. In that respect, the EFTA Court considered the development and marketing of addictive games by a monopolist to be relevant. The EFTA Court held nevertheless that a controlled expansion of games might be necessary to channel players away from *e.g.* highly addictive games offered via the Internet. It falls on the State to demonstrate that such channelling measures may reasonably be assumed to serve their purpose.

As regards the necessity of the legislation, the Court rejected the submission of the Norwegian Government that it was only subject to limited judicial review. The EFTA Court stated that it would be necessary for the national court to ascertain whether there are genuine risks connected to each game, which will differ considerably depending on the individual game. Furthermore, it was for the national court to examine the level of protection sought to be achieved by the gaming authorities. To the extent the national court concludes that the monopoly is compatible with the EEA Agreement, the EFTA Court holds that the State has a right to prohibit the marketing of games from abroad even if they are lawful in another EEA State. On the other hand, if the national court comes to the conclusion that the restrictions are not lawful, the State may nevertheless require the foreign service provider to hold a licence under the same conditions as its own nationals. However, the legislation must not be excessive and must take into account the requirements that the service provider has already had to fulfil in its home State.

Freedom of establishment

Norway's mechanism to avoid double taxation

In case E-7/07 the EFTA Court is asked by the Stavanger District Court to give guidance as to whether the Norwegian rules on credit allowance for tax paid in another EEA State are in accordance with the EEA Agreement.

The plaintiff, *Seabrokers AS*, has taxable income in both Norway and the United Kingdom. The company's global income is subject to tax in Norway. In addition, the income derived by the branch in the UK is taxed there. In order to avoid double taxation of the company's profit, the Norwegian tax provisions grant the company a tax credit allowance for income tax paid in the UK. Those rules entail that deductions for debt interests and group contributions shall be attributed to the activities in Norway and the UK in proportion to the source of the net income. Thus, the rules entail that parts of these deductions are attributed to the income in the UK and the deductions on the income in Norway are correspondingly reduced.

The Authority submitted written observations in this case in October 2007. It argued that the existence of an infringement to the freedom of establishment depends on whether the deductions in the calculation of the tax credit are or are not solely related to the activity of the branch established abroad.

When debt interest and group contribution can be linked solely to the business in Norway, a Norwegian company that establishes a branch abroad suffers a disadvantage since it is not able to deduct from its income in Norway the same amount of expenses that it could have deducted had it not exercised its freedom of establishment. It is the Authority's view that this disadvantage is not due to disparities between the tax systems of Norway and the UK but results from the manner in which the national tax provisions at issue treat expenses linked to the business in Norway. The Authority therefore concluded that, in so far as the expenses could as a matter of fact be linked only to the business in Norway, the Norwegian tax provisions amounted to a breach of the freedom of establishment enshrined in Article 31 EEA.

Free movement of goods

Draft technical regulations

The *Draft Technical Regulations Directive* (98/34/EC) establishes a notification procedure with the aim to prevent the creation of new, unjustified barriers to trade which can arise from the adoption of restrictive technical regulations. According to the Directive, the EEA EFTA States shall notify technical regulations in draft form to the Authority. Following the notification, there is a three month standstill period during which the Authority, the European Commission and other EEA States have time to examine the draft and issue comments if it appears that questions exist as regards the draft regulation's compatibility with the EEA Agreement.

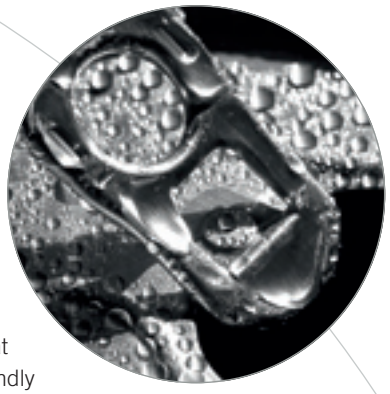
In 2007, the Authority received 28 notifications of draft technical regulations from the EEA EFTA States. Of these, 21 came from Norway, 6 from Iceland and 1 from Liechtenstein. 8 of the notifications prompted the Authority to send comments. The Commission commented upon 4 of the notifications, 2 of which were not commented on by the Authority.

The Authority received 757 notifications from the EU Member States, forwarded to it by the Commission. The EEA EFTA States can decide to send comments through the Authority in the form of a single coordinated communication but it was not felt necessary in any of these cases.

Year	EFTA notifications	Comments from the Authority	EU notifications	Single coordinated communications
2004	37	10	557	1
2005	55	11	733	0
2006	23	6	668	1
2007	**28**	**7**	**757**	**0**

Free movement of goods

Discrimination against imported beverage packaging



The Norwegian system for taxation of beverage packaging consists of two elements: first, a general environmental tax applicable to all beverage packaging, and secondly, a so-called base tax imposed on non-refillable beverage packaging only. Non-refillable packaging means packaging which cannot be reused in its original form. Hence cans, drink cartons and non-refillable plastic bottles which are not reusable in their original form are subject to the base tax, whereas refillable beverage packaging, *i.e.* glass and plastic bottles registered in a reuse system, are not.

The base tax was introduced in 1994 for environmental reasons, more specifically in order to reduce littering caused by non-refillable beverage packaging. At the time, non-refillable beverage packaging was not part of any return system for beverage packaging in place in Norway. With the establishment of Norsk Resirk in 1999, a return system for non-refillable beverage packaging was introduced. Consequently, both refillable and non-refillable beverage packaging units are returnable in Norway. There is no documentation that confirms that re-use is more environmentally friendly than recycling.

In June 2007, the Authority issued a letter of formal notice against Norway, concluding that the levying of the base tax on non-refillable beverage packaging constitutes discriminatory internal taxation as imported beverages are *de facto* taxed more heavily than similar or competing domestic products, and protection is thus afforded to domestic production of soft drinks and water. It follows from the case law of the European Court of Justice that the pursuit of an environmental objective does not relieve a State from its duty to observe the rules prohibiting discriminatory internal taxation.

Free movement of goods

Private import of alcohol to Norway

In November 2007 the Authority issued a Reasoned Opinion to Norway regarding the restrictions on private imports of alcoholic beverages into Norway. The Authority concluded in its Reasoned Opinion that the Norwegian restrictions are in violation of the principle of free movement of goods established by Article 11 EEA.

Formal infringement proceedings against Norway in this matter were initiated by the Authority in 2004. The Norwegian Government has maintained that the general ban on the import of alcoholic drinks for personal use form a part of the monopoly on the retail sale of alcoholic beverages, and therefore should be excluded from the free movement provisions.

The EFTA Surveillance Authority agrees that Norway is allowed to maintain its monopoly on retail sales of alcohol on Norwegian soil. However, the issue of imports of alcoholic beverages for personal use should be treated separately under the free movement provisions. Indeed, in a judgment of 5 June 2007, the European Court of Justice found that a similar system of import restrictions in place in Sweden was separable from the issue of the retail monopoly (Case C-170/04, *Rosengren*). As a consequence, Sweden was found to be in breach of the rules on the free movement of goods under the EC Treaty. The judgment in *Rosengren* corresponds in full with the view advanced by the Authority in the Norwegian case.

Free movement of goods

Dock charges on alcohol in Iceland

In 2007, the Authority submitted written observations to the EFTA Court in a request for an Advisory Opinion from the Supreme Court of Iceland concerning the compatibility with the EEA Agreement of dock charges on alcohol levied by Associated Icelandic Ports (Faxaflóahafnir sf.).

The question referred by the Icelandic court related to whether the actions of an undertaking such as Associated Icelandic Ports, wholly owned by several municipalities around Reykjavík, fell within the scope of Articles 10, 11 and 14 of the EEA Agreement. Furthermore, the Court asked whether the dock charges levied by the undertaking were in breach of these Articles as the fee charged for alcohol passing through its harbours is around three times higher than the fee for non-alcoholic drinks. In its observations the Authority maintained that it was not necessary to answer the first question as the dock charges were in any event compatible with the EEA Agreement as they were non-discriminatory.

An oral hearing was held in December 2007 and a judgment is expected in the first half of 2008.

Free movement of capital

Discriminatory treatment of shareholders

In 2004, the Authority reported on the judgment delivered in case E 1/04 (*Fokus Bank*), in which the EFTA Court ruled on discriminatory tax rules in Norway regarding distribution of dividends from companies established in Norway. In 2006, the Authority reported on its intervention in a reference to the European Court of Justice concerning similar questions of interpretation in the Community pillar of the EEA (Case C-170/05 *Denkavit*). The Authority in 2007 also intervened in another, broadly similar, case before the European Court of Justice (Case C-379/05 *Amurta*) in which the Court was called upon to interpret the provisions on the free movement of capital.

The case essentially concerned the tax treatment of shareholders in Dutch companies: those domiciled in Portugal were subject to a Dutch withholding tax whereas those domiciled in the Netherlands were exempt from that tax. The Court re-stated its basic proposition that, although direct taxation is a matter for the Member States, they must exercise that competence consistently with Community law. The difference in treatment with regard to taxation of dividends was considered to constitute a restriction to the free movement of capital and the Court rejected that the restriction could be justified by overriding reasons in the public interest.

The national court moreover asked whether the fact that the shareholder in Portugal might be granted a tax credit for the tax paid in the Netherlands was relevant for the assessment. The Court replied that it follows from settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages granted unilaterally by another Member State. The Court held however that it could not be ruled out that a Member State may succeed in ensuring compliance with its Treaty obligations through the conclusion of a convention for the avoidance of double taxation with another Member State. It was therefore for the national court to establish whether account should be taken of the Double Taxation Convention concluded between the Netherlands and Portugal and, if so, to determine whether that Convention enables the restriction on the free movement of capital to be neutralised.

Freedom to provide services

Trade unions' actions a fundamental right, but freedom to provide services must be respected

In 2006, the Authority submitted written observations to the European Court of Justice in Case C-341/05 *Laval*. The Laval case concerns a Latvian company providing services in Sweden.

When Laval refused to sign a Swedish collective agreement, Swedish trade unions initiated a blockade of all Laval's sites in Sweden. The work stopped, Laval's subsidiary in Sweden was declared bankrupt and the Latvian workers returned to Latvia.

The Court conclued that the trade unions' right to take collective action is a fundamental right which forms part of Community law. That right may however be subject to certain restrictions. Even if the right to take action is a fundamental right, the Community law is still applicable, such as the rules on the freedom to provide services.

The Court pointed out that the right to take collective actions for the protection of workers against social dumping may constitue such a reason of public interest, and that blockading the building site may fall within the objective of protecting workers.

However in the specific case, the action could not be justified. For example, the rules on pay which these actions tried to impose on a company established in other states are characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible.

Freedom to provide services

Freedom of lawyers to provide services in Liechtenstein

In October 2007 the EFTA Court handed down its Advisory Opinion in relation to two questions posed by the Liechtenstein *Fürstliches Landgericht*. The Opinion expressly confirms the existence under EEA law of an obligation of conforming interpretation. The Court also reiterates the lack of direct effect of unimplemented EEA law in the EFTA States.

The first question related to a rule in Liechtenstein law that required lawyers providing services in Liechtenstein to work in conjunction with a local lawyer in cases where they wished to represent their client in court. Directive 77/249/EEC on the freedom of lawyers to provide services contains an exception to the general principle of free movement in cases of 'representation in legal proceedings'. However, since the national proceedings concerned a procedure for which representation by a lawyer was not mandatory, the Court found that the exception did not apply and that requiring a lawyer to work in conjunction with a local lawyer would infringe Article 36 EEA and the Directive.

However, the referring court had asked whether such a provision may nevertheless be applied by a court in an EEA EFTA State. This second question goes to the issue of direct effect of EEA law. Since the referring court makes clear that Article 36 EEA is applicable as such in Liechtenstein law, the answer is unproblematic and EEA law must prevail. However, the Court took the opportunity to put the matter beyond doubt also in relation to directives and confirmed that the EC law principles of direct effect and primacy are not a part of EEA law, and that Protocol 35 to the EEA Agreement serves to regulate situations of conflict in the EEA. In other words, EEA law does not require that EEA rules not nationally implemented take precedence over conflicting national rules, including national rules which fail to correctly render EEA rules applicable in national law. However, national courts do have an obligation to apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.

Information society services

Norway leads the market review process

At the end of 2007, the difference between the EEA EFTA States had increased in relation to the pace of electronic communications market reviews. Whereas Norway started the second round of reviews of the state of competition in their electronic communications markets, Iceland saw the number of notifications decrease during 2007 and Liechtenstein has not formally notified any market review yet.

Fewer notifications submitted to the Authority, but an increase in the level of expertise:

In the course of 2007, the Authority examined a total of three formal notifications, covering an equal number of product markets. Norway notified the last market review of its initial round (minimum set of retail leased lines) and its first of the second round (voice call termination on mobile networks). Iceland notified the review of the market for wholesale access (including shared access) to the "last mile" of the public fixed telecommunications network, which connects the end-user to the network (the "local loop") for the purpose of providing broadband and voice services. Towards the end of 2007, the Authority also started pre-notification assessments of three further market reviews.

The number of notifications received by the Authority went down in 2006 compared to the previous year, when the peak in the number of market reviews was reached. On the other hand, the Authority has observed a consolidation of the trend identified in 2006, namely, that the notifications reflect an increase in the expertise gained in carrying out the reviews.

The trend also continues with regard to the outcome of the market reviews: in all of the notified analyses, the national regulatory authority (NRA) concerned concluded that the market under scrutiny was not effectively competitive and required the imposition of regulatory remedies on one or more operators with significant market power.

The Norwegian review of the wholesale market for terminating calls on mobile networks (basically, carrying a call from one telephone company to the subscribers of another, and especially the prices charged between the companies for this service) resulted in the imposition, in particular, of a price limit on the three main mobile operators. According to the proposed price controls, as of 1 July 2008, NetCom AS will be obliged to charge other operators the same prices as Telenor ASA for accepting in-coming calls on their respective networks ("symmetrical termination rates"). The Authority supported the NRA's choice of a cost accounting methodology which establishes what would be an efficient price for the mobile termination service. The Authority likewise concurred with the objective of eliminating the difference between the termination charges of Telenor ASA and NetCom AS within the timeframe in question. The Authority did, however, express concerns of the NRA's intention to allow these operators to keep charging mobile termination prices significantly higher than the established efficient cost of production of those services until July 2010. The final decision by the NRA has been appealed by NetCom AS.

The Icelandic review of the market for separated access to the "local loop" (see above) resulted in the imposition of a series of remedies, such as non-discrimination, transparency, access, accounting separation and price control obligations, on the main Icelandic operator, Míla ehf, to address its significant power on the market. The Authority had no comments on the measures proposed.

While the comments issued by the Authority are not formally binding, the NRA concerned must nevertheless take account of them. For example, this year the Icelandic NRA revised its draft decision on the market for access and call origination on public mobile telephone networks in light of the comments issued by the Authority.

International roaming tariffs to decrease:

In October 2007, the Regulation on international roaming on public mobile networks, adopted by the European Community in June, was incorporated into the EEA Agreement. The Regulation entered into force on the day following the last notification of fulfilment of constitutional requirements, namely on 22 December. Essentially, the Regulation establishes maximum levels for international tariffs. The Authority will monitor the implementation of the Regulation in Norway, Iceland and Liechtenstein.

Information society services

Delays in the application of the telecom package in Liechtenstein

Despite the final implementation of the regulatory framework by Liechtenstein the Authority remains concerned by its delayed application.

In May 2007, Liechtenstein notified full implementation of the 2002 electronic communications regulatory framework following the EFTA Court ruling in June 2006 concerning Liechtenstein's failure to implement the framework. The necessary implementing measures were adopted in the first half of 2007 but the National Regulative Authority has not yet formally notified any market review.

However, the Authority has been informed of the commencement of various market analyses, including the time-consuming yet crucial data gathering process that will underpin the assessments. At the end of 2007 the draft review of the market for access and call origination on public mobile telephone networks was undergoing national public consultation and pre-notification contacts with the Authority had been established.

Financial Services

Financial Services Action Plan – a review

In 2007 the Authority continued its review of the national measures implementing the EEA Acts comprising the *Financial Services Action Plan* (FSAP) in the EEA EFTA States.[6]

The FSAP sets out 42 measures aimed at creating an integrated, well functioning financial market to serve as a motor for growth, job creation and improved competitiveness in the European economy. At the end of 2007, of the 27 FSAP directives in force in the EU, 23 have been incorporated into the EEA Agreement. So far, 19 of those have been notified as fully implemented by all three EEA EFTA States, while the remaining 4 are overdue for notification by one or more State.

The aim of creating a single financial market in the whole EEA requires uniform surveillance of the transposition of the FSAP measures, not only in the EU Member States, but also in the EEA EFTA States. Transposition of FSAP measures has been given high priority within the Community.

Most notably, 2007 saw the entry into force of the Directive on Markets in Financial Instruments which to a great extent harmonises national measures applicable to regulated financial markets and investment firms.[7]

The FSAP review project, which the Authority started in January 2006, requires the EEA EFTA States to submit so-called "tables of correspondence", outlining which provisions in their national legislation are meant to implement the corresponding provisions of the directives. So far, tables from all three EFTA States have been received in respect of 12 of the FSAP directives.

The EEA EFTA States have in a number of cases been asked to submit further information or clarification regarding implementation, and in certain cases amendments to national provisions appear to be necessary in order to ensure full compliance. In 13 cases the assessment has been finalised and the cases closed. The Authority has not, to date, started any infringement proceedings against the EEA EFTA States on the basis of this review.

The number of directives being assessed resulted in substantial demands being made on the Authority's resources during 2006 and 2007. It has also entailed a considerable workload for the national administrations of the EEA EFTA States, which have shown good co-operation and effort to provide the necessary information.

It is estimated that during 2008 the EEA EFTA States will be invited to submit tables for the remaining FSAP Acts and that the Authority will, during the course of the year have completed at least an initial assessment for all the Acts.

6. See http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm.

7. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

Equal treatment

Survivor's pension – equal privileges for widows and widowers

In October 2007, the EFTA Court upheld the Authority's application for a declaration that the rules according to which a survivor's pension is calculated are in breach of Norway's obligations under the EEA Agreement.

This case, known as the 'Golden Widows' case after the category of women who receive better treatment as regards their survivor's pension than men in similar situations, dates from 2001. The Authority maintained that carving out this category of women violated Article 69 EEA as well as the Directive on occupational social security schemes (Directive 86/378). Norway has presented various arguments against this view over the years. However, in May 2007 it submitted a Statement of Defence to the EFTA Court by which it agreed with the position of the Authority and requested that the Court declare the Application to be well-founded.

The EFTA Court examined the case and found for the Authority. Currently the survivor's pension of a widower whose spouse joined the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivor's pension without curtailment. For pension rights accrued on the basis of periods of employment after 1 January 1994, this difference in treatment has been declared to be in violation of the EEA Agreement and Norway will have to take appropriate measures to bring the situation into line with EEA obligations.

Equal treatment

Requirements on plaintiffs to provide security for costs

In December 2007, the Authority issued a letter of formal notice to Liechtenstein in a case originating in a complaint filed with the Authority by two Austrian nationals that were acting as plaintiffs before a Liechtenstein court.

Section 57 of the Liechtenstein Civil Procedure Act provides that a defendant in civil or commercial proceedings can require from a plaintiff that does not have residence in Liechtenstein, to provide security for the costs of the proceedings. Such requirement appears, in the Authority's opinion, to amount to a violation of the non-discrimination principle laid down in Article 4 EEA, unless there is an objective justification for the difference in treatment.

It is a matter of settled case law that an objective justification exists in situations where it is impossible or considerably more difficult and/or expensive for the defendant to recover the costs of the proceedings from a plaintiff residing in another EEA Member State. Moreover, it follows from that case law that recovery is regarded as considerably more difficult and/or expensive when the State concerned is not bound by an international agreement providing guarantees on recognition and enforcement of judgments, such as the Lugano Convention of 16 September 1988.

Liechtenstein is not party to the Lugano Convention. However, since a bilateral agreement exists between Liechtenstein and Austria on recognition and enforcement of judgements in civil and commercial proceedings, it is the opinion of the Authority that there appears to be no objective justification for the requirement on security for costs in relation to persons residing in Austria.

Social security

The helplessness allowance – ESA v. Liechtenstein

Liechtenstein told to abolish the residence requirement for the helplessness allowance (case E-5/06).

On 14 December 2007, the EFTA Court upheld the EFTA Surveillance Authority's application for a declaration that by maintaining in force a residence requirement for granting the helplessness allowance (Hilflosenentschädigung), Liechtenstein is in breach of its obligations pursuant to the *Social Security Coordination* Regulation (1408/71). This allowance is awarded to persons resident in Liechtenstein who require help in order to carry out certain daily tasks without any qualification as to why they are helpless, including *inter alia* those who are helpless due to old age.

The aim of Regulation 1408/71 is to facilitate the exercise of the free movement of workers and self-employed persons by coordinating social security benefits. Pursuant to this Regulation certain benefits to workers and self-employed persons and their families, *inter alia* sickness benefits, shall on certain conditions be granted by an EEA State to such persons having their residence in another EEA State. However, benefits defined under Article 4(2a) as "special non-contributory benefits" and benefits in cash are non-exportable.

The helplessness allowance granted in Liechtenstein is listed in Annex IIa to Regulation 1408/71 which lists the type of allowances that each EEA State has notified as being "special non-contributory benefits".

However, a recent judgment of the Court of Justice in case C-299/05[8] has confirmed that Annex IIa to Regulation 1408/71 has no constitutive effect where the criteria laid down in Article 4(2a) of the Regulation is in fact not fulfilled.

The EFTA Court ruled that the helplessness allowance is not a special non-contributory benefit intended "solely as specific protection for the disabled", but a sickness benefit. Therefore, the residence requirement is in breach of Regulation 1408/71.

8. Judgment of 18/10/2007, Commission / Parliament and Council, not yet reported.

Social security

Icelandic social security – Can you take it with you when you go?

In October 2007, the EFTA Court held an oral hearing in an Advisory Opinion case referred by the District Court of Reykjavik concerning the Icelandic provision for projection of pension rights in case of invalidity (Case E-4/07).

In October 2007, the EFTA Court held an oral hearing in an Advisory Opinion case referred by the District Court of Reykjavik concerning the Icelandic provision for projection of pension rights in case of invalidity (Case E-4/07).

The Icelandic sailor in question had worked in Iceland before moving to Denmark, where he was subsequently injured in an accident leaving him unable to work. He is receiving a pension from the Icelandic funds into which he had paid but has been refused the additional benefit of having that pension calculated on the basis of projected pension points (i.e. the future points he would have accumulated had he not been incapacitated). The refusal is based on the fact that, under Icelandic law, the entitlement to projection is subject to the fund member having paid into the fund for at least 6 of the 12 months preceding the accident. Due to the fact that the sailor in question had moved to Denmark and was paying social security contributions in that country, he did not fulfil that condition. The EFTA Court has been asked whether such a condition is compatible with EEA law and in particular Regulation 1408/71 on the coordination of social security schemes.

The Authority is of the opinion that the sailor in question is entitled to the more advantageous method of calculation based on projected points. Regulation 1408/71 is based on the principle that a person must not see his or her rights lost or diminished simply by virtue of the fact of having exercised his or her right to move freely within the EEA. In the case at hand, the periods of contribution in Denmark must be taken into account as if they had taken place in Iceland.

Social security

Non-economic loss and coverage by national motor vehicle insurance

In December 2007 the Authority submitted written observations in Case E-8/07, *Celina N'Guyen*. In this case the EFTA Court is asked by the Oslo tingrett to give guidance as to whether the Norwegian rules according to which redress for non-economic loss is not covered by motor vehicle insurance is contrary to the EEA Agreement, and if so whether such an infringement is sufficiently serious to entail State liability.

The Authority considers that it stems from the wording of the *Motor Vehicle Insurance* Directives[9] as interpreted by the EFTA Court and the Court of Justice[10] that, since non-economic damage constitutes a ground for claim under the civil liability system in Norway, it has to be covered by motor vehicle insurance.

With regard to the second question, the Authority concludes that it falls within the competence of the referring national court to determine whether the conditions for State liability for breach of EEA law are met in the case before it. The lack of discretion with regard to whether civil liabilities should be covered by the insurance and the existence of a developed line of case law concerning the relevant provisions of the Directives would however appear to indicate that the breach is sufficiently serious to entail State liability.

9. Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, OJ L 103, 1972; Second Council Directive 84/5/EEC of 30 December 1983, OJ L 8, 1984; Third Council Directive 90/232/EEC of 14 May 1990, OJ L 129, 1990.

10. See notably Case C-348/98 *Ferreira* [2000] ECR I-6711 and Case E-1/99 *Finanger* [1999] EFTA Court Report 119.

Food and veterinary issues

Food safety and animal health

Introduction

The Authority is responsible for monitoring the EEA EFTA States' implementation and application of EEA legislation related to the whole food chain. The legislation covers fields such as seeds, feed and food, animal health and welfare, animal by-products, residues of medicines etc., pesticides and contaminants. The application control consists of, *inter alia*, verification through on-the-spot inspection of the effectiveness of the national control systems.

The Authority has the legal competence to adopt decisions related to animal disease status, programmes to eradicate such diseases and other monitoring programmes, border inspection posts etc. In 2007, the Authority adopted several decisions in these fields, the majority of which related to Norway.

In 2007, amendments were made to the EEA Agreement in these fields in relation to both Iceland and Liechtenstein. It was agreed that after an 18 month transitional period Iceland will take over more legislation related to food safety in agricultural products. This will be added to the legislation on fish and fishery products which is already applicable to Iceland.

Liechtenstein will henceforth be covered by the alleged bilateral agreement between Switzerland and the European Union. The EEA legislation on food and feed safety is therefore no longer applicable to Liechtenstein.

Inspections

The Authority carried out eight inspections in the EFTA States in 2007. Two further inspections planned in Iceland were not carried out because the revision of the EEA Agreement for Iceland related to food safety issues had not been finalised.

The fields inspected were drinking water, in both Iceland and Norway, and fishery products and zoonoses in Norway. As in previous years' inspections, the Authority observed improvements in the application of the EEA legislation. However, persistent shortcomings related to the official controls carried out by the competent authorities and inadequate enforcement of legislation were observed and were the most important issues brought to the attention of the national authorities. In the establishments visited, the Authority often observed imperfect own-checks systems. Well functioning own-checks systems are important for ensuring the hygienic quality of products offered for sale to consumers.

The Authority also carried out a general review inspection in Norway. The purpose of this inspection was to review and resolve any outstanding issues following conclusions from previous inspections undertaken by the Authority between 2001 and 2006. The Authority observed that the Norwegian authorities had taken corrective action in relation to many of its conclusions.

Three inspections related to border inspection posts were carried out in 2007, two in Iceland and one in Norway. One of the inspections in Iceland followed an Icelandic request for adding a new border inspection post and updating the status for some other posts. Following a request from Norway the Authority removed one border inspection post and four inspection centres from the Authority's decision that lists border inspection posts in Iceland and Norway which can check live animals and animal products from third countries. The amendments related to Iceland will be covered by a decision that the Authority intends to adopt early 2008.

In the inspection carried out in Iceland in January 2007 the Authority observed that consignments of, for example, fish oil were checked and permitted through border inspections posts not approved for such consignments. Following this observation and a confirmation from Iceland that this practice would continue, the Authority sent a letter of formal notice to Iceland in May 2007.

Trade in live sheep

The European Union is aiming at eradicating scrapie in its Member States. Scrapie is a degenerative disease that belongs to the family of transmissible spongiform encephalopathies (TSEs) and affects the central nervous system of sheep and goats. Active surveillance of the disease was introduced in 2002 in order to obtain better estimates of the scrapie prevalence in the EEA. Detailed rules concerning the approval of the national scrapie control programmes were established in Regulation (EC) 999/2001.

It is in this context that the Authority, in close co-operation with the Commission, approved the Norwegian national scrapie control programme. This approval was possible because of the low prevalence/absence of scrapie in the Norwegian territory. As a result, Norway has been granted additional guarantees according to which it can impose restrictions on intra-community trade of sheep and goats under the conditions laid down in the relevant EEA legislation.

The approval of the scrapie programme and the additional guarantees regarding intra-Community trade and import to Norway lead to the closure of a complaint case against Norway relating to the import of live sheep from Denmark to Norway.

Quarantine/isolation of live sheep imported into Norway was based on a national surveillance system with regard to sheep diseases since Norway had not been granted additional guarantees at that time.

As a result of the approval of its national scrapie control programme, Norway can now impose additional guarantees restricting the trade in live sheep provided certain conditions are met. The Authority will, however, continue to monitor whether the Norwegian application of quarantine in other areas, where surveillance and control programmes have not been approved by the Authority, is in line with relevant EEA legislation.

Residues

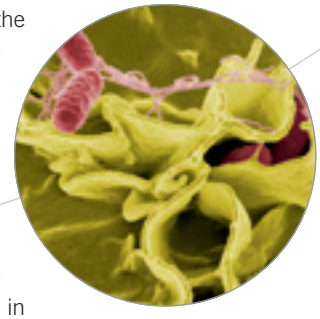
Directive 96/23/EC on monitoring residues is currently only applicable to Norway, but will, after a transitional period, also be applicable to Iceland through the revised Chapter I of Annex I to the EEA Agreement. The substances monitored are those having anabolic effect, unauthorised substances, veterinary drugs and contaminants.

The production process of animals and primary products of animal origin shall be monitored for the purpose of detecting the presence of residues from drugs and contaminants etc. The monitoring shall also aim at revealing any illegal use of legal or illegal substances. In order to do so the competent authorities in the EEA States must adopt a plan covering all relevant fields and substances.

When assessing the Norwegian plan for 2007 the Authority detected only minor deviations from what is required in the Directive. Thus, in line with the approach of the European Commission, the Authority concluded that the Norwegian plan for 2007 was in line with the aims of the Directive. The deviations have been addressed and they will be taken into account by Norway when drafting the plan for 2008.

Salmonella

Salmonella is one of the most common causes of foodborne diarrhoea worldwide. Most of these infections are transmitted from healthy carrier animals to humans through contaminated food. The main reservoir of salmonella is animals, and the main sources of infections in industrialised countries are animal-derived products, notably fresh meat products and eggs.

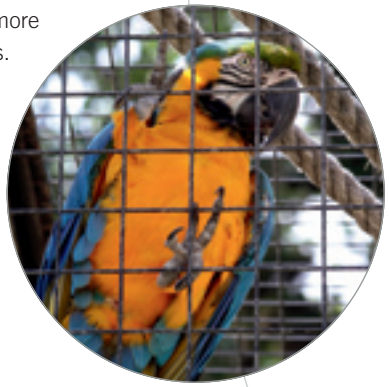


In 2007, the Authority, in close co-operation with the European Commission, examined the updated programme for the control of salmonella in Norway which covers the whole poultry production. However, EEA legislation currently in force has established Community targets still applicable for the reduction of the prevalence of salmonella in breeding flocks and laying hens of the *Gallus gallus* species. This is why the Authority approved, in 2007[11], only the provisions specifically related to breeding flocks and laying hens of *Gallus gallus* that were contained in the updated Norwegian programme for the control of salmonella.

11. Authority Decision 364/07/COL of 6 September 2007.

Avian influenza

Avian influenza or "bird flu" is a highly contagious viral disease which primarily affects birds, but on rare occasions can also be contracted by humans and other mammals. There are many different strains and sub-types of the disease, some more pathogenic and destructive than others. Within the EEA, preventive measures against avian influenza have been proposed to increase the avian influenza surveillance, to prevent or limit the spread of the disease in high-risk areas and to lay down the measures that must be taken by an EEA State in the event of an outbreak on its territory.



The Authority assessed, and approved, the Norwegian plan for preventive vaccination of birds kept in zoos against highly pathogenic avian influenza.[12] Under this plan zoos must obtain all the necessary permissions from the Norwegian authorities before vaccination commences. Participation in the vaccination programme is optional and the zoo, should it decide to participate, must cover the costs of vaccine, vaccination and surveillance.

Fish diseases

According to Directive 91/67/EEC regulating trade of aquaculture animals and products, it is possible for a farm, a country or part of a country, to achieve a special health status with regard to certain fish diseases depending on whether these diseases are present or not. Iceland has been recognised as an approved continental zone and as an approved coastal zone for fish with regard to the fish diseases viral haemorrhagic septicaemia (VHS) and infectious haematopoietic necrosis (IHN) while Norway has the same status with the exception of a buffer zone on the border between Norway and Russia.

Late 2007, Norway notified the Authority of an outbreak of VHS in two locations in a fjord in the County of Møre and Romsdal. Norway has informed the Authority of the measures taken in order to ensure that the disease is not spread. However, in order to ensure that the Authority's decision regarding the status for this disease reflects the actual situation in Norway, the Authority adopted in December 2007 a decision by which the affected parts of the fjord were exempted from the approved zone status. The Authority will continue monitoring the situation and the action taken by Norway.

12. Authority Decision 29/07/COL of 17 February 2007.

Security inspections

Aviation and maritime security

The role of the Authority as regards aviation and maritime security

Since the events of 11 September 2001, the European Community has introduced far-reaching aviation and maritime security legislation in the EU to prevent unlawful acts against civil aviation and maritime transport operations. These acts have been incorporated into the EEA Agreement and are applicable to Iceland and Norway. Since Liechtenstein has no airport open for commercial air transport operations, and is landlocked and has no ship registry, none of these acts apply to that State. The Authority is acting in close co-operation with the European Commission.

Aviation

The role of the EFTA Surveillance Authority in the field of civil aviation security is to monitor the application of the relevant EEA aviation security acts by the EEA EFTA States. As an instrument to measure the level of compliance with the acts within this field, the Authority conducts inspections of the national aviation administrations and of airports in these States. The Authority has conducted such inspections regularly since late 2005. In 2007, ten unannounced airport inspections and one inspection of a national administration were carried out.

In accordance with its Aviation Security Inspection Programme, the Authority has, in 2007, been focusing on compliance monitoring of airport and aircraft security, screening of passengers and cabin baggage, as well as hold baggage security and standards for technical equipment. The Authority's inspections have provided a thorough overview of the level of compliance with the civil aviation security requirements.

Maritime

The EEA maritime security regulations entered into force 1 April 2007 in the EFTA States. Similar to civil aviation security, the Authority will conduct inspections of the national maritime administrations, port facilities, ships and relevant companies, and recognised security organisations. In order to prepare for these new tasks, a maritime security inspector was recruited in 2007.

The Authority's maritime security inspections will start early 2008. The Authority has prepared a Maritime Security Inspection Programme for its inspections.

There is furthermore close co-operation between the Authority and the European Maritime Safety Agency (EMSA). The Authority attended, as an observer, one Commission maritime security inspection in 2007, and the Commission will likewise observe Authority inspections during 2008. In addition, EMSA will provide technical assistance to the Authority. This co-operation between the Authority, EMSA and the Commission will ensure that inspections are carried out in a harmonised manner in all EEA States.

Public procurement

New opportunities within the field of public procurement

New EEA public procurement rules became applicable to Norway and Iceland in April 2007. Liechtenstein has an additional 18 months to implement the new rules.

The idea behind the new rules is to simplify and clarify the procurement regime, to give greater flexibility by taking account of modern commercial practice and to facilitate electronic procurement in the public sector. Provisions regulating award procedures for major public sector contracts in general are found in the Public Sector Directive (2004/18/EC), while contracts in the utilities sector are governed by the Utilities Directive (2004/17/EC).

In terms of simplification, the new directives aim to be more user-friendly. The provisions are set out in such a way as to guide users step by step through the different stages of an award procedure. New procedures such as the competitive dialogue, and the possibility to define the purpose of the contract in terms of performance and not only in terms of standards are meant to provide greater flexibility.

In recognition of the success of legislation aimed at liberalising markets and increasing competition, the Utilities Directive establishes a new procedure (Article 30) whereby contracts in certain fields may be exempted from the application of the public procurement rules. The activities concerned are water, energy, transport and postal services. If an EEA EFTA State considers that such an activity "(…) is directly exposed to competition on markets to which access is not restricted" it can submit an application for exemption to the EFTA Surveillance Authority.

The question whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the provisions on competition. In certain fields, market access shall be presumed not to be restricted if the EEA EFTA State concerned has implemented and applies the specific secondary EEA legislation in that field.

Public procurement

Financing of film and TV – application of procurement and state aid rules

The Court of Justice handed down its judgment in Case C-337/06 Rundfunk in December 2007. The case concerned the German regional broadcasting stations and turned on the definition of 'contracting authority' contained in the procurement directives and, in particular, the condition of being 'financed by the State' which is part of that definition.

The Court has walked a fine line in finding that the broadcasters are caught by the definition, employing many of the arguments put forward by the Authority in its observations. The result is that the system of financing the broadcasters, which is not based on any contractual relationship between the viewer and the broadcaster and which grants the broadcaster the powers of a public authority in terms of enforcing payment, satisfies the condition that a body (to be classified as a contracting authority under the procurement directives) be 'financed by the State'. This judgment thus advocates a functional interpretation of the procurement directives while preserving the case law in the field of State aid which follows from the PreussenElektra judgment in 2003 (Case C-379/98) and is in line with the Authority's pending cases concerning the Norwegian and the Icelandic State broadcasters. The Authority also intervened in Case C-222/06 UTECA, a state aid case concerning an obligation on Spanish broadcasters to use a part of their revenue to finance Spanish films. The Authority argued in line with the PreussenElektra ruling that such an obligation is not State aid as no State resources are involved.

Chapter 3 Competition

Introduction

In 2007, the EFTA Surveillance Authority advanced its sector inquiries into the financial services sector, initiated proceedings in respect of the telecommunications markets in Liechtenstein, closed an in-depth investigation into exclusive TV distribution agreements in Norway and continued its investigation of other cases.

At the beginning of 2007, there were 14 cases pending with the Authority in the field of antitrust. Three new cases were opened during the year and four cases were closed. At the end of 2007, there were thus 13 antitrust cases open.

There were five cases pending at the start of the year concerning State measures possibly in conflict with the EEA competition rules. No new cases were registered during the year. One case was closed. Four cases were thus pending at the end of the year.

At the end of 2007, 7 merger cases and more than 25 antitrust cases which qualified for co-operation with the Authority under the EEA Agreement, were registered by the Authority as pending with the European Commission.

Under the co-operation mechanism established between the Authority and the competition authorities of the EEA EFTA States, the Authority was informed of three cases in which the national competition authorities envisaged that Articles 53 or 54 of the EEA Agreement could be applied.[1] One draft decision from the Icelandic Competition Authority and one draft decision from the Norwegian Competition Authority finding an infringement of Articles 53 or 54 of the EEA Agreement were received. During 2007, no courts in the EEA EFTA States asked for transmission of information from the Authority or the opinion of the Authority on questions regarding the application of the EEA competition rules. At the end of 2007, the Authority had 23 pending cases concerning national proceedings and other obligatory tasks in the area of competition.

Amendments were made to Protocol 23 to the EEA Agreement enabling the Authority and the competent authorities of the EEA EFTA States to participate in the meetings of the European Network of Competition Authorities for the purpose of discussing general policy issues.

1. Liechtenstein does not have a competition authority which enforces Articles 53 and 54 of the EEA Agreement but participates in the network of EEA EFTA competition authorities.

THE COMPETITION RULES OF THE EEA AGREEMENT

In contrast to the Authority's activities in other areas which are directed towards the EEA EFTA States, the EEA competition rules contained in Articles 53 to 60 EEA mainly concern individual economic operators.

The substantive competition rules under the EEA Agreement are virtually the same as those in the EC Treaty and can be summarised as follows:

- A prohibition on agreements or practices that distort or restrict competition (Article 53(1) EEA) with the exception of restrictions necessary for improvements which benefit consumers and which do not eliminate competition (Article 53(3) EEA);
- A prohibition on the abuse of a dominant position by market participants (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 apply the EEA competition rules to enforce a level playing field for market players in the European Economic Area. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of attribution rules laid down in Articles 56 and 57 EEA. Only one authority is competent to decide on any individual case.

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

Inspection powers in Norway

In 2007, an exchange of letters took place between the EFTA Surveillance Authority and the Norwegian Ministry of Government Administration and Reform regarding the incorporation into Norwegian law of the rules governing the Authority's inspection powers in the field of competition.

According to EEA law, the Authority should be in a position to conduct inspections at the premises of undertakings in the EEA EFTA States on the basis of a decision addressed to the undertakings concerned. Undertakings are obliged to submit to such inspections and fines can be imposed on undertakings that oppose an inspection ordered by an Authority decision. Assistance from national authorities, including a court order from a national court, would only be required if an undertaking opposes the inspection and the use of coercive measures becomes necessary.

In light of certain statements in the preparatory works to the Norwegian EEA Competition Act, the Authority questioned in a letter to the Ministry whether the Authority was obliged under national law to produce an order from a national court before an inspection could be carried out even if there was no opposition on the part of the undertaking concerned, and there was no need for the use of coercive measures.

In its response the Ministry stated that the EEA Competition Act did not limit the inspection powers of the Authority and confirmed that Norwegian law, correctly interpreted, gives the Authority the inspection powers it has been assigned under the EEA Agreement and the Surveillance and Court Agreement.

Thus, as required by EEA law, an inspection decision adopted by the Authority is binding on the undertakings to which it is addressed and those undertakings are obliged to submit to the Authority's inspection. An order from a national court is not required to produce these effects under Norwegian law. A national court order would only be required if the use of coercive measures becomes necessary because an undertaking acts in violation of its legal obligations and opposes the inspection. Only in case of inspections at non-business premises, such as private homes, must a national court order be obtained prior to the inspection.

The exchange of letters has been published on websites of the Ministry of Government Administration and Reform and the Norwegian Competition Authority.

The Viasat case comes to an end

In the first half of 2007 the EFTA Surveillance Authority finalised its investigation and adopted a preliminary position on a complaint from Viasat alleging that exclusive distribution agreements between TV2 and Canal Digital infringed the EEA competition rules.

Back in 2001, the Modern Times Group (MTG) and its Norwegian subsidiary Viasat lodged a formal complaint with the Authority against a long-term exclusive TV distribution agreement between TV2 and Canal Digital. The agreement concerned the distribution of the Norwegian public broadcaster TV2 on the Direct-to-Home (DTH) satellite platform of Canal Digital.

Following an investigation of the complaint, the Authority expressed concerns that the duration and scope of the exclusivity that bound TV2 to Canal Digital could have anti-competitive effects in the market for retail distribution of TV services in Norway. In 2003, TV2 and Canal Digital responded to these concerns by terminating the exclusivity and by giving TV2 the opportunity to negotiate with both Viasat and Canal Digital for the distribution of the TV2 channel on satellite platforms. However, TV2 ultimately concluded a new 2-year exclusive distribution agreement with Canal Digital and Viasat upheld its complaint. It also made new allegations regarding the negotiations which took place in 2003. Under these circumstances the Authority found it necessary to examine the impact of these developments on competition in the market.

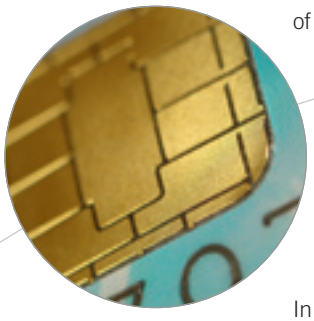
In 2005, TV2 invited both Viasat and Canal Digital to make exclusive and non-exclusive bids for the right to distribute TV2. Following bidding rounds and negotiation with the two contenders, TV2 concluded another exclusive distribution agreement of two years' duration with Canal Digital.

In mid 2007, pending any comments from the complainant, the Authority took the preliminary view that there were insufficient grounds for acting on Viasat's complaint. With regard to the possible restrictive effects of the agreements between TV2 and Canal Digital in the retail market, the Authority took *inter alia* into account that there had been competition for the rights to distribute TV2 every second year following the amendments in 2003. As far as the Authority had been able to ascertain, Canal Digital had not been given any preferential treatment when bidding for the rights to distribute TV2, and TV2 had chosen between offers made by both Canal Digital and Viasat before concluding the agreements with Canal Digital. The Authority also made a detailed assessment of the market developments since 2002. It appeared from this assessment that certain factors other than the exclusive agreements between TV2 and Canal Digital could have had a negative impact on Viasat's position in the market. The Authority also considered that the fact that TV2 had been available free-to-air during the whole period for a large part of the Norwegian population reduced the likelihood that the exclusivity had led to appreciable anti-competitive effects. Consequently the Authority took the preliminary position that there was insufficient evidence to hold that the agreements concluded in 2003 and 2005 between TV2 and Canal Digital had appreciably restricted competition. The Authority also took the view that on the basis of the information available TV2's conduct in relation to the conclusion of the exclusive distribution agreements with Canal Digital could not be regarded as an abuse of a possible dominant position on the part of TV2.

Further to the Authority's adoption of a preliminary position the complaint was withdrawn and the case was subsequently closed.

Inquiries in the field of financial services

During 2007, the EFTA Surveillance Authority published two interim reports dealing with different aspects of the retail banking sector and one dealing with business insurance.



After conducting extensive fact-finding, the Authority in 2007 made public its preliminary findings of the sector inquiry into retail banking that was launched in June 2005. The findings were published in two separate reports. The Authority's findings complement the findings of the European Commission's parallel sector inquiry, thus giving an overview of retail banking markets across the whole of the EEA. In addition, the Authority published an interim report detailing the preliminary findings of the business insurance sector inquiry.

Retail banking

CARD PAYMENTS

In June, the Authority published its first interim report detailing its findings relating to card payments. In this report, the Authority examined various aspects of the card payments markets in the EFTA States. The Authority found that card payment markets essentially operate on a national level and that there are significant differences in fee levels between countries in the EEA, both as regards cardholder fees and costs that are borne directly or indirectly by merchants accepting payment cards.

The inquiry found indications that overall, the payment card business enjoys considerable levels of profitability. Card issuing (the issuing of payment cards by a bank to its customers) appears to be more profitable than acquiring (recruiting merchants for card acceptance and transmitting the cardholder's payment back to merchants).

The Authority also examined market characteristics in order to identify actual and potential barriers to competition. In some markets, particularly those for acquiring merchants, there is a high degree of concentration with typically only a handful of market players offering their services in a given country. Moreover, market entry can often be rendered difficult by membership and governance rules determined by a particular card scheme.

CURRENT ACCOUNTS AND CORE RETAIL BANKING

In November, the Authority published its second interim report, dealing with current accounts and other aspects of core retail banking. The Authority was not able to conduct an analysis of the Liechtenstein market due to its small size and close integration with the Swiss market. Consequently, the report dealt with the Icelandic and Norwegian retail banking markets only.

In this report, the Authority examined both market structure and consumer behaviour. The retail banking markets in both Iceland and Norway are dominated by a relatively low number of large banks. Banking relationships between customers and banks are long and customers switch banks infrequently. Practices such as cross-selling (the selling of additional products and services to existing customers) and tying (requiring the customer to buy one product in order to obtain another) are common in relation to various banking products in both Iceland and Norway. Tying can make it more difficult for customers to switch banks, and may thus impede competition by making it more difficult for new market players to attract new clients.

Together the findings of the Authority and the Commission demonstrate that the manner in which customers use their bank accounts varies significantly across the EEA. For example, consumers in certain countries may use services such as ATM withdrawals, credit transfers, or direct debits much more frequently than consumers in other countries. This may well be influenced by high variations in prices for different payment services from country to country.

The Authority concluded its sector inquiry into retail banking with the publication of a concluding report, covering both payment cards and other retail banking services, in the beginning of 2008. This final report did take into account feedback received from market participants and the public in response to the two interim reports.

Business Insurance

In July, the Authority published an interim report on the preliminary findings of its sector inquiry into the business insurance markets of Norway and Iceland. The sector inquiry corresponds to a similar inquiry of the European Commission, which published an interim report on business insurance in January 2007 and a concluding report in September 2007.

As far as co-operation between insurers is concerned, no significant issues regarding joint setting of standard policy conditions were found. The provision for horizontal

co-operation under the "Insurance Block Exemption Regulation" does not seem to be relied upon to any great extent by insurers.

As to market structure and financial aspects of the industry, the interim report found high concentration in most insurance lines, both for insurers and brokers. There also appears to be considerable variation in profitability between insurance lines. Profitability levels in Norway and Iceland for some insurance lines appear to differ significantly. High profitability levels might be indicative of a lack of competition. However, the cyclical nature of the industry along with the time lag from premium payments to final settlement of related claims made it difficult at the stage of the interim report to assess profitability based on the Authority's survey data.

In Norway, specific issues were examined in relation to distribution arrangements, under which insurance companies have introduced a "new branch norm" on remuneration of brokers. The new branch norm calls for net quoting to brokers (*i.e.*, no commission from insurers to brokers). At the end of 2007, there were also policy discussions in Norway regarding a domestic legislative proposal which could make net quoting the law.

Of the EFTA States, only Iceland and Norway were included in the investigation. This is because there are no providers of business insurance in Liechtenstein. Customers of business insurance in Liechtenstein obtain insurance products from providers in other countries. The Authority intends to publish its concluding report in respect of the business insurance sector inquiry in the first half of 2008.

Leniency notice

On 19 December, the EFTA Surveillance Authority adopted a revised Notice on Immunity from fines and reduction of fines in cartel cases (the revised Leniency Notice) corresponding to the Leniency Notice of the European Commission.

The revised Leniency Notice strengthens the Authority's leniency programme through increased rewards, protection and guidance for companies that provide information in relation to a cartel. The Notice clarifies the information an applicant needs to provide to the Authority in order to benefit from immunity. In addition, the Notice introduces a discretionary marker system for immunity applicants, which allows for the acceptance of an application on the basis of limited information. It also clarifies the conditions for immunity and reduction of fines and introduces a procedure to protect corporate statements made by companies under the Leniency Notice from being made available to claimants in civil damages proceedings.

The Notice will enter into force when it is published in the Official Journal of the European Union and the EEA Supplement.

THE COMPETENCE OF THE EFTA SURVEILLANCE AUTHORITY TO DECIDE ON CARTEL CASES

The EFTA Surveillance Authority is competent under the EEA Agreement to deal with cartel cases where:

- The cartel appreciably affects trade between EEA States;
- The turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by the EEA Agreement; and
- Article 81 of the EC Treaty is not applicable in the same case (that is to say, the effect on trade between EC Member States and on competition within the Community must not be appreciable).

In cases where the Authority initiates proceedings, the competition authorities of the EFTA States should be relieved from their competence to apply Article 53 EEA. Moreover, limitations apply on the transmission to competition authorities of the EFTA States of leniency information originating from the Authority and on the use of such information.

Pending cases

Postal services

For some years the EFTA Surveillance Authority has closely followed developments in the market for B-to-C parcel services, that is to say, the market for the provision of parcel services to distance selling companies. Norway Post has held a very strong market position in this market for a number of years. There have also been indications that access to the market for new entrants has been difficult.

In particular, following a complaint, the Authority has investigated the exclusive agreements Norway Post concluded from 2000 onwards with retail groups and outlets for the establishment of so-called Post in Shops (Post i Butikk). During 2006, Norway Post removed or waived all exclusivity provisions in its agreements with retailers. The Authority still considered it necessary to continue the investigation of whether the exclusive agreements of Norway Post have had appreciable anti-competitive effects in the past. At the end of 2007, the Authority was in the process of finalising its investigation.

Norway Post has developed a rebate system under which it grants rebates to distance selling companies in connection with the provision of B-to-C parcel services. This system has raised some competition concerns.

As reported last year, Norway Post has made several changes to its rebate system during the course of the investigation in response to concerns expressed by the Authority. However, the Authority has found grounds to further investigate whether the amended system has been likely to adversely affect competition in the B-to-C market. At the end of the year no conclusion had been reached regarding the likelihood of such effects.

Ferry transport services

In April 2006, the EFTA Surveillance Authority carried out an unannounced inspection at the premises of Color Line, a major Norwegian ferry operator. The inspection was carried out in the context of an investigation into possible infringements of the competition rules of the EEA Agreement by Color Line in relation to its operation of ferry services to and from Norway.

The Authority's fact-finding continued in 2007 by way of information requests to market participants and public authorities. At the end of 2007, the Authority was in the process of analysing the information obtained as well as the need to gather further details.

Restructuring of the telecommunications market in Liechtenstein

In December 2006, the EFTA Surveillance Authority received a complaint against LTN Liechtenstein TeleNet AG (LTN), Liechtensteinische Kraftwerke Anstalt (LKW) and the Principality of Liechtenstein alleging that the restructuring of the telecommunications market in Liechtenstein is contrary to the competition rules of the EEA Agreement. In particular, it was alleged that the Principality of Liechtenstein had taken measures contrary to Article 59(1) EEA such that the two companies were bound to infringe Article 53 EEA.

The Authority found that the Principality of Liechtenstein had not infringed Article 59(1) EEA by imposing certain behaviour on the two companies. However, in its preliminary view the Authority considered that the companies had infringed Article 53(1) EEA by: (i) committing not to compete with each other for an indeterminate duration; and (ii) concluding an arrangement with regard to development of the telecommunications network in Liechtenstein.

In December, the Authority opened proceedings concerning alleged infringements of Article 53(1) EEA by LTN and LKW. The Authority issued a Preliminary Assessment to LTN and LKW detailing the substance of its competition concerns. Following receipt of the Preliminary Assessment, LTN and LKW may submit a package of commitments to remove the Authority's concerns.[2] Provided that the Authority receives appropriate commitments, the Authority envisages publication of a notice in the Official Journal and EEA Supplement during 2008. The notice would summarise the commitments proposed by LTN and LKW and request comments from interested parties within one month of publication. Following the consultation period, the Authority may by decision make the commitments binding on LTN and LKW.

2. The Authority may adopt a preliminary assessment pursuant to Article 9 of Chapter II of Protocol 4 to the Surveillance and Court Agreement.

Co-operation cases

In accordance with the rules in the EEA Agreement on co-operation between the European Commission and the EFTA Surveillance Authority, as in previous years the Authority was involved in cases dealt with by the Commission and took part in discussions on competition policy at European level.

Mixed merger cases in 2007

In 2007, the Authority was involved in a number of merger cases handled by the European Commission pursuant to the EC Merger Regulation[3] and Article 57 of the EEA Agreement.

NOTIFICATIONS

The Authority received regular notifications from the Commission which qualified for co-operation under the EEA Agreement including the following cases:

- Statoil / Hydro
- Nestle / Gerber
- Bonnier / Egmont (books)
- Yara / Kemira GrowHow
- Ineos / Kerling
- STX / Aker Yards

STATOIL/HYDRO

The Authority played an active role in particular, in the Commission's investigation of the merger between Statoil ASA and the petroleum business of Norsk Hydro ASA on the basis of the rules on co-operation laid down in Protocol 24 to the EEA Agreement. The Commission granted clearance to the merger after a first-phase investigation.

The main effects of the transaction were on the upstream markets for the production of natural gas and oil, and on three downstream oil markets in Sweden: the non-retail supply of diesel, the non-retail supply of light heating oil and retail sales of motor fuels.

Upstream natural gas

The main concern of the Commission related to the large proportion of natural gas extracted from the Norwegian Continental Shelf ("NCS") to which the merged entity would have access.

The vast majority of transport and processing infrastructures of the NCS are owned by Gassled, a joint venture in which Petoro,[4] Statoil, Hydro and other major petroleum companies have interests. However, this infrastructure is operated and managed by Gassco, an independent Norwegian state-owned operator. These gas infrastructures are subject to an access regime in which capacity is allocated on a non-discriminatory basis in accordance with regulations prescribed by the Norwegian State. On the basis of the agreements and rules governing the access to infrastructure, the Commission concluded that the merger would not affect any market for gas infrastructure on the NCS.

Despite the strong position of the merged group in natural gas production on the NCS, the Commission concluded that there would be sufficient alternative sources of supply in all the geographic areas examined (EEA, regional and national level).

Downstream oil

Regarding the three downstream oil markets in Sweden, the Commission's market investigation concluded that no significant anti-competitive effects would result from the transaction. The remaining alternative suppliers on the three markets would continue to constrain the behaviour of the merged entity.

REFERRAL PROCEEDINGS

Referral proceedings are proceedings whereby a merger case is referred from the European Commission to one or more national competition authorities or vice versa. By virtue of Article 6 of Protocol 24 to the EEA Agreement, the EFTA States can participate in such proceedings. Documents from the Commission to the EFTA States or from the EFTA States to the Commission are transmitted via the EFTA Surveillance Authority.

In 2007, over 50 requests for referral from national competition authorities to the Commission were transmitted from the Commission to the Authority. A large majority of

3. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
4. Petoro AS is a state-owned company which manages the commercial interests of the Norwegian State in petroleum activities on the NCS.

the requests were made by the parties before notification to national authorities. Among these cases, seven were reviewable under the Norwegian Competition Act but were referred to the Commission with the agreement of the Norwegian Competition Authority. This included amongst others, the following cases:

- Calyon / Societe Generale / Newedge
- TomTom / Tele Atlas
- Syniverse / BSG (wireless business)
- Travelport / Worldspan
- Serafina / Intelsat

The parties to a merger can also request that a concentration with a Community dimension be examined by an EFTA State prior to notification. In 2007, one such referral request was made in Bonnier / Egmont (books) in which the Commission partially referred the examination of the transaction to the Norwegian Competition Authority whilst retaining competence over the review of the effects of the transaction on the Danish publishing markets itself.

Mixed antitrust cases in 2007

The Authority was also involved in several cases in 2007 in which the European Commission applied Article 53 or 54 of the EEA Agreement. 11 new cases were registered in which the Commission intended to apply one of these articles.

The Commission adopted decisions in which it applied Article 53 or 54 of the EEA Agreement in the following cases:

- Morgan Stanley Dean Witter / Visa International
- Flat Glass
- Chloroprene Rubber
- MasterCard

MASTERCARD

In one of the antitrust cases in which the Authority was involved in 2007, the European Commission adopted a decision involving multilateral interchange fees (MIF). A MIF is a charge levied on each payment at a retail outlet when the card payment is processed. The Commission found that MasterCard's MIF for cross-border payment card transactions in the European Economic Area (EEA) infringed Article 53 of the EEA Agreement and Article 81 of the EC Treaty and did not qualify for individual exemption. The Commission concluded that the MasterCard organisation's MIF inflated the cost of card acceptance by retailers without leading to proven efficiencies.

When assessing the compatibility of MasterCard's MIF with the EEA competition rules, one of the factors the Commission considered was the fact that a number of payment card schemes have operated successfully in the EEA without a MIF, among them the Norwegian Bankaxept system. The Commission considered the existence of these open card schemes as evidence that a MIF is not objectively necessary for the co-operation of banks within an open payment card scheme such as MasterCard's.

The Authority assisted the Commission in gathering information about the nature, functionality and background to the Bankaxept scheme. Furthermore, the Commission's decision also relied on the findings of the Authority's sector inquiry in the field of payment cards (see page 45) concerning Bankaxept.

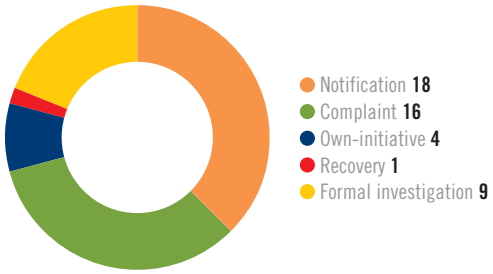
In its decision, which was adopted in December 2007, the Commission ordered MasterCard to withdraw the European cross-border MIFs within six months.

Chapter 4 State aid

Introduction

In 2007, the Authority registered the greatest number of newly opened cases for state aid ever: 62 cases were opened, of which 48 concerned individual state aid control cases. Although only one new case was opened on recovery, the Authority received 18 new notifications and 16 new complaints. The Authority opened the formal investigation procedure in respect of four notifications and in three cases of complaints. Six new cases were launched on the initiative of the Authority, two of which were formal investigation procedures. In addition, the Authority opened 14 files regarding its obligatory tasks which concerned, amongst others, the adoption of new guidelines on the interpretation of the state aid provisions, the update of the existing guidelines or the extension of the use of the state aid e-notification portal for all communications with the EFTA States.

Figure 1 New cases by case category



Out of 39 cases closed in 2007, 31 concerned individual state aid control cases: 16 of these individual state aid cases had been initiated on the basis of complaints, 11 concerned state aid measures notified by Iceland and Norway and four were own-initiative cases of the Authority. Three of the cases closed concerned formal investigation procedures. It should be noted that for reporting purposes, when the formal investigation procedure is opened, the original case is closed and a new separate case is opened. In addition, eight cases regarding obligatory tasks of the Authority such as the adoption of guidelines, publication of the scoreboard or monitoring of the implementation of the so-called Transparency Directive were closed in 2007.

Of the 83 cases pending at the end of 2007, 69 concerned state aid control cases (including four recovery cases) and 14 referred to obligatory tasks of the Authority. As was the case in previous years, the majority of the pending cases (37 cases) are based on complaints while there are only 10 pending notifications. The Authority is under an obligation to deal with notifications within two months of receipt of a complete notification. For this reason, priority is given to the treatment of notifications over complaints. There are currently 14 formal investigations open, two of them on the own initiative of the Authority. Finally, four further pending cases have been launched at the own initiative of the Authority.

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 and await the approval of the Authority before putting the aid into effect. Aid that has been paid out in breach of the obligation to notify and which does not meet the conditions for approval shall be recovered from the aid beneficiary.

State aid provisions and revision of guidelines

On the basis of Article 61(1) of the EEA Agreement, state aid is in principle prohibited. However, aid may be approved by the Authority on the basis of certain conditions designed to ensure its compatibility with the EEA Agreement. Article 61(2) and (3) contains several examples of aid which is or may be declared compatible. The provision which plays the key role in the Authority's state aid practice is Article 61(3)(c): *"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.). In addition, compensation for the discharge of public service obligations where these concern undertakings entrusted with the operation of the services of general economic interest referred to by Article 59(2) may also be considered compatible with the Agreement. Various Block Exemptions in the form of European Commission Regulations are also incorporated into the EEA Agreement. These Regulations provide for exemptions on certain conditions, for aid to small and medium-sized enterprises, aid for training and aid to facilitate employment. A minimum threshold below which aid need not be notified is also provided for in a Block Exemption.

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. The purpose of these Guidelines is to explain how the Authority interprets and applies the state aid rules. They also ensure uniform interpretation, application and implementation of Articles 61 and 62 of the EEA Agreement and are in line with the European Commission's approach to state aid.

The Guidelines are regularly amended or supplemented. This year, the Authority took a decision to update the State Aid Guidelines by deleting certain chapters and incorporating a new Chapter on the rules applicable to unlawful aid. It also prolonged its Environmental Guidelines and adopted new Guidelines for State Aid to Research, Development and Innovation.

Energy and the environment

Sale of electric power in Norway

In the course of 2007, the EFTA Surveillance Authority assessed several cases concerning the sale of electric power by public authorities in Norway.

One case concerned an informal request from Norwegian authorities to amend three contracts between the state-owned power company, *Statkraft*, and three power intensive companies. The contracts allow the firms to lease power plants from *Statkraft* at a predetermined long term price for electricity. This price will, however, be replaced by the current spot market price on the power exchange if this latter price exceeds a certain threshold for a number of days. The request from the Norwegian authorities concerned the possibility to unilaterally increase the threshold value triggering the application of this clause.

In a letter to the Norwegian authorities the Authority expressed its opinion that the proposed revision would shift the balance of the contract in favour of the private parties and therefore, constitute state aid. As the aid in question would be operating aid, the Authority did not see any basis for its approval. Following the Authority's letter, the Norwegian authorities abandoned the plans to alter the provision.

In another case the Authority decided to open the formal investigation procedure with respect to a power sales contract entered into by the municipality of *Notodden* and *Becromal Norway AS*, an aluminium foil producer having a plant in the municipality. Under Norwegian law, municipalities where watercourses are developed for power production have the possibility to buy a certain amount of power (so-called concession power) at cost. According to the contract in question, the municipality had sold certain power volumes at a price set equal to its purchasing costs which appear to be below market prices.

Therefore, the Authority cannot disregard that *Becromal* might have been granted state aid in the form of favourable power prices.

Because there may be more cases similar to the *Notodden* case, the Authority has engaged in a dialogue with the Norwegian authorities concerning disposal by municipalities of concession power in general. The aim is to ensure that municipalities are sufficiently informed and that mechanisms are put in place so as to avoid the granting of unlawful state aid through the sale of concession power in the future. The Authority is not questioning the right of the municipalities to buy concession power below market price. Possible state aid issues arise only when this power is resold below market prices to undertakings engaged in economic activities.

Energy and the environment

Environmental protection

In 2007, the Authority adopted three decisions not to raise objections to state aid for environmental protection. In two other cases, it opened the formal investigation procedure to carry out a more detailed assessment. It further adopted a decision to prolong the Authority's State Aid Guidelines on Aid for Environmental Protection (hereafter the Environmental Guidelines).

In February 2007, the Authority authorized the prolongation of an amendment to a Norwegian scheme to provide state financial assistance for reducing nitrogen oxide (NO_X) emissions from vessels registered in the Norwegian Shipping Register. The scheme had been previously approved by the Authority. The scheme is prolonged until the end of 2009 and applies to vessels with engine power exceeding 750 kW. It takes account of the fact that costs of NO_X reductions are now estimated to be higher than originally foreseen. The amendments were considered to be compatible with the Authority's Environmental Guidelines.

In another case, the Authority authorized the prolongation of a previously approved aid scheme, which concerns the reduced electricity tax for the regions of Finnmark and North Troms. The electricity tax should provide an incentive for undertakings to curb electricity consumption and to use more environmentally friendly alternatives. Undertakings in the above mentioned regions however, find it difficult to adapt to this taxation. In line with the Environmental Guidelines, the Authority authorised the tax reduction, as the undertakings still pay an amount exceeding the minimum taxation as applied in the European Community.

In November 2007, the Authority decided not to raise objections in respect of individual state aid granted to *Celsa Ameringsstål* situated in *Mo i Rana*, Northern Norway. The company intends to invest in a new cleaning technology for mercury recovery which should reduce such mercury emissions by 98% compared to the current situation. The Norwegian authorities will support 35% of the investment cost, after deduction of production benefits resulting from the application of the new technology. This is in line with the investment aid provisions of the Environmental Guidelines.

Also in November, a formal investigation procedure was opened regarding a notified aid scheme, which provides for certain exemptions from the CO_2 tax on natural gas and liquefied petroleum. According to a Norwegian proposal, gas used for purposes other than heating of buildings will not be subject to the tax. This exemption in particular covers electricity used in the production processes. The Authority is in doubt whether this measure will in reality favour certain enterprises particularly in the manufacturing sector and thus constitute state aid. If aid is involved the Authority has doubts with respect to its compatibility.

Towards the end of 2007 the Authority opened a formal investigation following a complaint from *Varmeprodusentenes Forening*, regarding the implementation of an aid scheme by the Norwegian Government for alternative, renewable heating and electricity saving measures in private households. The support scheme covers *inter alia*, stoves and boilers burning pellets and heat pumps in waterborne heating systems. Other heating technologies such as environmentally friendly wood-burning stoves are not covered by the scheme. The scheme is targeted at private households, which can apply for a refund of maximum 20% of documented and eligible costs, up to certain maximum ceilings.

Based on the information submitted by the Norwegian authorities, the Authority has doubts as to whether the scheme constitutes state aid. The support for private households may confer an indirect economic advantage upon the producers and importers of the heating technologies covered by the scheme, and thus put them in a more favorable position to the detriment of other producers and importers of environmentally friendly heating systems. If the scheme involves state aid, the Authority also has doubts as to its compatibility.

In December 2007, the Authority prolonged its current Environmental Guidelines until it adopts new guidelines corresponding to the new Community Guidelines on State aid for environmental protection, which are due to be adopted by the European Commission in early 2008.

Energy and environment

Pending notifications

During 2007, the Authority received several notifications notably in the area of energy.

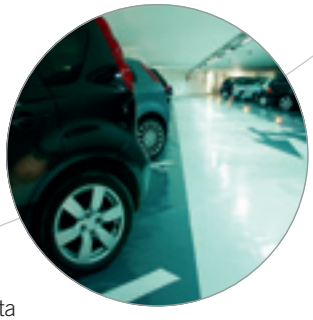
In July 2007, the Authority received a notification by the Norwegian authorities on the investment of the Norwegian State in the company which will construct and own the Mongstad carbon capture test centre. The objective of the test centre will be to facilitate testing and development of carbon capture based on the post-combustion technology. The ownership of the State is notified to be 80% with the remaining 20% held by *Statoil*. Other investors are invited to participate which might reduce the participation of the State.

Also in July 2007, the Norwegian authorities notified a scheme for electricity production from renewable energy sources, such as hydropower, wind power and biomass. The scheme aims at increasing the production of electricity from renewable energy sources by compensating parts of the additional production costs related to electricity production from renewable energy sources. The scheme will be administered by the Norwegian Energy Fund (Enova). It will be funded partly through an earmarked fund and partly through the grid fee paid by electricity consumers.

Later, the Norwegian authorities notified a proposal to exempt from a CO_2 tax undertakings which as of 1 January 2008, are subject to the revised Norwegian emission trading scheme. The revision of the Norwegian emission trading scheme follows changes introduced as a consequence of the incorporation into the EEA Agreement of the Emission Trading Directive of the European Community. The Norwegian authorities have further proposed to abolish the current exemption from heating oil tax in favour of the pulp and paper sector. In parallel with a general increase of the heating oil tax the sector would instead benefit from a reduced heating oil tax rate.

In all these cases the Authority has requested further information to enable it to assess the compatibility of the schemes with the EEA Agreement.

Sale of land and buildings



In the course of the year, the EFTA Surveillance Authority received a number of complaints concerning the sale of land and buildings by local public authorities at prices allegedly below the market price, which might imply that buyers of properties have received state aid. In two cases the Authority decided to open the formal investigation procedure.

One of these cases concerned sales of three properties in the municipality of *Time* in the county of *Rogaland* in Norway. One property was given to a private investor in return for the construction of new parking spaces below the ground. Another property was sold at cost. The third property is a football stadium which was given to a football club playing in the first division. The Authority took the view that the prices paid for the properties and the methods by which they were established gave rise to a presumption of state aid. The Authority had not been presented with information which would reverse this presumption. Thus, it was considered necessary to open the formal investigation procedure.

On its own initiative, the Authority opened the formal investigation procedure concerning the State's sale of the former Lista military air base situated in *Farsund*. In September 2002, the Norwegian Defence Estates Agency sold Lista air base to *Lista Flypark AS*. The sale resulted in the Norwegian State paying to *Lista Flypark AS* NOK 10 875 000 (approximately EUR 1.4 million) to take over the air base. Based on the information submitted by the Norwegian authorities, the Authority came to the preliminary conclusion that it could not be excluded that the sale may have involved some elements of state aid. Moreover, it appears that prior to the sale of the air base, parts of the air base had been leased out at a price which may have been below market value and may also have involved some elements of state aid.

In both cases, the Authority will take its final decisions after having reviewed comments from the Norwegian Government and from any other interested parties. The other cases will be dealt with in due course.

Kindergartens

The Association of Private Day-Care Centres *(Private Barnehagers Landsforbund)* in Norway filed a complaint to the EFTA Surveillance Authority arguing that the public support to municipally owned day-care institutions was state aid incompatible with the EEA Agreement.

The Authority rejected the complaint and adopted a decision concluding that the support is not State aid. The basis for the Authority's decision was that the municipal kindergartens are not undertakings performing economic activities, in particular because they are educational institutions financed by the State. For this reason no state aid is involved. In addition, the Authority concluded that support to municipal kindergartens did not, at the time of the decision, appear likely to affect trade between EEA States, which is a condition for a measure to be state aid. Finally, the Authority maintained that even if the public financing of municipal kindergartens was to be considered as state aid, the public money they receive is justified compensation for the provision by the kindergartens of services of general economic interest.

Private Barnehagers Landsforbund requested the EFTA Court to annul the above-mentioned decision of the Authority. The case is now pending before the EFTA Court.

Research and Development and Innovation cases

In February 2007, the EFTA Surveillance Authority adopted new Guidelines for State aid for Research and Development and Innovation (R&D&I). In the new Guidelines, the Authority laid down the criteria on the basis of which EFTA States can grant state aid not only to research and development – as under the previous Guidelines – but also to innovation projects (such as aid to young innovative enterprises and aid to innovation clusters) in conformity with the state aid rules of the EEA Agreement.

Under the new Guidelines, the general level of aid that undertakings may benefit from is more favourable than before. The Guidelines furthermore clarify the method to be used to assess whether aid can be granted. The overall test is that the aid must address a defined market failure, must be well designed and that the identified benefits must outweigh the distortions to competition resulting from the aid. In addition, the new Guidelines also explain the rules that are applicable to collaboration projects between private undertakings and public research organisations.

At the same time the Authority has formally proposed to the EFTA States that existing schemes be amended, where necessary, in order to bring them into line with the new Guidelines. The general time limit for so doing has been set at twelve months.

The first application of these new Guidelines was a decision concerning a Norwegian programme of financial support from the State budget to Centres for Research-based Innovation (CRIs) for their research and development projects. The principal objectives of the scheme are to promote research, development and innovation by creating a knowledge base that will give enterprises an incentive to innovate. The scheme also aims at facilitating active alliances between research enterprises and research institutions, supporting research by industrially oriented research groups and stimulating researcher training and transfer of research-based knowledge.

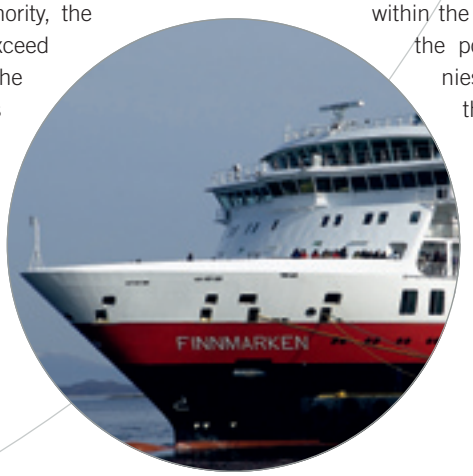
Public funding is available to CRIs on the basis of this programme, for projects involving cross-border co-operation of public research bodies and private undertakings in any field of research. Originally, the Norwegian authorities foresaw the creation of 10 CRIs with the total contribution from the State budget of NOK 100 million (approx. EUR 12 million) per annum. Later in 2007, the Authority was asked to approve amendments to the scheme. The changes concerned the increase of the number of CRIs to 14 and because of a higher number of aid recipients, the increase of the annual budget to NOK 140 million (approx. EUR 17 million). The Authority accepted these amendments by a decision adopted in September 2007.

The State funding is channelled through the Research Council of Norway which can cover up to maximum 50% of the CRIs' annual budget, whereas the rest must be financed to a large extent through private means. The scheme will be in operation until 2015.

Maritime transport

State aid to Hurtigruten

In 2004, two Norwegian ferry companies, the so-called *Hurtigruten* companies, faced higher social security charges as a result of increased tax rates enacted by the Norwegian Parliament. These increased costs were compensated by a special allocation in the State Budget. In the view of the Authority, the compensation appeared to exceed what was necessary to cover the increased costs of the companies to carry out the public service obligation they were entrusted with (daily stops all year round in 34 harbours along the Norwegian coast). On this basis, the Authority decided to open the formal investigation procedure.



After having investigated the case, in December 2007 the Authority authorised the aid. This assessment was based on specific state aid rules for shipping companies in the Authority's Guidelines on Maritime Transport. On the basis of the fierce international competition within the maritime transport sector and the possibility for shipping companies to flag vessels out of the EEA, these rules allow the costs of shipping companies related to social security contributions to be partially or fully reimbursed. The Authority concluded that the aid granted to the Hurtigruten companies was compatible with these rules.

Maritime transport

Maritime transport in Iceland

In December 2007, the formal investigation procedure was opened regarding a tonnage tax system and a refund scheme for the employment of seafarers notified by the Icelandic authorities.

Under the notified tonnage tax scheme the ordinary corporate tax rate of 18% is based on a notional tonnage rather than on actual profits. A more favourable tax rate for a specific sector, like undertakings in the maritime sector, constitutes state aid. The Authority assessed the compatibility of this measure with the EEA state aid provisions under the Authority's Guidelines on Aid to Maritime Transport and *inter alia*, raised doubts as to the compatibility of the measure with the Guidelines, in particular that: (i) certain shipping activities which are eligible for tonnage tax, like time-charters, may not fulfill the conditions of the Guidelines for being included in a tonnage tax scheme; (ii) only ships registered in the Icelandic International Shipregister will benefit from the tonnage tax, but not ships registered in any other EEA Shipregister; (iii) only companies fully tax liable in Iceland will benefit from the scheme, excluding companies that are partially tax liable, which might discriminate against foreign operators; and (iv) taxable income subject to the tonnage tax is very low compared to similar regimes in other EEA States.

With respect to the system of grants to ship-owners of tax levied on seafarers, the Authority raised concerns related to ship registration and tax liability similar to those referred to above concerning the tonnage tax.

Maritime transport

Icelandic Harbour Act amendments

In 2007, the Icelandic authorities notified certain amendments to the Icelandic Harbour Act. After having scrutinized the notification, the Authority opened the formal investigation procedure. The Icelandic Harbour Act is a general framework law which contains provisions as regards what constitutes a harbour, the management and operation of harbours and funding from the so-called Harbour Improvement Fund.

The Harbour Act which was enacted in 2003 provides for damage compensation for certain harbour constructions. The 2007 amendment extends such damage compensation to cover ship lifts, ship hoists and dry dock constructions. The amendment entered into force in March 2007.

The Authority took the preliminary view that this extension is not compatible with the EEA state aid provisions. The Authority could not – at this stage of the procedure – see that such compensation could be justified on the basis of the rules on state aid to shipbuilding, on aid to compensate for natural catastrophes, or any other rules contained in the EEA Agreement.

A further concern of the Authority resulted from a provision in the Harbour Act which limits the state funding to harbours owned by municipalities. Privately owned harbours are not put on an equal footing. The Authority failed to see a justification for such discrimination.

The Authority further examined the introduction of the Harbour Act in 2003. The Authority found that most of the support measures which were not notified are related to infrastructure, such as the support for breakwater constructions, navigation channels, etc. The support of infrastructure which is open to all users does not constitute state aid within the meaning of the EEA Agreement. The Authority will investigate further whether certain measures would amount to state aid, e.g. support to pilot vessels or support for quay installations, and if so, whether the aid would be compatible with the EEA Agreement.

Maritime transport

Turborouter

In 2006, on the basis of a complaint the Authority opened a formal investigation into state aid granted by the Research Council of Norway regarding the so-called Turborouter research and development projects (see Annual Report 2006, page 54). Turborouter is a tool for optimizing vessel fleet scheduling, *i.e.* to decide to which vessels different cargoes should be assigned.

The Authority had doubts as to whether these projects could be considered compatible with the state aid rules of the EEA Agreement, in particular, the Guidelines on aid for research and development. State aid may be granted to genuine research and development projects. The Authority was concerned, however, that the activities investigated were closer to regular business activity than to genuine research and development. Furthermore, the Authority had doubts as to whether the overall costs of the project were correctly calculated, in particular, how contributions from the companies benefiting from the aid should be measured.

In April 2007, the Authority closed the formal investigation and concluded that the granting of aid to the Turborouter projects was done in accordance with a previously approved aid scheme for industrial research and development.

Co-operatives

In December, the Authority opened the formal investigation procedure regarding a notified special tax deduction for certain co-operative societies in Norway.

According to the proposed scheme, certain co-operatives within the agriculture, forestry and fisheries sectors as well as co-operative building societies and consumer co-operatives will be entitled to deduct allocations to equity capital from their income, thereby reducing the basis for the income tax. The aim of the scheme is to grant a fiscal advantage to the co-operatives on the basis that the co-operatives are considered by the Norwegian authorities to have a more difficult access to equity capital than other undertakings. In particular, according to Norwegian law, co-operatives cannot issue shares to the public or issue other capital certificates or securities.

The Authority considers that the proposed scheme may constitute state aid and if it is aid, the Authority has doubts as to whether it would be compatible with the EEA Agreement.

Regional aid

In 2007, the Authority authorised two regional aid schemes.

In April 2007, the Authority approved a scheme for direct transport aid for enterprises in certain regions in Norway. The area covered by the scheme comprises all of northern Norway, most of *Nord-Trøndelag* county, and several municipalities in *Sør-Trøndelag*, *Møre og Romsdal* and *Sogn og Fjordane* counties as well as some municipalities of *Hordaland* and *Buskerud* counties.

The aim of the scheme is to promote regional development in regions situated far away from central areas. The objective sought is achieved by partly offsetting the competitive disadvantages resulting from additional transport costs for undertakings located in peripheral and sparsely populated regions. Aid under the scheme is granted as compensation for extra costs in relation to transport of goods within the national borders and must be calculated on the basis of the shortest and most economical form of transport.

In December 2007, the Authority authorised a Norwegian aid scheme for newly created small enterprises. The scheme is intended to stimulate the establishment of more profitable small enterprises in the assisted areas in Norway by providing economic support in the first five years after their creation.

The aid will be granted in the form of operating aid and covers costs such as fees for renting production facilities and equipment and advisory and consultancy expenditures and administrative costs related to the creation of the enterprise.

Recovery cases

International trading companies

The Authority adopted a negative decision requesting recovery of state aid granted in application of the Icelandic International Trading Companies (hereinafter "ITC") special tax legislation in 2004. In 2005, the EFTA Court concurred that Iceland was in breach of its obligations under the Authority's decision for not having implemented the terms of the decision. In 2006, the Icelandic authorities informed the Authority that only one undertaking had benefited from aid under the ITC tax scheme and that the recovery process had been initiated. Throughout 2007, the services of the Authority have been in continuous contact with the Icelandic authorities regarding the application of the correct method to determine the amount to be recovered. However, no aid amounts were recovered in 2007.

Recovery cases

Electricity tax

In 2004, the Authority adopted a final decision regarding the aid granted by the Norwegian State to the manufacturing and mining sector by granting exemptions from the electricity tax. In 2005, the EFTA Court upheld the Authority's decision which had ordered the Norwegian authorities to recover any illegal aid from the aid recipients. In 2007, the Norwegian authorities informed the Authority about the recovery of illegal aid (*i.e.* unpaid electricity tax) from potentially 73 aid recipients. The recovery, which includes compound interest, is estimated to amount to a total of NOK 144 million (approximately EUR 18 million).

Recovery cases

Enova

In 2006, the Authority adopted a final decision regarding the aid granted by the Norwegian Energy Fund (Enova) in the form of *inter alia*, investment support for renewable energy production, energy saving, new energy technology and support for energy audits. By this decision, the Authority laid down criteria under which individual grants under the Enova schemes can be declared compatible in line with the Authority's Environmental Guidelines. At the same time, the Authority considered that already granted support which is not in compliance with those criteria constituted incompatible and unlawful state aid subject to recovery by the Norwegian authorities.

The recovery process has been carried out by the Norwegian authorities throughout the years 2006 and 2007. The Authority has been exchanging information with the Norwegian authorities on a regular basis regarding the state of play and progress of the recovery. The Authority is currently awaiting further steps by the Norwegian authorities with regard to issuing recovery orders to the relevant beneficiaries and their implementation under the provisions of the national law.

VAT compensation

Municipalities and certain other institutions in Norway are compensated for value added tax (VAT) paid on their acquisitions. Based on a complaint, and after having investigated the case, the Authority concluded that such compensation for certain transactions amounts to state aid incompatible with the EEA Agreement.

The VAT Compensation Act came into force in 2004. It applies to municipalities, county municipalities and certain other institutions, mostly carrying out tasks under municipal supervision. Under the general VAT rules, municipalities have to pay VAT on their purchase of goods and services in the same way as ordinary consumers. If they provide these services in-house, no VAT is levied, as there is no transaction triggering a VAT levy. Such a situation constitutes an incentive for municipalities to choose in-house production instead of external provision of goods or services which would be subject to VAT.

To achieve a level playing field, the VAT Compensation Act established that municipalities would get VAT reimbursed. As long as provision of goods or services subject to VAT is concerned there is no state aid issue. However, certain services are not subject to VAT. That is the case, for example, for financial services, or health and education services. Providers of such services may not charge VAT on their sales, but they have to pay VAT on the goods and services they buy themselves, like teaching material to provide educational services. Municipalities and other institutions covered by the VAT Compensation Act are reimbursed in full for the VAT they pay. This is not the case for private providers of VAT-free services. When such private companies operate in competition with municipalities or municipal institutions, the compensation to the municipalities for VAT implies that there is a transfer of state resources that distorts competition.

The Norwegian authorities agreed to amend the Act and to recover any compensation paid out in contravention of the state aid rules.

Road construction

Having received a complaint the Authority adopted a decision to open the formal investigation procedure concerning the establishment of the 100% state owned company, Mesta AS. Mesta was established on 1 January 2003 in order to take over the road construction activities previously carried out within the Production Department of the Public Road Administration in Norway.

In its decision the Authority expressed doubts as to whether state aid is involved as Mesta was exempted from document duties and registration which are levied in relation to establishments. Doubts were also raised in relation to the assessment of assets transferred to Mesta AS and the prices at which service contracts were transferred from the previous Production Department to Mesta.

The Authority queried also whether state aid is involved in the amount of NOK 993.6 million (approx. EUR 124 million) which Mesta received from the State in order to cover restructuring costs, such as the costs of various pension packages in favour of employees transferred to Mesta. Finally, the Authority raised doubts as to whether

state aid is involved in an equity injection of NOK 512 million (some EUR 64 million) to cover costs for offering salary compensation measures to former civil servants.

The Norwegian authorities have been invited to supply the Authority with further information in respect of all of the foregoing measures.

The Authority decided to reject another complaint alleging that the Production Department of the Møre and Romsdal District Office of the Norwegian Road Administration received state aid. The state aid allegedly enabled the Production Department to submit a lower-priced offer than that of private operators in the context of a tender launched for construction work in relation to *"Riksveg 651 – Rotsethorntunnelen"*.

The Authority took the view that the Production Department of the District Office of *Møre and Romsdal* was not engaged in an economic activity and was hence not an undertaking within the meaning of the EEA Agreement. The Authority therefore considered that the Production Department of the *Møre and Romsdal* District Office did not receive any state aid.

Housing Financing Fund in Iceland

Following a judgement of the EFTA Court in 2006, the Authority adopted a decision to initiate a formal investigation procedure with regard to the financing system of the Icelandic Housing Financing Fund. During the course of 2007, the Authority received comments from the Icelandic State and other interested parties concerning this decision. At the end of the year, the information submitted to the Authority was still under review with a view to reaching conclusions in early 2008.

Interventions in state aid cases before the European Court of Justice

In 2006, the Authority intervened in Case C-199/06 *CELF*. The national judge in Case C 199/06 *CELF* sought to explore the extent of the obligation of national authorities, pursuant to Article 88(3) EC, to recover State aid in cases in which a subsequent Commission decision declared the aid to be compatible with the internal market. The Advocate General in his Opinion concurs with the view presented by the Authority that, in such a case, the aid must be recovered as the subsequent approval does not have retroactive effect.

In 2007, the Authority intervened in another case, also testing the limits of the standstill obligation contained in Article 88(3) EC, although from a different perspective, Case C 384/07 *Wienstrom*. That case concerned the obligation of national courts to enforce the standstill obligation of its own motion in cases not related to third parties' rights. The Authority argued that in such cases, the national judge is not obliged to enforce the standstill clause, unless he may, under national procedural law, raise such issues.

Article 88(3) EC corresponds to Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement and stipulates that aid should not be put into effect until the Commission has approved it.

Both cases concern what consequences a breach of the standstill obligation should have in national court proceedings. As the number of recent references concerning the standstill obligation indicates, Article 88(3) EC is crucial to the success of the Community rules on State aid. The interest for the Authority in being a part of shaping the interpretation of this rule would appear to be beyond doubt.

Both cases are still pending.

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