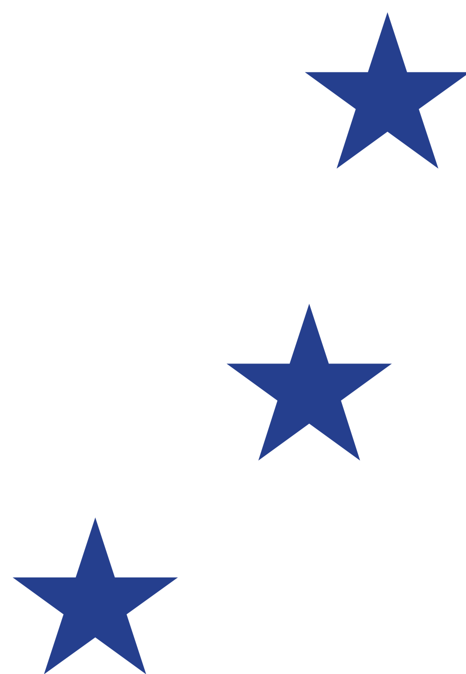
EFTA Surveillance Authority

Annual Report 2012



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Foreword

2012 was yet another year of financial and political crisis in the EU. Unemployment has struck hard, especially amongst the young people of Europe. The way out of the crisis is through economic growth and healthy state finances. Increased trade in goods and services at a well-functioning Internal Market is viewed as an important contribution to recovery.

The timely implementation and enforcement of common rules within the EEA are essential conditions for the EFTA States' participation in the Internal Market. However, the EEA cooperation cannot be taken for granted. The success of the EEA is only possible with continuous attention and efforts every day to secure a level playing field across the EEA. The Internal Market has to be a reality on the ground, not just on paper. This is the key task of the EFTA Surveillance Authority. On behalf of all 30 EEA States, we ensure that the EFTA States honour their obligations under the EEA Agreement.

In 2012, the Authority has unfortunately seen a worrying increase in the numbers of directives and regulations that are not implemented within the time limits set in the EEA Agreement. The Internal Market Scoreboard for the EFTA States in 2012 is highly disappointing. The governments of the EFTA States must shoulder the responsibility for securing an effective management of their EEA obligations.

The Internal Market has to be a reality on the ground, not just on paper.

The Authority opened nearly three hundred new Internal Market cases in 2012 due to a lack of national implementation of new EEA rules. Out of these, two thirds concerned Iceland. Fortunately, most cases are solved without having to resort to litigation. Acting on the basis of the same benchmarks as the European Commission when it comes to the initiation of formal infringement procedures, the Authority brought two cases concerning Iceland before the EFTA Court last December. The majority of the three hundred cases relate to technical rules and regulations, but this is no excuse for the EFTA States which have to establish more robust administrative routines and have more respect for the deadlines within the EEA.

Complaints, especially from businesses or individuals that trade or provide services across EEA borders, are an important source of information and knowledge about how the Internal Market functions in practice. After an increase in the number of complaints originating from Iceland after the financial crisis in 2008, most complaints last year were against Norway.

The control of state aid is another important task for the Authority. In 2012, the Authority approved environmental aid to the energy sector and energy-demanding industry in Norway (Mongstad, Södra Cell Tofte, Akershus Energi and Eidsiva Energi), amounting to 3.14 billion Norwegian kroner or 420 million euros. Last year the Authority also approved 342 billion Icelandic kronur or 2 billion euros of state aid commitments given by Iceland in 2008–2009 to establish three new banks after the financial crisis. This very substantial amount of state aid is granted in the form of capital injections, loans, guarantees and available, but not so far used, credit facilities. The Authority concluded that the aid was necessary in order to ensure financial stability. The three banks concerned are still undergoing restructuring measures under the Authority's surveillance. Through good cooperation with Icelandic authorities we managed to put in place measures aimed at contributing to more competition in Iceland's financial sector. In Liechtenstein, the Authority approved new tax rules intended to make it profitable to invest in future-oriented industries that use information technology.

Common rules are not worth much if the are not enforced in an effective manner.

Within the field of competition, in 2012 we co-operated closely with the national competition authorities in Iceland and Norway. In December, the Authority conducted investigations in a possible case against the Norwegian company Telenor, and the Authority has pursued the close cooperation with the European Commission in cases related to companies established in the EFTA States. On the basis of our earlier decisions in cases concerning Norway Post and Color Line the Authority collected approximately 30 million euros in fines in 2012.

Common competition rules in the EEA are a necessity for the establishment of a genuine Internal Market. In this the Authority also has a stake. Common rules contribute to fair competition, but these rules are not worth much if they are not enforced in an effective manner. In the field of state aid, the aim for the years to come must be to target the aid to promote new business opportunities and the creation of jobs in new and innovative industries. This is important for the future in the EFTA States as well as in the EU.

Oda Helen Sletnes,
President

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Chapter 1

INTRODUCTION

The EFTA Surveillance Authority monitors compliance with European Economic Area rules in Iceland, Liechtenstein and Norway, enabling them to participate in the European Internal Market

The European Economic Area

The European Economic Area (EEA) consists of the 27 Member States of the European Union (EU) and three of the four European Free Trade Association (EFTA) States: Iceland, Liechtenstein and Norway (Switzerland is not part of the EEA). It was established by the EEA Agreement, which came into force in 1994, an international agreement which enables the three EFTA States to participate fully in the European Internal (or Single) Market.

The purpose of the EEA Agreement is to guarantee, in all 30 EEA States, the free movement of goods, people, services and capital – "the four freedoms". As a result of the agreement, EU law on the four freedoms, state aid, and competition rules for undertakings, is incorporated into the domestic law of the participating EFTA States. All new relevant EU legislation is also introduced through the EEA Agreement so that it applies throughout the EEA, ensuring a uniform application of laws relating to the Internal Market.

The EEA Agreement ensures equal rights to participate in the Internal Market for citizens and economic operators in the EEA, and equal conditions of competition. It also provides for co-operation across the EEA in important areas, such as research and development, education, social policy, the environment, consumer protection, tourism and culture. By removing barriers to trade and by opening new opportunities for some 500 million Europeans, the Internal Market of the EEA creates jobs and growth and adds to the international competitiveness of the EEA States.

The success of the EEA Agreement depends on uniform implementation and application of the common rules in each of the 30 EEA States. The Agreement provides for a system of supervision where EU Member States are supervised by the European Commission, while the participating EFTA States are supervised by the EFTA Surveillance Authority. The two institutions co-operate closely on policy as well as individual cases.

The role of the Authority

The EFTA Surveillance Authority ensures that the participating EFTA States (Iceland, Liechtenstein and Norway), respect their obligations under the EEA Agreement.

The Authority protects the rights of individuals and market participants who find their rights violated by rules or practices of the EFTA States or companies within those States. Such rules or practices may, for example, be discriminatory, impose unnecessary burdens on commercial activity, or constitute unlawful state aid. The Authority may initiate proceedings against the relevant EFTA State at the EFTA Court, seeking a change in the relevant rules or practices unless the State concerned decides to take appropriate action in response to the Authority's request.

The Authority also enforces restrictions on state aid, assessing its compatibility with the functioning of the Internal Market. The Authority has the power to order repayment of unlawful state aid.

The Authority also ensures that companies operating in the EFTA States abide by the rules relating to competition. The Authority can investigate possible infringements of EEA provisions, either on its own initiative, or on the basis of complaints. It can impose fines on individual undertakings and assess mergers between undertakings where certain thresholds are met.

In monitoring and enforcing the Agreement, the Authority has powers that correspond to those of the European Commission and there is close contact and co-operation between the Commission and the Authority. The two institutions oversee the application of the same laws in different parts of the EEA.

Organisation of the Authority

College

The Authority operates independently of the EFTA States and is based in Brussels. The Authority is led by a College which consists of three members, each appointed for a period of four years by the three participating EFTA States. Although College members are appointed by the Member States, they undertake their functions independently and free of political direction.

During 2012, the composition of the College was:

- Oda Helen Sletnes, (Norway) President
- Sabine Monauni-Tömördy (Liechtenstein)
- Sverrir Haukur Gunnlaugsson (Iceland)

The College is assisted by four departments:

- Internal Market Directorate
- Competition and State Aid Directorate
- Legal and Executive Affairs Department
- Administration

Budget and accounts

The activities and operating expenses of the Authority are financed by contributions from Iceland (9%), Liechtenstein (2%) and Norway (89%). The Authority's annual budget for 2012 was EUR 12.4 million.

More details on the budget and accounts can be found in the chapter on statistics.

Staff and employment

In 2012, the Authority consisted of 68 persons, including the three College Members, staff employed on fixed-term contracts, temporary staff, national experts seconded from the EFTA States' public administrations, and trainees. In 2012, 14 nationalities were represented amongst the staff and approximately half of the fixed term and temporary staff members were EFTA nationals. The gender mix was balanced with 47% of staff members being men and 53% women. 47% of management (College members and directors) was female.

In accordance with the Authority's staff regulations established by the EFTA States, all staff are employed for a three year period, normally renewable only once. As a consequence, the turnover of staff is high and there are, on a more or less permanent basis, employment opportunities for highly qualified candidates within the fields of activity of the Authority. It is an important goal to maintain competitive employment conditions in order to ensure that highly qualified candidates are attracted to work for the Authority.

Glossary of terms

EFTA – European Free Trade Association. An inter-governmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway and Switzerland.

EEA – European Economic Area. An area of economic co-operation that consists of the 27 EU Member States and three of the four EFTA States: Iceland, Liechtenstein and Norway (Switzerland is not part of the EEA). Inside the EEA, the rights and obligations established by the Internal Market of the European Union are expanded to include the participating EFTA States.

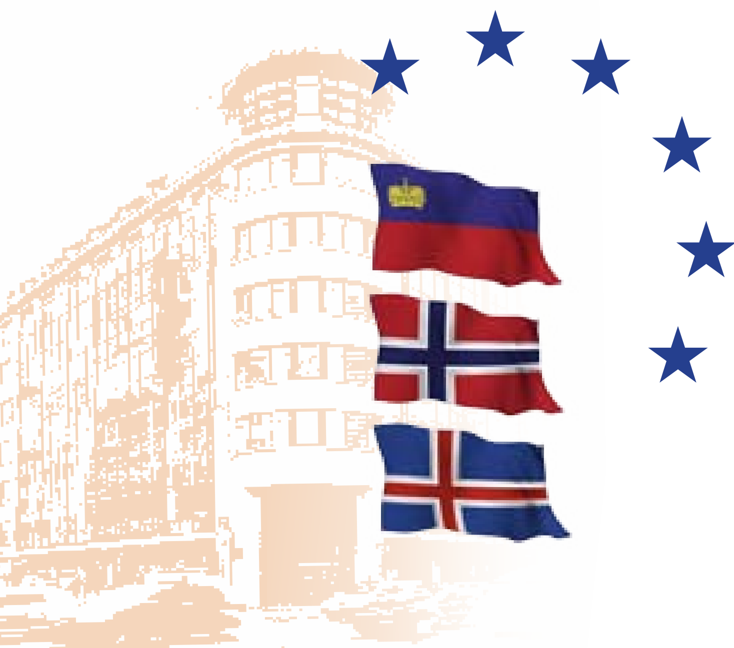
EEA Agreement – The Agreement which creates the European Economic Area.

EEA EFTA States – The three EFTA States that participate in the EEA: Iceland, Liechtenstein and Norway.

EFTA Surveillance Authority – The organisation which ensures that the three EEA EFTA States fulfil their legal obligations as stated in the EEA Agreement. Referred to as "the Authority" for the purposes of this report.

EFTA Court – The judicial body with jurisdiction with regard to the obligations of the EFTA States and the Authority pursuant to the EEA Agreement. The main functions of the Court consist of judgments in direct actions, in particular infringement cases brought by the Authority against the EFTA States, and advisory opinions in cases referred to it by the national courts of the EFTA States.

EEA Joint Committee – A committee of representatives of EU and EFTA States competent to incorporate legislation into the EEA Agreement.



Chapter 2

INTERNAL MARKET

Introduction

The role of the EFTA Surveillance Authority's Internal Market Affairs Directorate (IMA) is to monitor the EFTA States in order to ensure that they effectively implement the Internal Market rules, which mostly consist of regulations and directives, into their national legal orders and that they apply those rules correctly. In this context the Authority performs broadly the same tasks as the European Commission, and the two bodies work closely together.

The Internal Market is based on the rules concerning "the four freedoms" – the free movement of goods, persons, services and capital. These have been at the centre of European integration since the signing of the Treaty of Rome in 1957.

Highlights and priorities

In 2012, the Authority referred four IMA cases to the EFTA Court. The first case concerns Norway's non-compliance with EEA law regarding family benefits. In cross-border situations Norway makes the payment of this benefit subject to the condition that the parents of the child are married or living together. The Authority considers that under EEA law it is sufficient that the child is mainly dependent on the parent with whom it does not live (page 22).

In the second case, the Authority referred Liechtenstein to the Court for having in force discriminatory rules on financial guarantees for staffing agencies. An agency established in Liechtenstein has to provide a guarantee of 50,000 Swiss francs, whereas an agency with its seat outside Liechtenstein, or with a manager residing elsewhere, has to deposit a guarantee of 100,000 Swiss francs. The Authority considers that this is not in line with the right of establishment and the freedom to provide services (page 15).

The final two cases concern late implementation by Iceland of two Directives; one on medicated feeding-stuffs and the other on credit agreements for consumers.

In January 2013, the EFTA Court delivered its judgment in the Icesave case, which the Authority referred to the Court at the end of 2011. The judgment is described in chapter 5 of this Annual Report.

The EFTA Court found in favour of the Authority in an infringement case concerning stock exchanges it had brought against Norway. Norwegian law provides for a general ban of ownership above 20% of the shares in stock exchanges and securities depositories, with very limited exemptions. The EFTA Court agreed with the Authority that this law was in breach of the right of establishment and free movement of capital. The Authority has now started looking into whether Norway will comply with the judgment in a timely fashion.

In the summer of 2012, the Authority opened another infringement case against Norway concerning ownership restrictions, this time in the field of aquaculture. According to Norwegian law, a control of more than 25% of the sector is prohibited without any exemption. The Authority was of the view that this restriction was not in line with the right of establishment. The Norwegian government has indicated its willingness to amend the law and remove this total ban (page 13).

The Authority delivered a reasoned opinion to Norway concluding that the award of bus transport concessions in Aust-Agder were in breach of EEA obligation of non-discrimination and transparency (page 23). In its response to the reasoned opinion, Norway recognised that the award had been made in breach of EEA rules. However, Norway did not propose any measures to rectify the breach. The Authority has written to Norway inviting the termination of the contracts awarded in breach of EEA law, or the adoption of other similarly effective measures to remedy the breach. This is the first case the Authority has dealt with following the adoption of a new policy of enforcement in procurement cases. Previously, the Authority had closed cases having received a recognition of the infringement. Under the new policy the Authority, in principle, intends to pursue cases as long as the contract concerned continues to produce effects and the State has not taken suitable corrective measures to rectify the breach.

In 2011, the Authority started its first infringement proceedings for breaches of the Services Directive. These cases concern licence requirements in the Norwegian Planning and Building Act and the Liechtenstein requirement of appointing a co-trustee in Liechtenstein if the trustee does not reside there (page 14 and 16). In both cases the Authority delivered a reasoned opinion in 2012, and both governments have committed to amend the legislation. The Authority expects to have more infringement cases regarding the Services Directive in the near future. The European Commission has recently stated that it will apply a zero tolerance approach to breaches of the Directive, and the Authority will do the same.

The infringement procedure

Where the Authority has information about national legislation or practices that may not comply with the EEA Agreement, it may decide to initiate an investigation. This may be based on incorrect implementation of EEA law or where national rules or practices are incompatible with the Agreement. Such investigations can be initiated on the basis of the Authority's own surveillance of the EFTA States, or on the basis of a complaint, which anyone may submit to the Authority.

Investigation by the Authority may lead to the launching of formal infringement proceedings, which is a three-step procedure.

- Step 1: Opening the proceedings. This is a letter of formal notice whereby the Authority sets out its opinion of the issue and gives the State a chance to comment and bring forward its arguments.
- Step 2: If the case is not solved at this stage, the Authority may deliver a reasoned opinion.
- Step 3: Finally, the Authority may bring the case to the EFTA Court which will then adjudicate on the case.

Problems can often be resolved through exchange of information and discussions between the Authority and the EFTA State concerned without a need to resort to formal proceedings.

The Norwegian ban on the use of personal watercraft has received considerable attention in Norway. During the summer of 2012 the Norwegian government enacted a new regulation on this issue. However, the Authority still believed that the rules were too restrictive and in breach of the principle of free movement of goods, and sent Norway a letter of formal notice (page 17).

Finally, the Authority issued a letter of formal notice to Iceland concerning the ban on exchange rate indexed loans. Icelandic law prohibits such indexation, which the Authority considers to be incompatible with the free movement of capital (page 20). The aftermath of several rulings of the Icelandic Supreme Court regarding this indexation ban and legislation in response to those rulings was the subject of a complaint to the Authority (page 21). The complainants claimed that Iceland had breached EEA consumer law in several respects. The Authority closed that complaint after a thorough examination and found no breach of EEA law.

Internal Market Scoreboard

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

In the latest Scoreboard, due to be published in spring 2013, the average implementation deficit of the EEA EFTA States was 1%. This is the same as the target set by the European Council.

- Iceland 1.8%
- Liechtenstein 0.4%
- Norway 0.7%

The latest Internal Market Scoreboard for the EEA EFTA States, showing the implementation status of directives, can be found at the Authority`s website eftasurv.int. In addition, the website contains a searchable updated implementation status database.

Freedom of establishment

Ownership in the fish farming industry

Norwegian restrictions on ownership in the fish farming industry are in breach of the freedom of establishment in the Internal Market.

According to Norwegian law, acquisitions leading to majority control over more than 15% of the total number of salmon and trout farming concessions are subject to prior authorisation from the Ministry of Fisheries and Coastal Affairs. Moreover, acquisitions leading to majority ownership of more than 25% of the concessions are totally banned.

Since these ceilings hinder or even preclude business structures above a certain size, the establishment of businesses in the Norwegian aquaculture sector is made less attractive. The Authority therefore finds that the freedom of establishment has been infringed. Accordingly, the Authority issued Norway a letter of formal notice in July 2012.

Although the Authority acknowledges that regional policy objectives may justify certain restrictions, Norway has not been able to demonstrate that the ownership ceilings are suitable and necessary in order to achieve the legitimate objectives invoked. The achievement of a particular industry structure – for example, a certain mix between small, medium and large businesses – is a purely economic objective which cannot serve to justify restrictions to the fundamental freedoms.

The objectives of the Norwegian fish farming rules could be reached by other less restrictive measures. In this context, Norway could, for example, introduce a prior authorisation scheme for concessions above certain limits. However, as such authorisation schemes are by their very nature restrictive to the exercise of the fundamental freedoms, they would have to be transparent and objective, so that they would not be used arbitrarily.

In December 2012, the Norwegian government proposed to change the ownership restriction. The Authority is currently waiting to see how the proposed changes will be formulated.

Free movement of services

The Norwegian Planning and Building Act

Norway has agreed to change rules requiring local approval of construction service providers.

Under Norwegian law, undertakings to carry out construction services have to be approved by local governments before they begin to work. This applies to every project.

Following a complaint, the Authority found this approval system not compatible with the *Services Directive* (2006/123/EC), because the current legislation makes it very difficult for companies established outside Norway to provide services in the country.

Norway is in its right to establish control mechanisms in the field of building activities in order to protect consumers. However, the obligation to go through a registration procedure each time a company wants to provide a service in Norway is too cumbersome. In particular, as these companies have to go through similar controls in their home state, the Authority considers that less restrictive measures are available to achieve the objectives of the Norwegian legislation. Accordingly, in May 2012 the Authority delivered a reasoned opinion.

Norway replied to the reasoned opinion that it had decided to amend its legislation. A clear timetable has been given to the Authority. As a first step, in case where a central approval has already been obtained the obligation to go through additional local approval was dropped as of January 2013. As a second step, the complete system of approval shall be revised during 2013 and be effective at the latest by January 2014. The Authority is closely monitoring the legislative process.

Labour law

Labour clauses in public contracts

The Authority closed a case concerning labour clauses in public contracts after Norway amended its rules.

After the European Court of Justice delivered its *Rüffert* judgment in 2008, the Authority opened an own-initiative case concerning labour clauses in public contracts. In the subsequent infringement proceedings, the Authority concluded that the Norwegian rules were not in compliance with the *Posting of Workers Directive* and the freedom to provide services. This conclusion derived from the fact that the Norwegian rules required the application to posted workers of working conditions which had not been declared universally applicable.

As a response, Norway amended in 2011 its Regulation No. 112/2008 on pay and working conditions in public contracts. The Regulation now refers explicitly to pay and working conditions stemming from universally applicable collective agreements. Furthermore, the reference to local labour standards has been repealed. The amended Regulation still refers to "nationwide collective agreements" which have not been declared universally applicable under Norwegian law. This is problematic under EEA law. However, the fact that major sectors, in particular the construction sector, are covered by universally applicable agreements has significantly reduced the scope of the infringement. Furthermore, the Norwegian Government has entrusted the Agency for Public Management and eGovernment (Difi) with the task to improve the access to information about applicable working conditions in order to ensure more transparency.

Based on these improvements, the Authority considered it appropriate not to proceed with the case.

The Rüffert judgment

In Rüffert, the European Court of Justice found that the authorities in Lower Saxony were in breach of EU law by including in their public works contract a clause requiring contractors from other EEA states to pay wages of pay in accordance with local collective agreements in the building sector. These agreements had not been universally applicable in line with the Posting of Workers Directive.

Free movement of services

Deposits for staffing agencies

Rules concerning deposits for staffing agencies in Liechtenstein are contrary to the freedom to provide services and the freedom of establishment.

Today, an agency established in Liechtenstein with its responsible person residing in Liechtenstein is required to deposit 50,000 Swiss francs to provide financial guarantees when offering their services. In comparison, undertakings where the responsible person resides outside Liechtenstein, or undertakings established outside Liechtenstein providing cross-border temporary employment services, have to provide a guarantee of 100,000 Swiss francs.

The current legislation makes it more difficult for companies established outside Liechtenstein to provide this type of service compared with companies established in Liechtenstein. As a result of the difference of the amount of deposit, a service provider will be less competitive and less likely to provide services in Liechtenstein. The Authority considers that Liechtenstein's legislation is contrary to the freedom of establishment because it links the amount of guarantee to the place of establishment or the private residence of the person responsible for running the staffing agency.

Despite extensive exchanges of correspondence, the Authority could not convince Liechtenstein to amend its legislation. On 25 January 2012, the Authority delivered a reasoned opinion. Liechtenstein admitted that the current legislation might be in breach of EEA law. However, it indicated that no changes could be expected before January 2014. Accordingly, the Authority decided to bring the case to the EFTA Court.

Free movement of services

Trust management

Liechtenstein intends to remove residence requirements for management of trusts.

Today, when a trustee is appointed in a trust instrument, and that trustee resides outside of Liechtenstein, he has to collaborate with a co-trustee resident in Liechtenstein.

Following a complaint, the Authority reached the conclusion that such a residence requirement is contrary to the free movement of services. On several occasions both the EFTA Court and the European Court of Justice have consistently held that national rules under which a distinction is drawn on the basis of residence are in breach of EEA law. Liechtenstein justified its legislation by claiming that a co-trustee residing in Liechtenstein was necessary in order to ensure legal certainty against third parties with regard to the law applicable to the trust. Despite a letter of formal notice from the Authority, Liechtenstein maintained its view. On 5 September 2012, the Authority delivered a reasoned opinion.

After further dialogue, Liechtenstein has decided to revise its legislation in order to make it compliant with the EEA Agreement and has removed the residence requirement. The new legislation will enter into force in March 2013.

Freedom to provide services/Free movement of goods

Norwegian rules on VAT representatives

Foreign businesses should not be required to appoint a tax representative if they want to engage in business activities in Norway.

The Norwegian rules on VAT representatives require foreign established companies to appoint a tax representative in Norway that is jointly liable for the calculation and payment of VAT. Such rules are likely to increase the costs for those taxpayers and make market access in Norway more difficult. The rules, therefore, restrict the free movement of goods and services.

Norway has a legitimate interest in ensuring efficient fiscal supervision and preventing tax evasion. However, given the fact that Norway has concluded agreements with several EEA States providing for mutual assistance in the exchange of information and recovery of VAT, the requirement of a tax representative in Norway goes beyond what is necessary to reach the objectives pursued.

In September 2012, the Authority delivered a reasoned opinion to Norway in the case. In January 2013, the Norwegian government informed the Authority of its intention to amend the legislation and the Authority is currently assessing those proposals.

Rules on use of personal watercraft

The new Norwegian regulation on the use of personal watercraft is not in line with the principle of free movement of goods under the EEA Agreement.

The regulation, which came into force on 1 July 2012, confirms the previous general ban on the use of personal watercraft, with only limited exemptions. In a letter of formal notice issued to Norway in October 2012, the Authority pointed out several problematic issues concerning the ban.

Firstly, the rules fail to establish a credible system to designate in a timely manner the areas where personal watercraft *can* be used.

Secondly, the zones where such exemptions can be allowed are extremely limited. The Authority acknowledges that there are areas where a high level of environmental protection is necessary and does not oppose the restrictions on the use of personal watercraft in such areas. The exclusion zones, however, cover considerable parts of the coast, including areas in which the restrictive measures do not seem to be necessary on the basis of the protection of environment or safety.

In addition, the current Norwegian rules do not seem to be consistent, as water scooters are banned in areas where private motor boats are allowed.

Finally, the Authority expressed concerns with regard to the criminal proceedings brought against users of personal watercraft on the basis of the current Norwegian legislation.

The Norwegian ban on the use of personal watercraft was originally introduced into the Recreational Boats Act in 2000. The Authority, having received complaints concerning the rules, started its first infringement proceedings against Norway in 2004. Subsequently, Norway started a revision of its rules. In March 2011, Norway notified the Authority of the new draft regulation on the use of personal watercraft. The Authority issued comments to Norway highlighting numerous problems with regard to the proposed system. Despite the critical comments from the Authority, Norway adopted the regulation in June 2012.

In January 2013, the Norwegian government informed the Authority of its intention to amend the current rules and the Authority is currently assessing the proposed amendments.

Prevention of technical barriers to trade

In 2012, the Authority received only ten notifications of draft technical regulations from the EFTA States. This is a decrease in comparison with previous years. The Authority has addressed this decrease in meetings with the EFTA States, reminding them of the purpose of the early warning system.

Out of the ten notifications, four came from Iceland, four from Norway and two from Liechtenstein. Seven notifications prompted the Authority to issue comments. The European Commission commented on four of the notifications.

The Authority also received 734 notifications from EU Member States, which were forwarded to it by the Commission. EFTA States commented on one notification from EU Member States.

Year	EFTA notifications	Comments from the Authority	EU notifications	Single co-ordinated communications
2012	10	7	734	1
2011	14	4	676	0
2010	19	5	817	0
2009	16	9	708	0
2008	25	6	601	1

Notification of technical regulations

The *Technical Standards and Regulations Directive* (98/34/EC) establishes a notification procedure obliging the EFTA States to inform the Authority in advance of their intention to adopt new technical regulations. This prevents the creation of new, unjustified barriers to trade that could arise from the adoption of restrictive technical regulations.

Following the notification of draft technical regulations from the EFTA States, there is a three-month standstill period during which the Authority, the European Commission and other EEA States have time to examine the notified measures and issue comments if it appears that the draft regulation raises questions as to its compatibility with the EEA Agreement.

Free movement of capital

Interest deduction for mortgages

Norway intends to change rules which exclude deduction rights on mortgage loans in Germany, Belgium, Italy, Malta, Bulgaria and Portugal.

According to Norwegian tax rules, it is only possible to deduct interest expenses on mortgage loans if the property is located in Norway or in an EEA State where Norway has the right to tax the property according to double taxation agreements. The Authority considers those rules to be a restriction on the free movement of capital since they make investment in real estate less attractive in the six EEA States excluded from the tax advantage.

Norway has claimed that the restriction can be justified by the need to ensure the coherence of the Norwegian tax system and the allocation between the EEA States of taxing powers. The Authority disagrees with Norway on this point since there is no direct link between the deduction right and the actual taxing of the real estate.

The Authority is also of the opinion that the risk of double deductions or tax evasion can be addressed by making use of other less restrictive measures. Norway has concluded tax agreements with all the EEA States providing for an administrative assistance on the exchange of information. Norway could make use of those agreements in order to receive the necessary information relating to properties located in other EEA States.

In September 2012, the Authority delivered a reasoned opinion to Norway in this case. Two months later, Norway informed the Authority of its intention to introduce a statutory provision to the Norwegian Tax Act that will imply equal conditions for interest deductions when residents invest in real estate in Norway and other EEA States.

Free movement of capital

Ban on exchange rate indexation of loans

The Icelandic ban on the granting of exchange rate indexed loans in Icelandic Krona (ISK) is in breach of the general principle of the free movement of capital but it may be legitimate for Iceland to restrict the granting of such loans to consumers.

According to Icelandic law it is prohibited to grant loans in ISK that are indexed to the value of other currencies. In April 2012, the Authority issued a letter of formal notice to Iceland, concluding that such a ban is in breach of EEA rules.

The free movement of capital is protected in the EEA Agreement and EEA States are, as a general rule, not allowed to restrict cross-border capital movements.

It is the Authority's opinion that an index loan ban will dissuade Icelandic financial institutions from financing their loans in other currencies than the national currency and therefore restrict the free movement of capital.

The Authority acknowledges that loan agreements with exchange rate indexation may involve risk for consumers. Consumers usually have their income in the national currency and are therefore not prepared to react to fluctuation in the value of other currencies. Furthermore, consumers may not have the ability to assess the risk involved in such loan agreements.

The Authority believes that it can be lawful to restrict the granting of such high risk financial products to consumers. However, a total ban on granting such loans to individuals and companies goes beyond what can be considered necessary in order to protect consumers.

The Authority believes that Iceland could introduce other less restrictive measures in order to protect consumers. Iceland could, for example, require financial institutions to inform consumers in an adequate and clear manner about the risks involved before contracting a loan with an exchange rate indexation. Alternatively, consumers could be granted the right to retract within a certain time period from a signed loan contract.

The same does not apply to companies. Contrary to the situation relating to consumers, legal persons have the necessary means and resources to be able to adequately assess any risks involved when considering contracting a loan with an exchange rate indexation.

Iceland has replied to the letter of formal notice and maintains that the Icelandic ban on the granting of exchange rate indexed loans does not restrict the free movement of capital. The Authority is currently assessing Iceland's reply.

Consumer protection

Foreign currency indexed loans

Icelandic law providing for new interest rates in foreign currency indexed loans is not in breach of EEA legislation on consumer protection.

In 2010, the Icelandic Supreme Court ruled that the indexation of a consumer loan to a foreign currency is illegal under Icelandic law. In the aftermath of that ruling, Iceland amended its legislation on interest and price indexation, thereby obliging financial institutions to replace the interest rates in foreign currency indexed loans by interest rates published by the Central Bank of Iceland at the time when the loan was concluded. The interest rates by the Central Bank of Iceland often appeared to be higher than the interest rates negotiated in the loan agreement. This practice resulted in a complaint to the Authority, where it was alleged that the law amounts to a breach of EEA legislation on consumer protection.

The Authority, however, concluded otherwise. EEA legislation on consumer protection is essentially protecting consumers against unfair terms and practices applied by traders. The present case, however, does not concern the behaviour of traders. On the contrary, the new interest rates applied by the financial institutions follow directly from their obligations under national law and were therefore outside the scope of both Directive 93/13/EEC on unfair terms in consumer contracts and Directive 2005/29 on unfair commercial practices. Moreover, in the event that an interest clause is considered to be illegal under national law, it is for the national law to determine the implications thereof. Hence, the issue raised in the case was essentially a matter of Icelandic contractual law.

Financial services

Discriminatory tax deduction

Liechtenstein has put in place tax rules on notional interest deduction which restrict the EEA rules on freedom of establishment and free movement of capital.

The Liechtenstein notional interest deduction rules give companies a reduction in the actual corporate tax they need to pay. Companies subject to Liechtenstein tax can deduct from their taxable income a notional interest calculated on the basis of their adjusted shareholders' equity. However, when calculating the deduction, only the net assets in real estate or permanent establishments in Liechtenstein are taken into account. Real estate or permanent establishments located in EEA States other than Liechtenstein are excluded. The Authority believes that this difference in treatment discourages Liechtenstein companies from setting up permanent establishments or investing in countries other than Liechtenstein.

The Authority considers that the Liechtenstein legislation restricts the freedom of establishment and the rules on free movement of capital as set out in Articles 31 and 40 of the EEA Agreement. This restriction cannot be justified and the Authority therefore issued a letter of formal notice to Liechtenstein in April 2012. Liechtenstein replied to this letter and contested the Authority's findings.

The Liechtenstein rules on notional interest deduction show strong similarities with the Belgian rules on notional interest deduction which the European Commission is currently challenging. At the same time, a Belgian court has referred a question on the matter to the European Court of Justice (C-350/11). The Court ruling is to be expected in the course of 2013. Close scrutiny of these cases is necessary in order to ensure coherence and consistency in the application of the rules on the fundamental freedoms throughout the EEA.

Family benefits in Norway

Norway cannot make payment of family benefits to cross-border workers dependent on whether or not the parents of a child are married or living together.

In June 2010, two unresolved cases in the European Commission SOLVIT database caught the attention of the Authority. They concerned two mothers who were working and residing with their child in Lithuania in one case, and Slovakia in the other. The parents of the children were separated and the fathers were residing and working in Norway. The mothers were entitled to family benefits in their respective countries of residence. They had both, according to EEA law, requested the differential amount of the higher Norwegian family benefits to which the father in Norway would be entitled to under the Norwegian social security system. However, both applications for family benefits were refused by the Norwegian Labour and Welfare Service (NAV) because the child was not living permanently with the parent in Norway and could therefore not be classified as a family member according to Norwegian law.

According to EEA law, the Norwegian condition to live permanently with the parents has to be considered satisfied if the child is mainly dependent on the parent that does not live with the child. The marital status of the parents is thereby irrelevant. This was confirmed by the European Court of Justice in case *Slanina*. The ruling is based on the fact that in cross-border family situations different levels of benefits apply while this is normally not the case for pure national circumstances. Migrant workers would therefore always be disadvantaged as they would lose access to benefits and hence be discouraged from moving.

Accordingly, the Authority issued a letter of formal notice on 8 December 2010, delivered a reasoned opinion on 6 July 2011, and eventually referred the case to the EFTA Court on 28 March 2012. A judgment is expected in the course of 2013.

Public procurement

Bus transport services in Aust-Agder

Norway has recognised that bus transport concessions in Aust-Agder with a value of approximately NOK 1.5 billion were awarded in breach of EEA rules.

In December 2008, the county of Aust-Agder awarded a number of concessions for bus transport services to local bus transport companies for a period of four years. Two years later, the county made use of the prolongation clause in the contracts and extended the contracts by another four years until 31 December 2016 (except for the biggest contract, which was only extended for a further two years). The concessions worth approximately NOK 1.5 billion (EUR 205 million) were awarded without any competitive tendering or publication.

The Authority issued a letter of formal notice to Norway concluding that Norway had failed to comply with the principles of non-discrimination and transparency by allowing Aust-Agder to award and prolong the concessions without any form of publication. The Authority took the view that the concessions are of cross-border interest due to their value and duration. The lack of publication therefore disallowed potential interested parties to express interest.

Norway challenged the conclusions by the Authority and claimed that the concessions were awarded with full transparency, in accordance with Regulation 1370/2007 *on public passenger transport services by rail and by road*. Norway also claimed that several concessions lacked cross-border interest. As the Authority did not agree with the arguments brought forward by Norway, it delivered a reasoned opinion to Norway in June 2012, thereby reaffirming its earlier conclusions and inviting Norway to adopt proper rectifying measures within two months. In reply to the reasoned opinion, Norway recognised that the concessions were awarded in breach of the obligation of transparency and non-discrimination, but it did not adopt or propose any measures to rectify the breach. The Authority has written to Norway inviting the termination of the contracts or the adoption of other similarly effective measures to remedy the breach.

Procurement of service concessions

Under EEA law, service concessions are excluded from the procedural rules laid down in the directives on public procurement.

However, it follows from the case law of the European Court of Justice that service concessions are nevertheless subject to the general principles of EEA law. These imply a duty of transparency for the contracting authority that gives potential tenderers the opportunity to express interest in operating the services. The obligation of transparency applies where the service concession in question may be of interest to undertakings established in another EEA State.

Environment

The fight against air pollution

The Authority is currently investigating a complaint against Norway concerning alleged breaches of air quality legislation.

One of the key objectives of the EEA's environmental legislation is to improve the quality of our air. The concentration of industry and traffic in urban areas means that poor air quality can still pose a serious threat to human health. To tackle this, the Air Quality Directive introduces strict monitoring requirements on cities for a number of pollutants as well as the duty to prepare action plans to deal with poor air quality.

In cities, one of the most serious threats to clean air comes from motor vehicles. Diesel and petrol engines emit a wide range of pollutants, including carbon monoxide, nitrogen oxide and particulate matter. Exposure to elevated levels of these pollutants, particularly among people with lung or heart conditions, can lead to significant health problems.

This past year, the Authority received a complaint alleging that breaches of air quality rules in Norway mean that several cities are exposed to illegal levels of air pollution. Although Norway is currently introducing tough new measures to tackle car emissions, including the possibility of suspending traffic when pollution levels are high, the complainant claims that Norway has not yet put in place adequate action plans setting out the concrete measures it will take to address this issue.

The Authority is still investigating the case.

Emissions trading

Efforts to combat climate change

2013 will see the start of the third phase of the EU's Emissions Trading Scheme (EU ETS).

The EU ETS is the EU's flagship policy to tackle climate change. Established as a cap and trade system, its aim is to reduce greenhouse gas emissions from large emitters within the EU. The EFTA States have participated in the scheme since 2008.

Phase III of the scheme builds on previous experience and introduces a more ambitious cap on emissions. From 2013 onwards, the scheme will be further expanded to include the petrochemicals, ammonia and aluminium industries. At the same time, there will be important changes to the way in which the scheme is administered. In particular, there will be a single EEA-wide cap on emissions. Auctioning will become the default method for allocating allowances, progressively replacing free allocation.

The remaining free allowances will be allocated to companies based on harmonised EEA-wide rules. The EFTA States have prepared so-called National Implementation Measures (NIMs) setting out the number of free allowances for each qualifying installation in their jurisdictions. During 2012, the Authority, in close co-operation with the Commission, has been assessing these NIMs to ensure they comply with the revised rules. Where necessary, the Authority can require the EFTA States to make any necessary adjustments. A final decision on the NIMs is expected by early 2013.

Taxation

Use of EEA registered cars in Norway

Norway cannot impose a full registration tax on leased or borrowed motor vehicles which are registered abroad and used by Norwegian residents in Norway.

According to EEA case law, an EEA State may impose a registration tax on a motor vehicle registered in another EEA State if the vehicle is intended to be used essentially on its territory on a permanent basis. However, the obligation to pay a full registration tax without taking account of the duration of the use of that vehicle is considered to be disproportionate. Only when the use of the car would cover the entire economic life left of the vehicle, would a full registration tax be justified.

By imposing a full registration tax, Norway in practice hinders Norwegian residents from using leased car services offered by companies established in other EEA States and to hinder the latter from offering their services to Norwegian residents. This is in breach of the freedom to provide services. The Authority delivered a reasoned opinion to Norway concerning this breach in November 2012.

At the same time, the Authority issued a letter of formal notice to Norway concerning registration tax on foreign-registered motor vehicles owned by private individuals and borrowed by persons permanently resident in Norway. This letter is based on a recent judgment from the Court of Justice of the European Union, which states that imposing full registration tax on such borrowed motor vehicles amounts to a restriction to the free movement of capital. The registration tax is liable to make cross-border capital movements less attractive by dissuading residents in one EEA State from accepting loans offered by residents of another EEA State.

The Authority is expecting Norway's replies to both letters in early 2013.

Transport

Driving and rest time rules

In September 2012, the Authority rejected Norway's request for authorisation of a permanent exemption from the EEA rules on driving and rest time in transport of live animals.

In May 2009, Norway requested the Authority to authorise the grant of an exemption from Regulation (EC) No 561/2006. The Regulation foresees that the Authority may grant exemptions from driving and rest time rules in exceptional circumstances. The request concerned an application to prolong the driving time allowed before taking a break for all vehicles used for the transport of live animals from farms to slaughterhouses. As a subsidiary request, Norway requested that the mandatory break imposed through the Regulation could be undertaken with greater flexibility than foreseen by the Regulation. In the application, Norway referred to special features and challenges connected to the low population density, the considerable number of small farms (often requiring vehicles to make several shorter stops when collecting animals for the slaughterhouse, thus increasing the levels of stress and unrest for the animals), and long distances between slaughterhouses in Norway.

By Decision of 5 September 2012, the Authority rejected both the primary and the subsidiary request, concluding that the transport operations in question could not be regarded as carried out under "exceptional circumstances", as required by Article 14(1) of the Regulation. In light of the permanent and regular nature of the exemption request, the Authority found that the conditions for granting the authorisation were not met.

The Schengen Agreement

The term "intra-Schengen" refers to the 26 European countries that have implemented the Schengen Agreement, which is now part of EU law. The Schengen Area operates as a single international travel and immigration area with no border controls for people travelling between Schengen countries and only external border controls for those travelling in and out of the area.

Currently, the Schengen Area consists of 26 countries; Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and Switzerland.

Transport

Passenger departure charges in Norway

Norway cannot discriminate between domestic and intra- Schengen flights in levying passenger departure charges.

The level of charges set for 2013 by the public airport owner Avinor indicates a 29% difference in charges, or 47 NOK on domestic routes and 61 NOK on international routes.

In July 2012, the Authority sent a letter to Norway stating that Avinor's setting of passenger departure charges constitutes an unjustified restriction of the freedom to provide air services within the EEA. In general, services supplied by airports operated by Avinor do not vary according to the destination of intra-EEA flights upon departure. Upon arrival, however, all non-domestic EEA flights may be subject to customs controls and passengers arriving on non-Schengen flights may be subject to border controls.

As the current passenger departure charges are levied at different levels for domestic flights and non-domestic intra-Schengen flights, the Authority has taken the view that non-domestic intra-Schengen air services are treated – and notably charged – less favourably than the comparable type of service on domestic flights, save for the mandatory customs controls. In other words, the customs controls alone do not appear to warrant the differentiation in the passenger departure charges applied vis-à-vis domestic flights.

In October 2012, the Norwegian government informed the Authority that it had considered the matter and would take measures to level the departure charges in two steps in 2013 and 2014.

Transport

Ban on frequent flyer points in Norway

The Norwegian ban on the collection of frequent flyer points on domestic routes is in breach of EEA law.

In 2007, the Norwegian government enacted a regulation effectively banning all air operators from offering their customers collection of frequent flyer points (FFPs) on domestic routes in Norway. The general ban replaced a similar ban directed exclusively at the SAS group of companies. The aim of the ban is to protect competition on domestic routes.

Following a complaint from SAS, the Authority issued a letter of formal notice to Norway in July 2012. The Authority argues that the national prohibition to offer the collection of frequent flyer points on domestic air routes in Norway is not in line with the *Unfair Commercial Practices Directive* (2005/29/EC). Alternatively, the ban constitutes an unjustified restriction of both the freedom to provide air services within the EEA, and of the freedom of establishment of air carriers in Norway.

Despite a proposal in February 2012 by the Norwegian Competition Authority to abolish the ban on the three largest domestic air routes, the government of Norway announced in October 2012 that it would maintain the ban in its current form.

The Authority is considering the next steps in this case.

From farm to fork

The EEA legislation on food safety is based on the principle "from farm to fork". This principle entails that food safety shall be ensured at all stages of food production, from the farmer to the final consumer.

The food producer is responsible for the safety of the food he produces. This means that the food producer shall ensure that his production practices are hygienic and safe, that control measures are in place to minimise or eliminate risk factors and that both the raw material and the final products are traceable.

The national authorities in all EEA Member States shall control that food producers comply with their obligations under EEA law. As food products circulate freely in the internal Market, it is important to ensure that the Member States take a uniform and harmonised approach to these controls. The Authority and the European Commission carry out on-the-spot inspections in their respective Member States to verify that this is done. To ensure a harmonised approach, inspectors from the Authority participate regularly as observers in inspections carried out by the Commission, and vice versa.

Inspections in 2012

Norway

- Food hygiene and import of food of non-animal origin in Norway
- Food contact materials (packaging material, kitchenware, etc)
- Transmissible diseases (Zoonotic agents and salmonella)
- Contingency plans for the event of contagious animal diseases
- Animal welfare

Iceland

- Meat and milk products
- Food contact materials (packaging material, kitchenware, etc)
- Transmissible diseases (Zoonotic agents and salmonella)
- Import controls and veterinary checks at borders

Veterinary inspections

In 2012, the Authority carried out nine inspections in the EFTA States. The reports for these missions are published on the Authority's website.

Overall, the control systems in the EFTA States function satisfactorily. However, in certain areas serious shortcomings have been detected. In Iceland, enforcement action needs to be strengthened to ensure that establishments that do not comply with the EEA food hygiene legislation do not place products on the market. In Norway, serious hygiene shortcomings were seen in a hospital kitchen catering to a large number of patients, despite the fact that the kitchen had been regularly visited by the national authorities.

Hygiene package

On 1 November 2011, the so-called "Hygiene package" became fully applicable in Iceland. It comprises several legal acts setting out general and specific principles in food and feed law. Until 1 November 2011, Iceland only applied these acts in relation to fish and fishery products. However, from that date, the legislation was to apply in full to all food products in Iceland.

Iceland experienced some delays in the implementation of the relevant legislation. During 2012, the Authority issued 19 letters of formal notice to Iceland in relation to the implementation of the legislation in the Hygiene package and seven reasoned opinions were delivered. One year later, Iceland has implemented most of the legislation. However, one case has been referred to the EFTA Court, and in another two cases, the Authority is still concerned that the legislation is not correctly incorporated into Icelandic law.

Mad cow disease

In 2012, the Authority has dealt with several cases in relation to prevention, monitoring and handling of mad cow disease.

Fish meal – Norway

In Norway, production of feed for ruminants is not kept physically separate from production of feed for other animal species, for example poultry and pigs, which may contain animal proteins in the form of fish meal. This practice entails a risk of cross-contamination between the different processes. The Authority issued a letter of formal notice to Norway in December 2012 to which Norway was given two months to reply.

Disease monitoring – Norway

Norway has requested the Authority to authorise a revision of its monitoring programme for mad cow disease. The Authority has requested the scientific assistance of the European Food Safety Authority (EFSA) in this case. EFSA is expected to deliver its report in February 2013.

Removal of "specified risk material" – Iceland

Iceland has not implemented the provisions of the Regulation that relate to the removal of high risk tissues from carcasses at slaughter. The Authority delivered a reasoned opinion to Iceland in September 2012. Iceland has been granted an extension of the deadline to reply until February 2013.

EEA food legislation

Caffeine in food and beverages – Iceland

Icelandic legislation currently bans the use of caffeine in food products other than beverages but does not set any limit for the addition of caffeine in beverages. In the Authority's view, this is not in line with Article 11 of the EEA Agreement. Consequently, following the Authority's letter of formal notice issued in 2011, Iceland has proposed to modify its legislation concerning the addition of caffeine in food and beverages by setting different thresholds for the addition of caffeine in foodstuff and beverages. The goal is to ensure that consumption of products containing caffeine available on the Icelandic market, which could be harmful to health, is kept within certain limits. Iceland introduced a definition of "energy drinks" and proposes to ban the use of caffeine in alcohol.

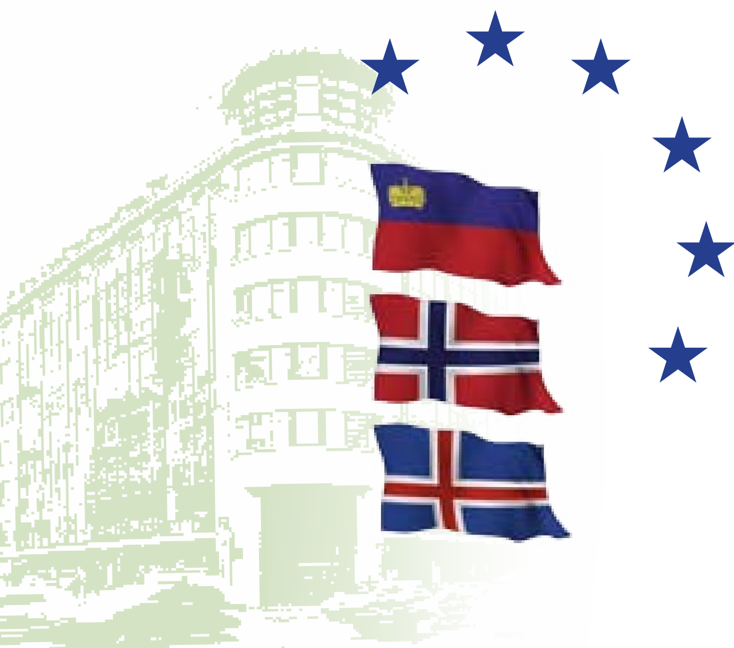
Prevention of mad cow disease

Regulation (EC) No 999/2001 sets out rules on the prevention, monitoring and handling of inter alia mad cow disease (bovine spongiform encephalopathy). This disease caused major disruption in food production in Europe in the 1990s, and it is thought that consuming meat from cattle infected with mad cow disease may cause serious disease in humans.

To avoid exposing animals to disease, the Regulation bans the feeding of animal protein to ruminant animals such as cattle and sheep.

Member States must monitor closely their cattle populations in order to detect any signs of mad cow disease developing.

Finally, in order to further reduce the risk of exposing humans to the disease, certain animal tissues considered most likely to be at risk of transmitting disease, such as the brain and spinal column, must be removed from the carcasses when animals are slaughtered.



Chapter 3

STATE AID

Main activities in 2012

In 2012, the EFTA Surveillance Authority adopted 24 state aid decisions, covering a broad range of areas. Thirteen of the cases concerned Norwegian aid measures. The Authority authorised aid to important sectors such as environmental aid for energy production and public service compensation for transport.

Ten decisions concerned Icelandic aid measures, including the final review of the rescue and restructuring aid for the three main Icelandic banks. The Authority concluded that the aid granted to the new banks should be considered compatible, as the aid was proportional to the objective of creating new, viable banks. The commitments offered by the banks ensured that the negative impact on competition was reduced to a minimum. These decisions, together with several other decisions adopted in 2011 and 2012, are an important step towards bringing to an end the Authority's review of the aid measures that were notified following the collapse of the Icelandic banking system in 2008.

The Authority has in several cases adopted negative decisions and required recovery of the difference between the low sales price and the real market price for the sale of land and property. To avoid state aid problems it is important not only to have a market price in all property transactions, but also that public authorities are able to document properly the transactions done. This may be ensured by either obtaining an independent value assessment before a sale takes place, or simply making use of a tendering procedure.

The State Aid Rules

State aid is assistance provided by public bodies to entities engaged in economic activities. The most obvious form of state aid is, for example, governments giving grants to businesses to facilitate capital investment, or providing aid to rescue and restructure ailing companies. State aid can, however, consist of public support measures in numerous forms, such as tax exemptions, loans on preferential terms, and state guarantees and investments in share capital made by public authorities on terms that would not be acceptable to a private investor. State aid is present when assistance is provided:

- by an EFTA State or through state resources;
- that confers an advantage to a recipient(s);
- that favours certain economic undertakings or the production of certain goods;
- that distorts or has the potential to distort competition; and
- that affects trade across the EEA.

The EEA Agreement contains a general prohibition on state aid in order to prevent distortions of competition and negative effects on intra-EEA trade. The rules seek to ensure a level playing field for companies across Europe, and to prevent government assistance being used as a form of protectionism in the absence of trade barriers. The prohibition is, however, subject to exceptions, recognising that government intervention can be necessary to correct market failure and for other purposes.

In 2012, the Authority adopted new guidelines for public service compensation. These guidelines are of great practical importance for the EFTA States. It remains the prerogative of the EFTA States to define and determine the need for services of general economic interest. The guidelines, however, underline the importance of having a proper entrustment act that specifies the public service task and ensures that the remuneration is limited to covering the cost for the efficient provision of such tasks.

The EFTA Court assessed four of the Authority's state aid decisions in 2012 and upheld three of them. In the Hurtigruten case the Court agreed with the Authority that the supplementary state funding to the coastal public transport service company in 2008 also benefitted the commercial operations, and that the illegal state aid had to be recovered. The Court also emphasised the need for documentation and transparency in the use of public funds.

Priorities for 2013

Following pre-notification consultations in 2012, the Authority is looking forward to receiving formal notifications of substantial new state aid measures both in Norway and Iceland. The Authority also expects that the states respect the standstill obligations in the EEA Agreement. No new state aid measures can be implemented before they have been approved by the Authority.

Handling of complaint cases will also be given priority in 2013. Economic operators in the EFTA States continue to provide important information about the EEA markets. The Authority has received a number of complaints involving public entities that carry out both administrative tasks and commercial operations. In such cases the state aid rules require separation of accounts and a reasonable allocation of costs for the different activities. This is important, in order to avoid state resources being used to cross-subsidise commercial activities.

In 2012, the European Commission launched a programme for state aid reform. This is the most comprehensive and important initiative to update rules and procedures on state aid since the EEA Agreement came into force. The reform pursues three closely linked objectives. Firstly, it should contribute to much needed growth in Europe. Secondly, it should focus state aid enforcement on cases with the biggest impact on the Internal Market. Thirdly, it should streamline rules and ensure faster decisions.

In this regard, a number of state aid guidelines will be revised. The Authority will, on its side, participate actively in these revision procedures and adopt similar guidelines to ensure the homogeneity in the EEA market. In 2013, the following important guidelines will be revised: Regional Aid, Research & Development & Innovation, Environmental Aid, Risk Capital and Broadband Deployment. As part of the adoption of the new regional aid guidelines, the Authority will also, following notification by the EFTA States, make a detailed assessment of their new regional aid maps.

In addition, the proposals on state aid reform contain new provisions for obtaining market data and information from economic operators. Finally, the reform aims to place greater responsibilities on national authorities through an expansion of the block exemption regulation. Changes to the procedural framework for state aid control will have to be implemented by the EFTA States through a revision of Protocol 3 to the Surveillance and Court agreement. Thus, the realisation of the ambitious objectives of the reform programme will require dedicated efforts by the EFTA States. They will among other things need to ensure that a broadened block exemption regulation is applied, monitored and reported correctly. Moreover, the aim of faster decision-making will still depend on the EFTA States' efforts to ensure compliance with standstill and notification obligations as well as ensuring timely and complete responses to the Authority's information requests.

The Role of the Authority

The prohibition on state aid that applies in Iceland, Liechtenstein and Norway is enforced by the Authority. It is also the Authority's role to decide how the exceptions to the prohibition are to apply. In its enforcement of the rules, the Authority has equivalent powers and similar functions to those of the European Commission.

Plans to grant state aid must be notified to the Authority prior to implementation. The Authority must then assess whether such a plan constitutes state aid and, if it does, examine whether it is eligible for exemption.

Decisions taken by the Authority in the field of state aid are published on the Authority's website and in the Official *Journal of the European Union*.

The financial crisis in Iceland

The three main Icelandic commercial banks

The EFTA Surveillance Authority approved the state aid granted for the restructuring of the three Icelandic commercial banks (Íslandsbanki, Arion Bank and Landsbankinn) in three Decisions adopted in June and July 2012.

These final Decisions marked the end of three of the main state aid cases that the Authority has dealt with following the collapse of the financial system in Iceland in 2008. Íslandsbanki, Arion Bank and Landsbankinn were established after their predecessors Glitnir, Kaupthing Bank and Landsbanki Íslands failed in October 2008. Most of the failed banks domestic operations, assets and liabilities were transferred to the new banks. In this process, the Icelandic State granted certain support measures. These included capital injections, subordinated loans and special liquidity facilities together with an unlimited state guarantee of deposits in domestic commercial and savings banks.

The Authority assessed the compatibility of the aid under Article 61(3)(b) of the EEA Agreement, which allows for aid to remedy a serious disturbance in the economy of an EEA State. Each bank had to submit a restructuring plan that demonstrates restoration of its long-term viability, sharing of restructuring costs between the bank's owners, the bank and the State, and that the aid is limited to the minimum necessary. Furthermore, measures had to be introduced to limit distortions of competition to a sufficient degree: the banks restrain from acquiring other financial institutions during the restructuring period, shareholdings in both financial institutions and companies under restructuring will be divested and measures will be introduced to the benefit of new and small competitors in the financial sector. The Icelandic authorities committed to introduce legislative amendments to facilitate switching for bank customers, reduce switching costs and thereby enhance competition in financial services.

Aid to investment funds in Iceland

In July 2012, the Authority found state aid to eight investment funds in Iceland to be compatible with EEA rules.

Due to heavy losses and a run on the funds by the investors, in October 2008 the Icelandic Financial Supervisory Authority (FME) issued a recommendation to management companies to wind up all non-UCITS funds. Thereafter the new state-owned banks acquired assets held by eight investment funds, which were managed by subsidiaries of the banks, for a total of ISK 82.2 billion (approximately EUR 536 million). The assets consisted largely of bonds issued by the collapsed banks or by companies they owned or controlled. The investors in the funds at issue received between 60% and 85% (depending on the fund) of the last recorded value of their unit share certificates.

In its assessment of the case, the Authority found that the transactions amounted to state aid as they were financed by resources from fully state-owned banks controlled by temporary boards of directors consisting mainly of civil servants. The transactions were not made on market terms acceptable for a private investor since the value of the assets at the time was highly uncertain.

The Authority considered the state aid compatible with Article 61(3)(b) of the EEA Agreement. In October 2008, the financial sector in Iceland had collapsed and the government had to implement extraordinary measures in an attempt to stabilise the economy. These measures were necessary and proportionate to try to restore faith in the financial sector.

Icelandic investment banks

In December 2012, the Authority closed a formal investigation into loans granted to the investment banks Saga, VBS and Askar Capital.

The loans, of a total amount of ISK 52 billion (EUR 330 million), were granted on favourable terms by the Icelandic Treasury in March 2009 to reschedule short-term collateral and securities loans from the Central Bank of Iceland to long-term loans. These loans were secured amongst others with bonds issued by the three commercial banks, Glitnir, Kaupthing and Landsbanki Íslands, which collapsed in October 2008.

Although the Icelandic authorities claimed they had endeavoured to protect the interest of the state and acted in line with the conduct of a private creditor, the Authority had doubts whether the terms agreed by the Treasury were consistent with commercial conditions.

The three investment banks are in liquidation and have ceased all regular economic activity. For this reason, the assessment of the aid measures and their compatibility would have no effect. Under those circumstances, the Authority decided, in December 2012, to close the investigation.

What is UCITS?

UCITS is an EU Directive which establishes a common regulatory regime for Undertakings for Collective Investment in Transferable Securities. Funds under UCITS can market themselves throughout the EU. Investments are limited to those securities listed on public stock exchanges. Many mutual funds in Europe use the UCITS legislation.

Sale of land

Recovery of aid to Haslemoen

The Authority required Haslemoen AS to repay aid amounting to NOK 4.9 million (EUR 670,000) for the purchase of buildings under market value.

The municipality acquired the Haslemoen Leir military camp from the Norwegian State in 2005 for the price of NOK 46 million (EUR 6.3 million). Less than a year later, it resold 29 of the 44 buildings located in the Inner Camp of Haslemoen Leir to Haslemoen AS for NOK 4 million (EUR 540.000). After a formal investigation, in March 2012 the Authority concluded that the sale was carried out below the municipality's primary cost, and thus below the market value. The Norwegian authorities successfully implemented recovery of the unduly granted aid plus compound interest before the summer.

Oppdal sale cleared

In May 2012, the Authority concluded that the sales price of a plot of land in the Municipality of Oppdal did not contain any state aid elements.

In this case, the municipality relied upon two independent expert valuations. They estimated the value of the property to be in the range NOK 800,000 – 850,000 (EUR 110,000 – 116,000). However, before the property was sold, the municipality received a conflicting higher offer of NOK 3.1 million (EUR 420,000) from a competitor of the intended buyer. Nevertheless, the municipality decided to sell the property for NOK 850,000 without scrutinising the higher bid, and on this basis the Authority opened a formal investigation into the case.

The Authority found that the competitor had a special interest in the property and was therefore willing to pay an excessively high price for the property to prevent the other company from establishing a competing business on the property. Thus, the higher bid was not comparable with the bid made by the buyer and could not serve as a sufficient indication that the value of the property, as established by the independent experts, did not reflect the market value.

Sale of land

In order to assess whether unlawful state aid is involved in the sale of land and buildings by public authorities, it follows from the Authority's Guidelines that the primary cost of acquiring the property is an indicator for the market value. This is unless a significant period of time has elapsed between the purchase and the sale.

The Guidelines provide for two situations where the price paid for the property will be held to correspond to market value, thereby excluding the presence of state resources:

1. The sale has taken place through an unconditional bidding process;

2. The sale has taken place after an independent expert valuation.

State aid in the transport sector

Oslo Sporveier and Sporveisbussene

In December 2012, the Authority closed its investigation into aid granted to AS Oslo Sporveier and AS Sporveisbussene.

Following the judgment of the EFTA Court, in March 2012 the Authority reopened the formal investigation into the compensation granted to AS Oslo Sporveier and AS Sporveisbussene for local scheduled bus transport services in Oslo for the period 1994–2008. The investigation also assessed a capital injection paid by Oslo Municipality in June 2004 to cover the underfunding of pension accounts for both public and commercial services; and the application of the group taxation rules to and by the Oslo Sporveier Group.

The Authority concluded that the annual compensation and the public service part of the 2004 capital injection constitute existing aid, due to the fact that they have been granted in accordance with the provisions of an existing aid scheme. Both measures would be considered compatible with the EEA Agreement as they have solely covered the costs of the public service minus the revenues generated and including a reasonable profit.

As regards the part of the capital injection carried out in 2004 to cover the underfunding of pension accounts for the commercial services, the Authority concluded that a market economy investor would have invested under the same terms, thus no advantage was actually present.

Finally, in relation to the application of the group taxation rules and the benefits deriving from tax derogations, the Authority concluded that this measure provided a selective advantage to companies organised in groups as opposed to single entities. Nevertheless, such derogations are within the logic of the tax system, given that the system allows similar tax treatment and does not affect tax neutrality among the companies of the same group.

The Charter Fund for Northern Norway

In June 2012, the Authority decided to open a formal investigation procedure into the notified scheme on a Charter Fund for Northern Norway.

The objective of the scheme is to increase the use of airports in Northern Norway and to contribute to the regional development of the region. Three counties are concerned: Nordland, Troms and Finnmark.

The counties will establish a Charter Fund which will cover part of the charter costs for any tour operator flying charters to Northern Norway. A maximum of 25% of the charter costs may be paid by the Charter Fund, if it appears at the end of the charter series that planes were less than 80% full.

The Regional Aid Guidelines provide for the possibility to grant operating aid to fight depopulation in regions which are the least populated. The Norwegian authorities have argued that the scheme is in line with the Authority's Regional Aid Guidelines as it will prevent or reduce continuing depopulation in Northern Norway.

The Authority opened a formal investigation as it has doubts whether a scheme providing for the grant of operating aid to tour operators that may be situated outside the least populated regions may be compatible with the Regional Aid Guidelines.

Aid for the environmental protection

Support for district heating systems

During the course of 2012, the Authority approved state aid for two district heating/cooling projects in Norway. The projects are supported under the Norwegian Energy Fund Scheme.

In May 2012, the Authority gave the green light to aid amounting to NOK 73.1 million (EUR 1 million) to Akershus Energi Varme AS for the construction and expansion of district heating and cooling infrastructure in Lillestrøm, Strømmen and Nitteberg. The Akershus project involves connecting 167 end users to the district heating and cooling network. It is estimated that the heating part will lead to a 35% reduction in primary energy use, and the cooling part to a 10.7% reduction in primary energy use.

In December 2012, the Authority approved NOK 120.5 million (EUR 1.7 million) in aid to Eidsiva Bioenergi AS for the construction of a wood and bio-oil fuelled renewable district heating plant in Gjøvik. The Eidsiva project will make it possible to achieve a net reduction of at least 17,417,000 litres of oil per year and an annual reduction in CO_2 emissions of at least 47,000 tonnes. Neither project would be commercially viable without the aid.

Development Phase of Mongstad CCS Facility

The Authority approved the Norwegian State's financing of the development phase for the industrial Carbon Capture and Storage (CCS) project in Mongstad.

The ultimate objective of the project is to capture and store the CO_2 emissions from a refinery and a combined heat and power plant in Mongstad. At this stage, the Norwegian State will finance technology and feasibility studies for an industrial scale CCS facility.

The aid for the development phase, which amounts to NOK 2.85 billion (EUR 375 million), is granted on the basis of an agreement between the State, Gassnova and Statoil. Statoil acts as a project executioner and will subcontract technology vendors and other suppliers in line with national and EEA procurement rules. The aid is well targeted to promotion of CCS while limiting possible distortions of competition and negative effects on trade. Gassnova will merely supervise the project execution without being involved in economic activities. The Authority has therefore taken the view that the funds allocated to Gassnova (NOK 200 million / EUR 27 million) in the context of this project do not involve state aid.

Environmental aid and district heating

The EEA state aid rules allow the EEA States to support environmental objectives where, on balance, the benefits outweigh potential distortions of competition. Where the aid amounts exceed certain thresholds, measures must be notified to the Authority and are subject to detailed assessment under the state aid rules. Aid is allowed under the Environmental Aid Guidelines to support district heating. District heating is a system for distributing heat generated in a centralised location for residential and commercial heating requirements, and is seen as an important tool to reduce the use of electricity and oil for heating purposes. District cooling, similar to district heating, involves the centralised production of cooling, which is then distributed to buildings in the vicinity of the production facility. District cooling contributes to reducing electricity used for cooling purposes by, for example, air conditioning equipment.

Renewable energy production: Södra Cell

In April 2012, the Authority approved NOK 100 million (approximately EUR 12.8 million) in environmental aid to Södra Cell Tofte AS under the Norwegian Energy Fund Scheme.

Södra Cell Tofte is a leading producer of bleached sulphate pulp. The aid will enable the company to replace the use of fossil fuels with self-produced bio-energy, and thus eliminate the use of conventional energy. Excess electricity will be sold on the power exchange Nord Pool Spot.

Telecommunication and data centres

Aid granted to Verne Data Centre

The Authority ordered a recovery of ISK 440 million (EUR 2,6 million) from Verne, a company in the data centre business.

In July 2012, the Authority finalised its investigation into agreements entered into with Verne by the central and local authorities in Iceland and a state controlled utility. It considered that the power contract between Verne and *Landsvirkjun*, the National Power Company, and a lease agreement on 9.6 hectares of land at the former NATO base at Keflavík airport in Reykjanesbær were concluded on market terms and did not entail state aid.

However the Authority found incompatible state aid had been granted to Verne with the sale by the State in 2008 of five industrial buildings and with a municipal agreement on derogations from property tax and street construction tax. Thus, the Authority ordered recovery of the aid. ISK 140 million (EUR 820,000) has been recovered for municipal taxes and ISK 300 million (EUR 1.8 million) for the buildings. The Icelandic authorities have challenged the Authority's decision before the EFTA Court.

The use of former NATO optical fibres

In November 2012, the Authority cleared a contract between the government of Iceland and the telecom undertaking Og fjarskipti (Vodafone) for the lease of an optical fibre previously reserved for defence purposes.

In April 2008, the State Trading Centre (*Ríkiskaup*) organised a tender for the use and operation of two of the three optical fibres formerly used by NATO. A contract was concluded with Og fjarskipti in February 2010 on the basis of the tender.

Following a complaint, the Authority assessed the transaction and found that the lease contract at issue was concluded on the basis of a well-published and open tender procedure. Moreover, the rent paid by Og fjarskipti under the contract is well above the costs of the Icelandic state for making the fibre available for commercial use. On this basis, the Authority concluded that there was no aid involved in the contract at issue.

Liechtenstein IP Box

In December 2012, the Authority approved the extension of a Liechtenstein tax reduction regime for revenues from intellectual property rights.

The Authority had cleared the previous version of the scheme in 2011 as a general measure, which is not selective and, therefore, does not constitute state aid. With the present measure Liechtenstein broadens the tax reduction scheme to include revenues from software and technical or scientific databases. The aim of the measure is to further promote research and development (R&D).

The Authority does not exclude that the measure might benefit certain sectors more than others sectors in the Liechtenstein economy. However, it is in the nature of tax incentives for R&D that they favour only firms which undertake such investments. This does not result in state aid if the difference in treatment does not go beyond what is justified by the nature and general scheme of the system.

The Authority considered that the eligibility criteria are solely based on the recipients' R&D activities and do not go beyond the objective of promoting certain R&D activities.

Icelandic film support

In July 2012, the Authority approved changes to the Icelandic Film Support Scheme.

The Icelandic Film Support Scheme entered into force in 1999 and provides that a share of production costs may be reimbursed after production (now 20%). In December 2011, Iceland notified the Authority of an amendment to the scheme. As this first notification raised some issues, the Icelandic authorities submitted a new notification in June 2012.

The main changes concern the conditions to be met in order for a film to receive the support and an extension of the scheme until 31 December 2016. In order to benefit from the support scheme, a film must meet a series of conditions under a cultural test. The cultural test the Icelandic authorities have adopted is in line with the Authority's and the European Commission's practice. The Authority therefore considered that the amended Film Support Scheme complied with the terms of its Guidelines on state aid to cinematographic and other audiovisual works and raises no objections to its implementation.

Westman Islands ship lift

In May 2012, the Authority concluded that an ISK 370 million (EUR 2.2 million) investment in the Westman Islands harbour ship lift did not involve the granting of state aid.

In 2006, a ship lift operating in the harbour of the Westman Islands since 1982 broke down. The municipality decided to let the public undertaking, the legal owner of the ship lift, carry the full cost of repairs.

Following a complaint, the Authority assessed the case and considered that the operation of the ship lift should not be viewed in isolation from other economic activities of the public undertaking operating at the harbour. The harbour is operated as a public undertaking and its infrastructure is an important platform for various maritime related economic activities.

The Icelandic authorities had explained that users will be charged market prices for access and use of the infrastructure and that the revenues from those charges are forecast to cover the total cost associated with the operation of the ship lift in addition to an adequate remuneration for the capital invested in the repairs. Thus, no advantage will be granted through the remuneration charged for the use of the ship lift.

Recovery cases

Aid granted to Hurtigruten

In December 2012, the process of recovering over-compensation granted to Hurtigruten was finalised.

On 29 June 2011, the Authority adopted a negative decision and requested recovery of over-compensation granted to Hurtigruten for commercial activities.

In 2008, the Norwegian authorities agreed to provide Hurtigruten with additional compensation in the form of annual payments amounting up to NOK 90 million (EUR 12.3 million). The Authority found that the additional extra compensation was not restricted to cover the public service cost, but also covered the cost of the commercial activities. As the company did not keep separate accounts, the Authority could not determine the exact amount of over-compensation.

During the recovery procedure, the Norwegian authorities have presented the Authority with a new model for cost allocation. On the basis of this model, the Norwegian authorities have been able to determine the exact amount of over-compensation and to include interest on the unduly granted aid.

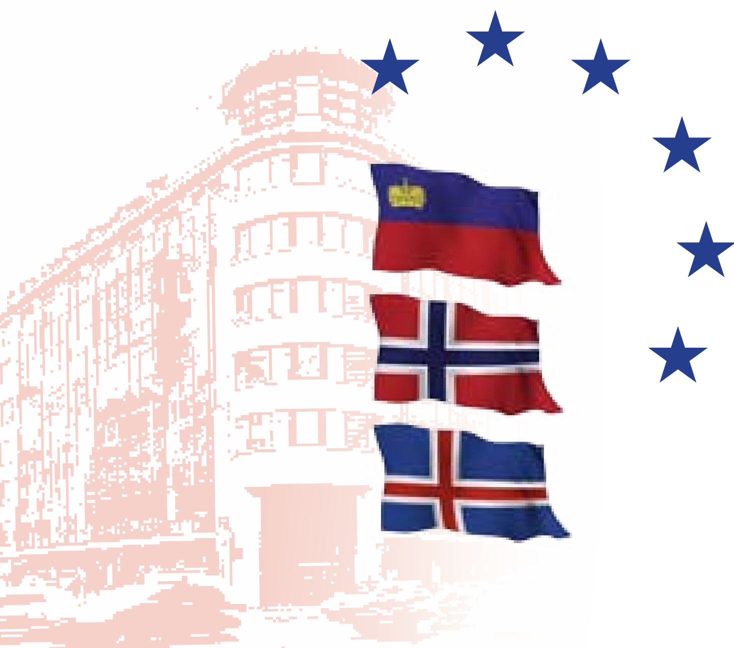
After the Authority started investigating the aid measure, the Norwegian authorities held back a substantial amount of the foreseen additional compensation. As some of the aid that went to cover the increased costs of the public service was deemed compatible by the Authority (approximately NOK 260 million / EUR 35.6 million), the Norwegian authorities could, at the end of the recovery procedure, pay out an additional NOK 87.6 million (EUR 12 million) in compatible aid to the company. The remaining approximately NOK 144 million (EUR 19.7 million) that was granted but not disbursed to the company was incompatible aid and therefore could not be paid out.

Aid granted to Asker Brygge AS

In August 2012, the EFTA Court upheld the Authority's decision on the recovery of incompatible state aid from Asker Brygge AS.

In July 2011, the Authority concluded the formal investigation regarding the sale of a plot of land by the municipality of Asker to Asker Brygge. The property was sold in 2007 for a sum of NOK 8.7 million (EUR 1.2 million) without an open bidding procedure or an independent expert evaluation prior to the sales negotiations. As established by a subsequent independent value assessment carried out by the municipality, the property was sold for a price below its market value. Moreover, the sales agreement allowed for the deferred payment of 70% of the sales price without requiring any interest. These conditions would not have been acceptable for a private investor. A sale of land below market value is regarded as state aid, which in principle is incompatible with the EEA Agreement. Consequently, the Authority required Asker Brygge AS to repay the incompatible state aid received.

The Norwegian authorities had recovered the amounts corresponding to the aid granted as the difference between the market and the sales price for the plot in 2011. However, the aid granted with the deferred payment of 70% of the sales price was pending execution in December 2012.



Chapter 4

COMPETITION

Main activities in 2012

In 2012, the EFTA Surveillance Authority's decision in the Color Line case became final. In the Posten Norge case the EFTA Court ruled in favour of the Authority. As a result of the outcome of these two cases the Authority collected close to EUR 30 million in fines in 2012.

Significant resources were devoted to investigations of potential new cases. The Authority carried out unannounced inspections at the premises of two undertakings in Norway, Nord Pool Spot and Telenor. The first inspection was carried out at the request of the European Commission. The second inspection concerned a case that is currently being investigated by the Authority.

The mandate of the Hearing Officer, who plays a key role as the guardian of procedural rights in competition cases, was revised in 2012, and new guidelines on best practices for the conduct of competition proceedings were adopted.

In addition, the Authority adopted new guidelines for horizontal co-operation agreements. These guidelines clarify under which circumstances different kinds of co-operation between competitors are permitted under competition law. The new guidelines follow the Commission's adoption of similar guidelines in 2011.

The Authority was involved in various national cases in which the EFTA competition authorities envisaged applying Articles 53 and 54 of the EEA Agreement, and also in cases under the EEA competition rules that fell under the jurisdiction of the European Commission. It participated in discussions relating to regulatory developments and competition policy matters within the framework of the European Competition Network.

The Authority visited the Norwegian Competition Authority in 2012 and held a seminar on relevant topics in EEA competition law.

Outlook for 2013

In 2013, the Authority will continue investigating the case launched in 2012 following the inspection carried out at Telenor's premises in Norway.

The Authority plans to adopt a new Notice on the conduct of settlement procedures in cartel cases. The Notice will supplement the rules in Protocol 4 of the Surveillance and Court Agreement which allow the Authority to settle cartel cases through a simplified procedure.

More generally, the Authority will continue to monitor markets in the EFTA States in close liaison with the national competition authorities, with a view to ensuring that undertakings operating in those States comply with the EEA competition rules.

New Protocol 4

A new, restructured version of Protocol 4 to the Surveillance and Court Agreement entered into force in 2012. Protocol 4 lays down the rules on the functions and powers of the Authority in the field of competition. The changes include rules on the conduct of settlement procedures in cartel cases. However, the substantive rules of Protocol 4 have essentially remained the same. The protocol can be found at the website of the EFTA Secretariat, www.efta.int.

The competition rules of the EEA Agreement

The substantive competition rules set out in the EEA Agreement are virtually the same as those in the Treaty on the Functioning of the European Union 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

- A prohibition on State measures in relation to public undertakings or undertakings with special or exclusive rights which are contrary to Articles 53 and/or 54 EEA (Article 59 EEA).

The EEA competition rules are enforced across the EEA by the Authority and by the European Commission. Responsibility for handling individual cases is divided between the Authority and the Commission on the basis of rules laid down in the EEA Agreement.

In addition, the Authority has exclusive jurisdiction to take action against any EFTA State that enacts or maintains in force measures concerning public undertakings or undertakings with special or exclusive rights that are contrary to provisions in the EEA Agreement, including the prohibitions on anti-competitive conduct.

The Authority enjoys the same investigative and enforcement powers as the European Commission including the power to impose fines of up to 10% of global turnover on undertakings that infringe the competition rules. The procedural rules relevant to the application of the EEA competition rules by the Authority are set out in the Surveillance and Court Agreement.

It is further incumbent upon the Authority to supervise the application of the EEA competition rules by the competition authorities of the EFTA States.

The Authority's website provides further information on the EEA legal framework in the field of competition: www.eftasurv.int/competition/competition-rules-in-the-eea/.

Inspections at Telenor's premises

In December 2012, the Authority carried out unannounced inspections at the headquarters of Norwegian telecommunications company Telenor ASA and its subsidiary Telenor Norge AS.

The inspection was carried out in the context of an investigation into possible breaches of the competition rules of the EEA Agreement by Telenor in connection with its provisions of mobile telephony services in Norway.

The information obtained at the inspection will now be examined with a view to ascertaining whether there is any evidence of infringements of the EEA competition rules.

Inspection of undertakings

The Authority has the power to conduct inspections of undertakings and associations of undertakings where necessary in order to carry out the duties assigned to it in the field of competition. Inspections are a preliminary step in antitrust investigations and do not imply that the company inspected is guilty of anti-competitive behaviour. During an antitrust investigation, the rights of defence of the companies involved are fully respected.

Posten Norge decision upheld

In April 2012, the EFTA Court upheld the Authority's decision finding that Posten Norge had abused its dominant market position in the parcel delivery market.

Posten Norge AS brought an appeal before the EFTA Court in September 2010, seeking annulment of the EUR 12.89 million fine imposed by the Authority for infringement of the EEA competition rules. The Posten Norge case (Case E-15/10 *Posten Norge AS* v *EFTA Surveillance Authority*) is the first case in which a decision by the Authority imposing fines on undertakings has been challenged before the EFTA Court.

The EFTA Court upheld the Authority's decision of 14 July 2010. In that decision, the Authority found that Posten Norge had abused its dominant market position when introducing its *Post i Butikk* (Post-in-Shop) concept, by including clauses in its agreements aimed at preventing competitors from opening their own parcel-delivery points in some of the largest supermarket, kiosk and filling station groups in Norway.

The EFTA Court upheld the Authority's assessment of Posten Norge's conduct, holding that, in order to compete effectively, new entrants needed to establish a nationwide delivery network. To that end, co-operation with one or more of the leading grocery store, kiosk or petrol station chains was of major importance. Foreclosing access to a substantial part of the these chains (approximately 50%), both directly, through the exclusivity obligations, and indirectly, through the incentives created for Posten Norge's partners, was liable to restrict competition when other chains were not readily available. Under these circumstances, the conduct of Posten Norge therefore amounted to an abuse.

However, the EFTA Court reduced the fine imposed on Posten Norge from EUR 12.89 million to EUR 11.112 million on the basis that the duration of the Authority's administrative procedure had been too long.

In its judgment, the EFTA Court also held that the proceedings, which had led to the imposition of a substantial fine, as a matter of principle had to respect the guarantees for criminal proceedings enshrined in Article 6 of the European Convention on Human Rights. In particular, the right to a fair trial requires that the EFTA Court is entitled to quash in all respects, on questions of fact and law, the decision being challenged. The EFTA Court's review of the Authority's complex economic assessments is not limited to an examination of whether those assessments are manifestly wrong.

Competition cases at the EFTA Court

A decision adopted by the Authority can be challenged before the EFTA Court by the addressee of the decision or by other persons who are directly and individually concerned.

As opposed to most other areas of EEA law, in the field of competition the Authority's decisions will normally be addressed to undertakings rather than an EFTA State.

Undertakings can bring an action for annulment before the EFTA Court within two months of being notified of the decision by the Authority.

Following an application seeking the annulment of a decision, the Authority is invited by the EFTA Court to submit its written observations in a Statement of Defence. In a second round of written pleadings, the applicant submits its reply to the Statement of Defence and thereafter the Authority its rejoinder.

All EEA States and the European Commission may also submit written observations to the EFTA Court, as may third parties to whom the EFTA Court grants leave to intervene.

On the basis of the written pleadings, a report for the hearing is prepared by the EFTA Court in preparation for an oral hearing. The purpose of the oral hearing is to provide an opportunity for the judges to ask questions and for the parties involved to supplement their written pleadings and to answer or rebut arguments not addressed in their written pleadings.

Judgment in the case is rendered by the EFTA Court on the basis of the written and oral pleadings submitted to it. Judgments of the EFTA Court cannot be appealed.

The Color Line case

The Norwegian ferry operator Color Line paid a fine imposed on the company for infringement of the EEA competition rules.

The Authority concluded its proceedings against Color Line at the end of 2011, adopting a decision finding that Color Line had infringed the EEA competition rules and imposing a fine of EUR 18.8 million.

The Authority's case concerned an agreement that was concluded in 1991 with the public harbour of Strömstad in Sweden. Through that agreement, Color Line secured long-term exclusive access to harbour facilities in Strömstad harbour. Since there was a lack of alternative harbours in this area of Sweden, the agreement prevented competitors from operating routes in competition with Color Line.

The Authority's decision became final in 2012, when Color Line declined to challenge it before the EFTA Court and paid the fine.

Since the Authority's decision, there have been a number of developments in the relevant harbours. The Authority is monitoring those developments with a view to ensuring that the EEA competition rules are complied with. Towards the end of the year it was made public that competitors of Color Line would seek compensation for losses they alleged had incurred due to infringements of the competition rules on the part of Color Line.

Measures on increased transparency

The Authority has adopted two measures that will increase the transparency, fairness and predictability of competition proceedings.

The measures were adopted in December 2012, and aimed at increasing interaction with parties in proceedings under Articles 53 and 54 of the EEA Agreement and strengthening the mechanisms for safeguarding the procedural rights of parties.

The measures provide practical guidance on the conduct of proceedings before the Authority. They give parties a clear picture of what to expect at different stages of an antitrust investigation and increase their ability to interact with the Authority's services.

Revision of the Hearing Officer's mandate

The revised mandate of the Hearing Officer strengthens and expands the Hearing Officer's role. The Hearing Officer is independent from the Competition and State Aid Directorate and plays a crucial role as the guardian of procedural rights in competition procedures.

If parties have a dispute about their procedural rights they can refer the matter to the Hearing Officer who will have an enhanced role throughout the proceedings.

Key developments include:

- Strengthened role in the preparation and conduct of oral hearings.
- Reports will cover the effective exercise of procedural rights throughout the proceedings, including the investigation phase.
- The new mandate expressly empowers parties to refer matters to the Hearing Officer in antitrust commitment proceedings.

The Hearing Officer also has some new functions during the investigation phase. In particular:

- Resolving issues regarding the confidentiality of communications between companies and their external lawyers (legal professional privilege).
- Intervening when a company considers that it has not been informed of its procedural status.
- Parties will be able to refer the matter to the Hearing Officer if they feel that they should not be compelled to reply to questions that might force them to admit to an infringement.
- Intervening in disputes as to the extension of deadlines to reply to requests for information.

Notice on best practices in antitrust proceedings

The Notice contains guidance on best practice aimed at ensuring that parties are better informed of the state of play throughout the course of proceedings under Articles 53 and 54 EEA. It also provides for greater interaction between the Authority's services and relevant parties from an early stage. The best practices include:

- Earlier opening of formal proceedings in most cases.
- State of play meetings at key points in the proceedings.
- Disclosing key submissions in the investigative phase.
- Publicly announcing the opening and closure of proceedings and the sending of a statement of objections.
- Informing parties to the statement of objections of the main parameters for the possible imposition of fines.
- Guidance on the commitment procedure.
- Enhanced access to "key submissions" of complainants or third parties prior to the statement of objections.

Horizontal co-operation agreements

In May 2012, the Authority adopted new guidelines to clarify what kinds of co-operation between competitors are permitted under the competition rules in the EEA Agreement.

Co-operation between competitors may have harmful effects for consumers and limit competition. However, it can also create synergies that lead to lower prices, more choice and better products to the benefit of consumers.

The new rules will help to prevent co-operation that leads to higher prices, less choice or less innovation, and encourage co-operation that contributes to improvements and economic progress.

Co-operation with national authorities

In 2012, the Authority was informed of four new investigations by the EFTA competition authorities and reviewed one draft decision.

National competition authorities and courts in the EFTA States apply Articles 53 and 54 EEA side-by-side with the equivalent national competition rules. In order to ensure coherent and efficient application of those provisions, the activities of the Authority in the field of competition are co-ordinated with the activities of the national competition authorities. This is done in the EFTA network of competition authorities. Although Liechtenstein does not have a competition authority that enforces the EEA competition rules, it still participates in the EFTA network alongside the competition authorities of Iceland and Norway.

When acting under Article 53 and 54 EEA, the members of the network inform each other about new investigations. The national authorities reported four such investigations to the Authority in 2012.

Before adopting decisions applying Articles 53 and/or 54 EEA, the competition authorities of the EFTA States must submit a draft decision to the Authority. A final decision may only be adopted once the Authority has been given the opportunity to comment, with a view to ensuring that Articles 53 and 54 EEA are applied in a consistent manner throughout the EEA.

The Authority reviewed one draft decision in which the national authority envisaged applying the EEA competition rules. In that decision, the Icelandic Competition Authority found that the Icelandic telecoms incumbent Síminn's pricing in the Icelandic market for mobile telephony had been abusive in that it gave rise to a margin squeeze. Following consultation with the Authority, the Icelandic Competition Authority adopted a decision finding that Síminn had infringed Article 54 EEA as well as the corresponding provision in the Icelandic Competition Act, and imposed a fine of ISK 440 million (EUR 2,5 million).

In another case, the Norwegian Ministry responsible for competition matters consulted the Authority on whether co-operation between two bus operators on a route between Bergen and Stavanger (Kystbussen) was capable of affecting trade between EEA States to such an extent that the EEA competition rules would need to be applied. After consulting the Authority, the Norwegian Ministry decided, on the basis of the facts of the case at hand, that the EEA competition rules were not applicable. In its final decision, the Norwegian Ministry reversed a decision by the Norwegian Competition Authority which had found that the co-operation constituted an infringement of the Norwegian Competition Act.

National courts in the EFTA States may, where they find it necessary in order to reach a decision in a particular case, request assistance from the Authority with regard to the application of EEA competition rules. In 2012, no court in the EFTA States availed itself of this possibility.

Co-operation with the European Commission

The Authority continued to co-operate closely with the European Commission's Directorate General for Competition in the enforcement of the EEA competition rules.

Rules on co-operation between the European Commission and the Authority in the EEA Agreement allow the Authority and the competition authorities of the EFTA States to be involved in discussions on competition policy at EU level, in particular within the framework of the European Competition Network (ECN). Co-operation between the Commission and the Authority is also foreseen in individual cases in which one of the authorities applies the EEA competition rules.

In a significant number of cases, the Commission applies the EEA competition rules alongside the EU competition rules. Cases dealt with by the Commission can have considerable impact on markets and market players in the EFTA States. The EEA rules on co-operation in competition cases ensure that the Authority and the EFTA States can make their voices heard in cases that concern the EFTA States' territory.

Merger cases in 2012

Mergers are examined at European level if the annual turnover of the companies concerned exceeds specified thresholds in terms of global and European sales. The rules on jurisdiction are such that in practice the European Commission is the competent authority to assess mergers under the EEA Agreement. The Authority is involved in merger cases by virtue of the EEA co-operation rules.

One merger case in which the Authority was involved in 2012 concerned the acquisition of medical device company Synthes by Johnson & Johnson. After carrying out an in-depth investigation of the transaction, the Commission, supported by the Authority, cleared the acquisition following an undertaking by Johnson & Johnson to divest its entire EEA trauma business.

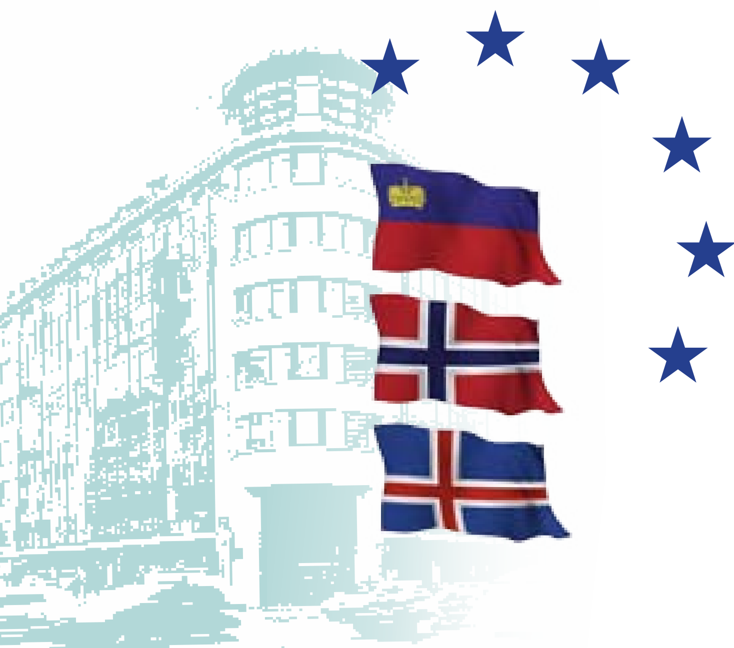
Antitrust cases in 2012

By virtue of the co-operation rules under the EEA Agreement, the Authority is also involved in cases in which the European Commission applies Articles 53 or 54 of the EEA Agreement.

Surprise inspections are often a preliminary step in competition investigations into suspected restrictive practices.

In February 2012, the Authority carried out an unannounced inspection in Norway at the request of the Commission in relation to an investigation of European power exchanges. Power exchanges provide services that facilitate electricity trading at wholesale level. The Commission was concerned that the companies involved might have infringed the competition rules of the EEA Agreement and the Treaty on the Functioning of the European Union. At the end of the year, the Commission's investigation of the case was still pending.

The Authority was involved in three Commission cases in which commitments offered by companies in order to remove competition concerns identified in a preliminary investigation were made binding. The first case involved agreements between Apple and four international publishers on the resale of e-books. In the second case, Rio Tinto offered commitments to resolve competition concerns relating to markets for aluminium smelting equipment. The third case concerned the licensing of Thomson Reuters' instrument codes, used by financial institutions to retrieve data from Thomson Reuter's real-time data-feeds.



Chapter 5

LEGAL AFFAIRS

Introduction

In 2012, a total of 15 new cases reached the EFTA Court. Those cases, listed below, show how varied are the issues raised in EEA law and their importance for individuals and economic operators throughout the EEA.

As usual, the EFTA Surveillance Authority participated in all cases before the EFTA Court. It appeared either as a party or systematically commented both in writing and orally on those proceedings in which national courts from Iceland, Liechtenstein and Norway sought clarification of specific points of EEA law.

While the total number of cases lodged in 2012 was slightly fewer than in the two previous years (15 compared with 19 in 2011 and 18 in 2010), some of the new cases brought by or against the Authority required additional resources to be devoted to their conduct. Supplementary briefs had to be prepared because of interim procedures such as applications to intervene, or requests that the Authority produce certain evidence and explanations.

2012 was the year in which the European Court of Justice (ECJ) celebrated its sixtieth anniversary. From very modest beginnings, delivering its first judgment in 1954, it gradually laid the foundations in carefully crafted judgments of modern EU law and in particular the law of the Internal Market. In 2012, it handed down seven judgments which involved the interpretation and application of the EEA Agreement specifically.

New EFTA Court cases 2012

Case E-15/12, Jan Anfinn Wahl v the Icelandic State
Does EEA law prohibit Iceland from refusing an EEA citizen entry on the basis of being a member of the Hells Angels Motorcycle Club?

Case E-14/12, EFTA Surveillance Authority v Liechtenstein
Failure by Liechtenstein to change national rules discriminating between foreign and national staffing agencies.

Case E-13/12, EFTA Surveillance Authority v Iceland
Failure by Iceland to implement Directive 90/167/EEC laying down the conditions governing the preparation, placing on the market and use of medicated feeding stuffs.

Case E-12/12, EFTA Surveillance Authority v Iceland
Failure by Iceland to implement Directive 2008/48/EC on credit agreements for consumers.

Case E-11/12, Beatrix Koch, Dipl. Kfm. Lothar Hummel and Stefan Muller v Swiss Life (Liechtenstein) AG
Interpretation of specific terms and the obligation to provide information to policy holders under Directive 2005/83/EC on life assurance.

Case E-10/12, Yngvi Harðarson v Askar Capital hf
Clarification on how employers must inform their employees under Directive 91/533/EEC of changes made to their work contracts.

Case E-9/12, Iceland v EFTA Surveillance Authority
Appeal against the Authority's decision that Iceland must recover from Verne Real Estate ehf unlawful state aid because certain land was sold below market price.

In the EFTA Court, a lot of attention was drawn to the oral hearing in the Icesave case. The EFTA Court's judgment in this case is described on page 51 in this chapter. In addition, the EFTA Court handed down 15 judgments in 2012, of which seven were brought by or against the Authority. The EFTA Court upheld the Authority's decisions in four Norwegian cases concerning sale of land, ownership of stock exchanges, abuse of dominant position and unlawful aid to the costal steamer Hurtigruten (see page 50). A state aid decision on Liechtenstein tax rules applicable to investment companies was also upheld.

On the other hand, an Authority decision approving an aid measure to a municipal provider of digital learning materials, Nasjonal Digital Læringsarena (NDLA), was annulled by the EFTA Court. The EFTA Court also annulled an Authority decision refusing public access to certain inspection documents in the competition case against Posten Norge (see page 52).

Case E-8/12, DB Schenker v EFTA Surveillance Authority

Appeals against three letters by the Authority allegedly refusing public access to documents of a competition investigation and other documents. See also Case E-7/12.

Case E-7/12, DB Schenker v EFTA Surveillance Authority

Alleged omission by the Authority to deal with a request for public access to documents of a competition investigation and action for compensation of certain legal fees as damages. See also Case E-8/12.

Case E-6/12, EFTA Surveillance Authority v The Kingdom of Norway

Failure by Norway to end its practice of excluding single parents living abroad from national child benefits.

Joined Cases E-4/12 & E-5/12, Risdal Touring AS,Konkurrenten.no AS v EFTA Surveillance Authority

Appeals against an email and a letter by the Authority allegedly refusing public access to documents of a state aid investigation.

Case E-3/12, Staten v/Arbeidsdepartementet v Stig Arne Johnsson

Does the entitlement to national unemployment benefits depend on residing or being physically present in Norway?

Case E-2/12, HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins (ÁTVR)

Does EEA law prohibit a state monopoly on the sale of alcohol to refuse to sell beverages because of "sexually charged illustrations" on the labels and other alcoholic drinks unless labelled especially as such?

Case E-1/12, Den Norske Forleggerforening v EFTA Surveillance Authority

Appeal against the Authority´s decision that funds and assets granted to the Nasjonal Digital Læringsarena in Norway did not involve state aid.

Case E-14/10, COSTS – Konkurrenten.no AS v EFTA Surveillance Authority

Taxation of costs by the EFTA Court following its judgment in Case E-14/10 Konkurrenten.no v EFTA Surveillance Authority.

Comitology

On the Authority's proposal, the Standing Committee of the EFTA States adopted a new decision laying down the new advisory and examination procedures for so-called "comitology" decisions.

Comitology refers to a process by which EEA law is modified or adjusted and takes place within different "comitology committees". The EFTA States are represented in the committees, which are chaired by the Authority. The comitology procedure is applicable to the mechanisms for control by the EFTA States of the Authority's exercise of implementing powers.

In its Decision 3/2012/SC of 26 October 2012, the Standing Committee modernised and aligned the procedure with those conferred on the European Commission by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011. That Regulation replaced the four types of procedures which had existed before (the advisory committee procedure, the management committee procedure, the regulatory committee procedure and the regulatory committee procedure with parliamentary scrutiny) with just two procedures: the advisory procedure and the examination procedure.

The Authority proposed that the Standing Committee should also repeal all previous designations of committees and replace them with a new, single decision designating one committee per annex to the EEA Agreement. It was necessary to do that because many committees had been set up or designated which no longer served any practical function. Accordingly, the Standing Committee adopted the Authority's proposal on the designation of committees by its Decision 4/2012/SC of 26 October 2012.

The Authority will propose new, standardised rules of procedures to the Committees when they are first convened.

Hurtigruten judgment

The EFTA Court upheld the Authority's decision that Hurtigruten had received unlawful state aid.

Hurtigruten is a commercial cruise line sailing along the Norwegian coast from Bergen in the south to Kirkenes in the north; and simultaneously operating a subsidised public ferry service on the same route, with the same ships. In the face of financial difficulties of the company, the tendered agreement on the subsidised ferry service from 2004 was renegotiated in 2008 and the State granted additional compensation. The Authority investigated whether that additional funding partially cross-subsidised Hurtigruten's commercial operations. In June 2011, the Authority indeed found unlawful state aid and ordered Norway to recover any cross-subsidisation from the company.

Both Hurtigruten and the Norwegian State challenged the Authority's decision on a number of grounds, *inter alia* that there was no aid and that if there was aid, it was justified.

However, in its judgment of October 2012, the EFTA Court upheld the Authority's Decision in its entirety.

The Icesave judgment

Iceland was not obliged to ensure payment of a minimum compensation to the depositors of the collapsed Icelandic online bank Icesave.

After the Icelandic banking sector collapsed in 2008, the Icelandic government took action to protect domestic depositors and to ensure that normal banking could continue in Iceland despite the crisis. Among other actions, the domestic deposits of Landsbanki Íslands hf. ("Landsbanki") were transferred to a new bank. However, deposits in Landsbankis online branches in the Netherlands and the United Kingdom, called Icesave, were not transferred and became unavailable.

According to the rules of the EEA, Iceland's Depositors' and Investors' Guarantee Fund should consequently have paid out the minimum guarantee of EUR 20,000 per Icesave depositor. The relevant rules in the Deposit Guarantee Directive have been part of Icelandic law since 1999. However, no payments were made to the Icesave depositors and the Dutch and British authorities decided to step in and compensate them instead.

In December 2011, the Authority brought an action against Iceland seeking a declaration from the EFTA Court that Iceland had failed to comply with its obligations resulting from the Directive. The Authority argued that Iceland's unequal treatment of foreign and domestic depositors of Landsbanki was discriminatory. The European Commission intervened to support the Authority.

In its judgment, the Court dismissed the Authority's claims. It held that the Directive in the version applicable to the case did not impose an obligation on the Icelandic state to ensure payment to depositors in the Landsbanki branches in the Netherlands and the United Kingdom when the national deposit guarantee fund itself was unable to pay.

The Court further held that Iceland had not infringed the principle of non-discrimination because the domestic depositors and those in the Icesave branches were not in comparable positions. Their respective positions were different, according to the EFTA Court, because the domestic depositors had been transferred to a new bank and never lost access to their deposits. They were thus never in need of compensation from the deposit guarantee fund.

Finally, the Court held that the transfer of the domestic depositors to the new bank was not in principle an issue to be examined by the Court and could, had it involved any discrimination between depositors, have been justified in the circumstances of the financial collapse in order to save the Icelandic banking sector.

Access to documents judgment

The EFTA Court annulled a decision of the Authority refusing to grant public access to documents obtained by the Authority during a competition investigation.

The transport and logistics company DB Schenker requested the Authority to give it all the documents in the file concerning an investigation into an abuse of a dominant position by Posten Norge. DB Schenker claimed it needed the documents to support its follow-on damages action against Posten Norge in the Norwegian courts.

The Authority granted access under the public access to documents rules to most of the documents, but refused to hand out the documents obtained during the Authority's inspection of Posten Norge's premises in 2004. The refusal was on the grounds that giving the public access to them would undermine the privacy and integrity of private individuals involved in the practices of Posten Norge and that the documents contained commercially sensitive information.

In its judgment delivered on 21 December 2012, the EFTA Court held that the Authority was wrong not to disclose the inspection documents and that it could not rely on any of the exceptions available to withhold disclosure. Moreover, the EFTA Court held that the Authority had failed to consider whether the private enforcement of competition law and institutional transparency may constitute an overriding public interest in disclosure.

Activities in the EU courts

Because the European Court of Justice (ECJ) is the guardian of the EEA Agreement in the EU legal order, the Authority once more participated in a select number of cases before the European Union courts that have a particular impact on EEA law and its future development.

The Authority provided written advice in five preliminary reference cases before the ECJ. This included a Belgian case on Sunday trading (C-559/11 *Pelckmans Turnhout*) and a Dutch case on the scope and meaning of the new regulatory framework for electronic communications networks and services (C-518/11 *UPC Nederland*).

In Case C-536/11 *Donau Chemie*, the Authority argued that an Austrian rule allowing cartel perpetrators to flatly veto that their victims may access any document on the public investigation file, falls short of the balancing of public and private interests necessary under EU competition law.

In Case C-85/12 *Landsbanki*, the Authority recommended that due to Directive 2001/24/EC, the reorganisation and winding-up measures taken for Landsbanki Islands hf. under the Icelandic Emergency Act (No. 44/2009) also apply in France. It follows that individual enforcement lawsuits brought there are governed by Icelandic law. The French courts should apply Icelandic law to decide on the effect of interim protective measures adopted in France before the moratorium on debt payments concerning Landsbanki was declared in Iceland.

In Case C-375/12 *Bouanich*, the Authority advised that the EU Internal Market rules preclude French tax provisions that fail to fully take into account taxes on foreign dividends already paid in another EU Member State.

Still in 2012, the Authority intervened in writing in support of the European Commission in one case before the ECJ (C-239/11 P *Siemens* v *Commission*) and in three cases in the EU General Court (Cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn* v *Commission*). In all four cases, the Authority argues that the EEA laws governing antitrust investigations comply with fundamental rights.

The Authority and court interventions

The Authority has the right to get involved in any case before the EFTA Court.

In cases before the European Court of Justice it can intervene in the following ways:

- In a preliminary reference where a court of an EU Member State asks the ECJ to interpret EU law, the Authority may make written or oral submissions if the subject matter of the proceedings is in an area covered by the EEA Agreement.
- In other cases, the Authority may seek leave to intervene in support of one of the parties under the conditions laid down in Article 40 (3) of the Statute of the Court of Justice.

New rules on access to documents

In September 2012, the Authority adopted new rules on public access to documents.

The new rules are an update of the previous rules adopted in 2008, and the main rule is not changed: a document should be publicly available, unless one or more exemptions apply. The new rules represent a codification of recent EU case law and the Authority's practice in handling access requests.

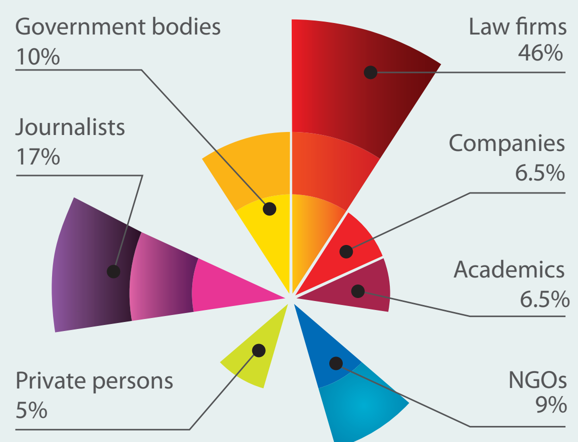
More information

The new rules make it clear that anyone, without any justification, is entitled to ask for access to the Authority's documents. The rules also state that the complete minutes of the Authority's College meetings shall be published on the Authority's website, giving public insight into all formal decisions made by College. In addition, the Authority has broadened the scope of documents listed in the weekly updated document registry. The minutes and the registry give the public information on which cases the Authority is dealing with at any given time.

As a measure to increase transparency, in line with the aim of the rules, the Authority will launch an online searchable public access database in 2013, containing all documents to which access has been granted under the public access rules.

Access requests in 2012

- The total number of access requests nearly doubled, from 107 in 2011 to 201 in 2012.
- 15 requests were denied. Like previous years, these were mainly concerning pending state aid investigations.
- Four of the denied requests were appealed to the President, of which one was approved.
- In seven instances only partial access was given. One of these was appealed to the President.
- In six instances the requests referred to documents not held by the Authority.
- The requests came from the following groups:



A two-step procedure

The new rules formalise a two-step procedure for handling access requests:

Step 1 A request, which should be sent to the registry of the Authority, will always be replied to with an acknowledgement of receipt. Then, the Authority will use no more than 10 working days to deal with the access request.

Since the adoption of the rules, the average request handling time has been approximately four-and-a-half days, which is the same as before. If the applicant asks for third party documents, the Authority will consult the Author of the documents. This process can lead to a postponement of the 10 days deadline.

Of 87 access requests dealt with under the new rules since they were adopted in September 2012, only eight were postponed due to such consultation. Without taking these eight cases into account, the average request handling time was three days.

Step 2 If an access request is denied, the applicant can appeal to the President of the Authority, who will assess the case again. A letter from the President is the Authority's final say concerning an access request, and is a Decision which can be challenged before the EFTA Court.

Since September 2012, the Authority has issued two letters from the President. One of them overruled the initial decision to deny access and granted the applicant the documents he was asking for.

Exemptions

The new rules clarify that only finalised documents are subject to public access. Moreover, internal documents will normally not be given out, unless they entail a decision. In addition, the new rules confirm a presumption established by EU case law that documents in pending state aid investigations are not subject to public access, unless there is an overriding public interest in such access.

In December 2012, the EFTA Court handed down a judgment in its first ever access to documents case. Four other access to documents cases will be dealt with (see page 52) by the EFTA Court in 2013. All relate to cases handled under the previous access rules of 2008.

Public presentations and ESA Day

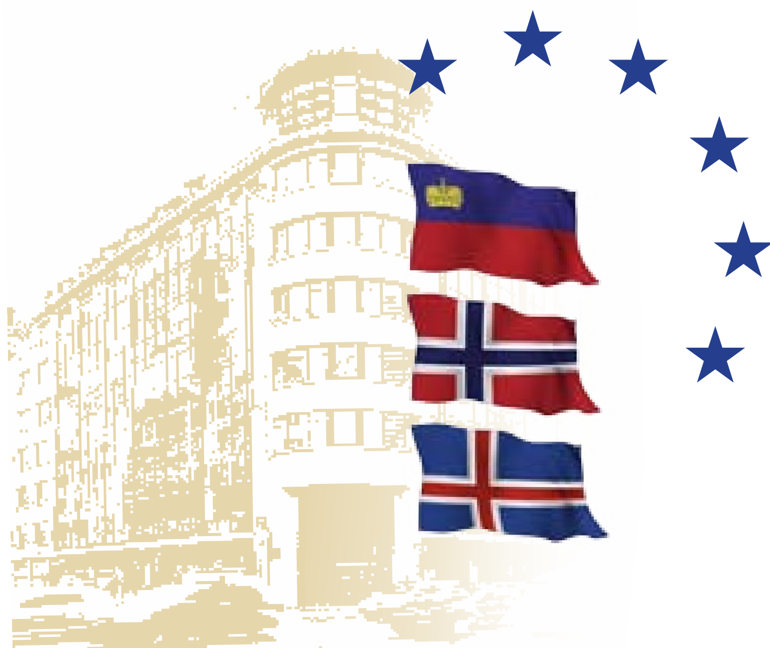
Giving public presentations for interested parties is a priority for the Authority. In 2012, more than 1,700 persons from nearly 100 visiting groups attended such Authority presentations in Brussels.

The Authority's College, directors and staff members also participated in a range of seminars and meetings in EFTA and EU Member States.

In addition, the Authority continued giving so-called ESA Day presentations in the EFTA States. When introduced, the ESA Day concept was tailored to give government officials a better understanding of the Authority's approach in different fields of its case handling. In 2012, the concept was broadened to include other interested parties as well. In June 2012, around 120 persons, including representatives of Icelandic law firms, attended the ESA Day held in Reykjavik.

Visit the Authority

Groups coming to Brussels are welcome to visit the Authority for a presentation of its work. Please send an email to registry@eftasurv.int for further details.



Chapter 6

STATISTICS

Case handling by the Authority

This chapter presents a picture of the total case load of the Authority, categorised by type of case and by country. It also gives an overview of the number of cases that were opened and closed within the Authority's different fields of work during the past year. General trends are an increase in own-initiative and pending cases, especially within Internal Market affairs. An overview of the Authority's budget for 2012 is given at the end of the chapter.

Pending cases

In recent years, the Authority has worked to reduce the number of pending cases, in particular old cases. However, in 2012 the number of pending cases has been rising again. At the end of 2012, the Authority had a total of 543 pending cases.

Figure 1 shows the number of own-initiative cases going up, mainly due to a high number of non-transposition cases:

Complaints are cases where the Authority examines information received from economic operators or individuals regarding measures or practices in the EFTA States which are not considered to be in conformity with EEA rules.

> "Case" in this section refers to an assessment of the implementation, or application, of EEA law, or to tasks executed for the purpose of fulfilling the Authority's obligations under EEA law, registered before and during the year 2012. Such cases do not necessarily lead to the initiation of infringement proceedings against one or more EFTA State(s) or undertakings, or the opening of formal investigations.

Notifications cover state aid measures, draft technical regulations, and telecommunications market notifications that are submitted to the Authority by the EFTA States for examination or approval.

Obligatory Tasks are cases which are opened on the basis of an obligation on the Authority deriving from the EEA Agreement directly, or from secondary legislation, such as inspections in the area of food safety or transport.

Own Initiative cases are those opened by the Authority at its own instigation. Such cases include the non-implementation of directives, the non-incorporation of regulations, for Iceland and Norway, and the examination of the implementation (e.g. the verification of the conformity of national laws with EEA legislation) and application of EEA law. The latter covers, for example, examination of individual award procedures for procurement, state aid or concessions where the Authority considers such examination is warranted based on different sources of information.

The category "EEA/Third countries" in figure 2 refers to cases where more than one EFTA State was involved, typically two or all three EFTA States; or cases transferred to, or dealt with in co-operation with, the European Commission as they concerned EU Member States or third countries.

Cases opened and closed

The number of opened and closed cases during 2012 gives an insight to the activities of the Authority. In 2012, there was an increase in both categories. The increasing number of Icelandic cases is especially noticeable. A case is closed when the issue at stake has been resolved, or when the Authority finds that no infringement has taken place.

Figures 3 and 4 show that the great majority of cases is related to Internal Market affairs, which comprise areas such as the free movement of capital, goods, persons and

services, the environment and energy matters as well as public procurement. The difference between Internal Market closures and openings is the main contributor to the total increase in pending cases (Figure 1).

Figure 3 shows that the number of new cases has gone up by nearly 50% in the past year. A steep increase in new Internal Market affairs cases was the reason for the total increase. At the same time, there is a decrease in new competition and state aid cases.

In 2012, the Authority opened 209 cases relating to Norway, 269 relating to Iceland, and 40 relating to Liechtenstein. In 2012, most closures were of Norwegian and Icelandic cases, while again only a relatively small and slightly decreasing number related to Liechtenstein.

Figure 1: Pending cases, by category

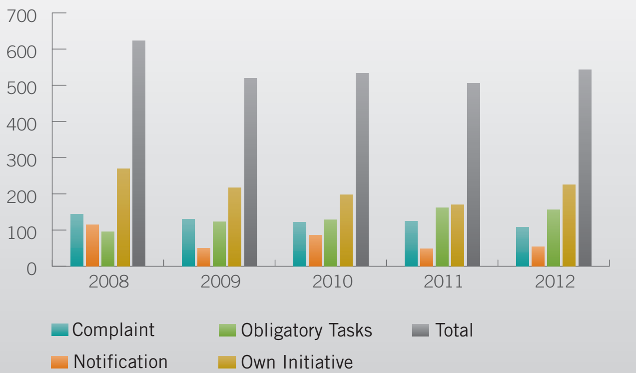


Figure 2: Pending cases, by country

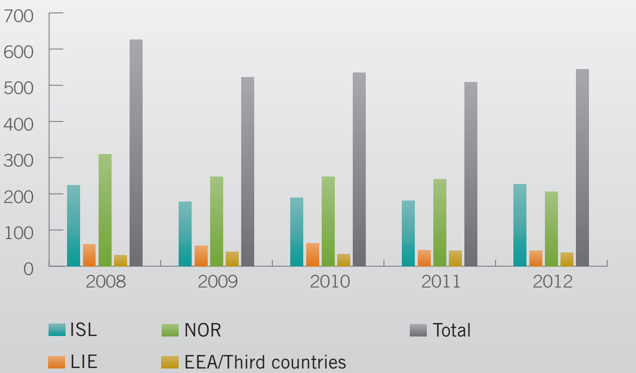


Figure 3: Cases opened by the Authority (new cases), by field of work

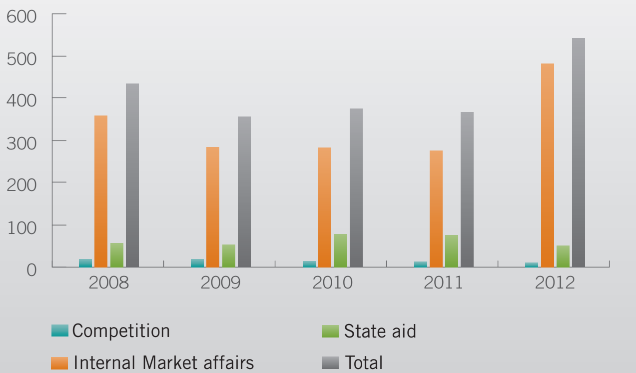


Figure 4: Cases closed by the Authority, by field of work

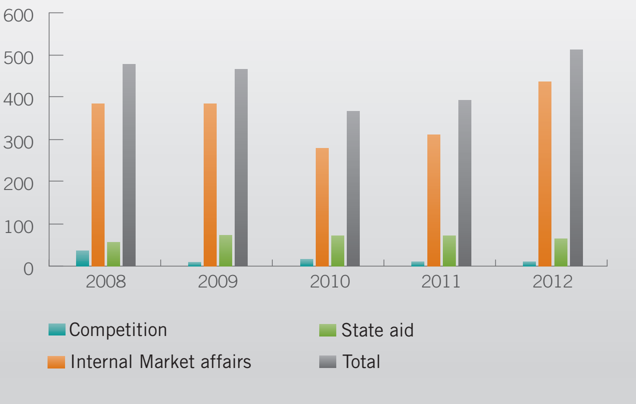


Figure 5: Cases opened by the Authority (new cases), by country of origin

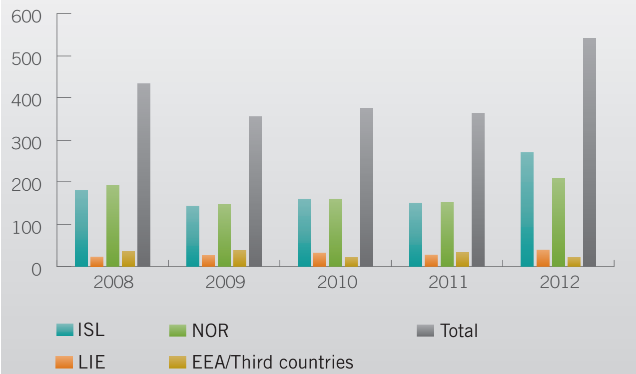
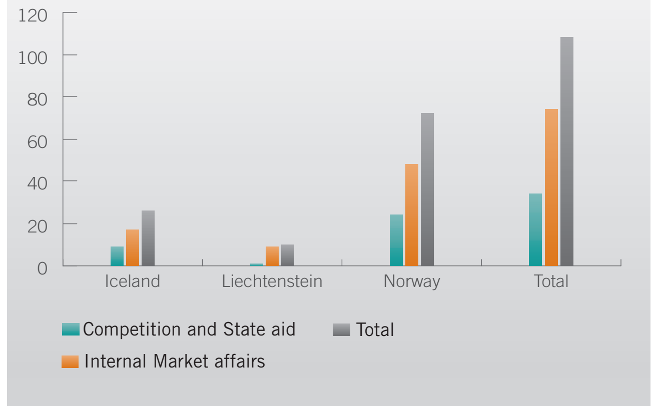


Figure 7: Pending complaints at the end of 2012



Complaints in 2012

Complaints from interested and concerned parties are an important source of information and contributes to the Authority`s surveillance of the EFTA States` compliance with EEA law.

Most new complaints in 2012 have been related to Internal Market affairs. This is true for all three EFTA States. The number of new complaints against Iceland has continued to fall after a sharp increase in 2009 and 2010 due to complaints relating to the banking sector and/or capital movement in Iceland. At the same time the number of all pending complaints has continued to decrease (see Figure 7).

The majority of complaints in 2012 concerned the implementation and application of EEA law in Norway: 72 of 108 cases still pending at the end of 2012 concern that State. This trend is equivalent to previous years. Most new complaints (44 out of 58) and closures (54 out of 72) also concerned Norway.

Figure 6: Cases closed by the Authority, by country of origin

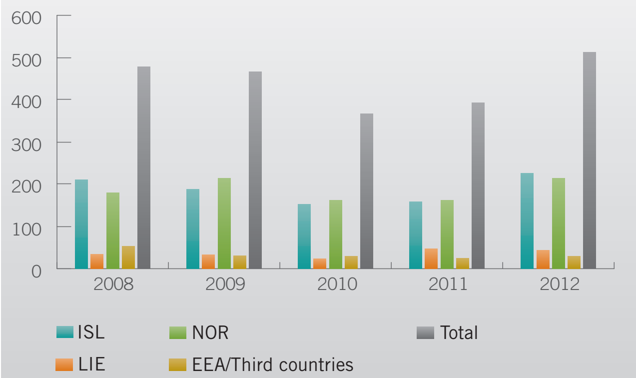
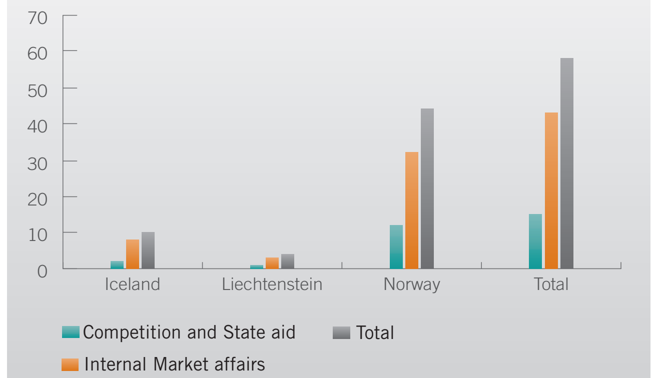


Figure 8: New complaints lodged with the Authority in 2012



Lodging a complaint:

In principle, *anyone* is entitled to lodge a complaint with the Authority. However, the Authority enjoys discretionary powers in deciding whether or not to pursue a case. If the Authority has decided to pursue a case against one or all EEA EFTA States, it is on its own initiative and not on behalf of the complainant.

To send a complaint to the Authority, visit the Authority's website www.eftasurv.int. Here you will find more information on how to lodge a complaint within the different areas (Internal Market Affairs, State Aid and Competition).

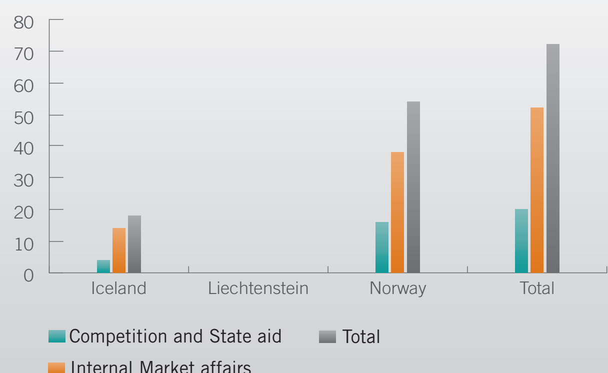


Figure 9: Complaints closed during 2012

Budget

The activities and operating budget of the Authority is financed by contributions from Iceland (9%), Liechtenstein (2%), and Norway (89%). The Authority's total budget for 2012 was EUR 12.4 million, a nominal increase of 1.3% compared with 2011. For the last three years, as well as for 2013, the Authority has proposed in real terms zero growth budgets.

On 20 June 2012, the Authority submitted its Financial Statements for the preceding financial year (2011), and the accompanying Audit Report by the EFTA Board of Auditors (EBOA), to the EFTA States. The Financial Statements for 2011 were approved by the EFTA States on 7 December 2012, and the Authority was discharged of its accounting responsibilities for that period.

On the same date, 7 December 2012, the EFTA States adopted the Authority's budget for 2013, and the budgets for 2012 and 2013 break down as follows (all amounts in EUR):

Total budget proposal	**Budget 2013**	**Budget 2012**
Financial income	5,000	15,000
Contributions and Other income	12,743,756	12,413,354
Other income	21,000	32,500
Contributions from the EEA/EFTA States	12,722,756	12,380,854
Total Income	12,748,756	12,428,354
Salaries, Benefits, Allowances	-9,754,871	-9,509,354
Salaries	-6,299,804	-6,358,151
Benefits,allowances and turnover costs	-3,455,067	-3,151,203
Travel, Training, Representation	-747,500	-729,000
Office Accommodation	-1,091,885	-1,065,000
Supplies and Services	-1,149,500	-1,120,000
Financial costs	-5,000	-5,000
Total expenditure	-12,748,756	-12,428,354

Chapter 7

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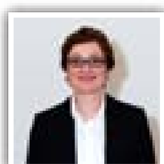

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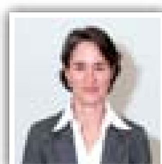

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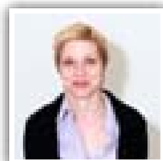

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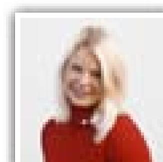

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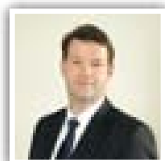

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Hanne Zimmer CSA
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Lennart Garnes IMA
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Eggert Ólafsson IMA Trainee
Grímur Jóhannsson LEA Trainee

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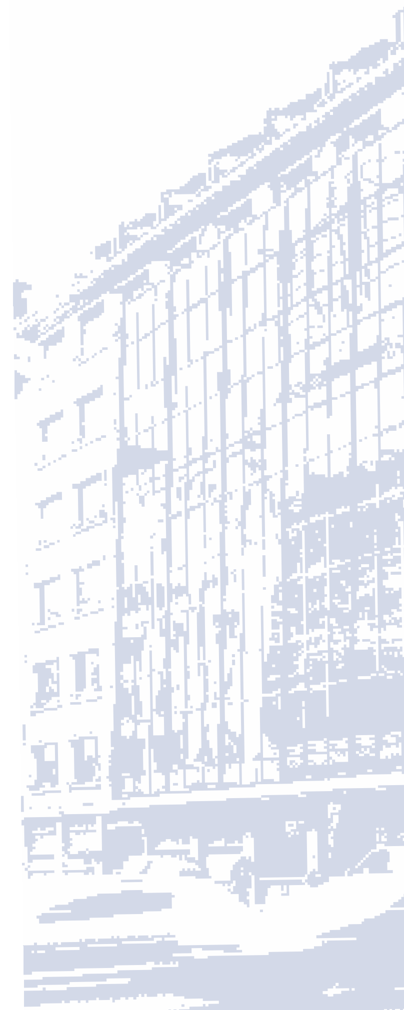

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