Case

E-12/16

Marine Harvest ASA

v

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Fish and other marine products – Material scope of the EEA Agreement – Protocol 9 – Surveillance competence)

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Summary of the Judgment

1 It follows from Article 8(3) EEA that the product coverage of the EEA Agreement does not include fish and other marine products "unless otherwise specified". The reason for excluding certain goods from the general scope of the EEA Agreement is that the Contracting Parties wished to maintain freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement.

2 Although the fisheries sector was excluded from the general scope of the EEA Agreement, the Contracting Parties agreed on special provisions for fish and other marine products. This follows from Article 20 EEA, which states that the provisions and arrangements applicable to such products are set out in Protocol 9 EEA. Accordingly, fish and other marine products are regulated by that protocol. According to Article 4(1) of that protocol, State aid to the fisheries sector that distorts competition shall be abolished.

3 In the field of State aid, the competence of the EFTA Surveillance Authority ("ESA") is laid down in Article 1 of Protocol 26 EEA and Article 24 of the Surveillance and Court Agreement. The wording of these provisions suggests that they are intended to be exhaustive with regard to ESA's competence to perform surveillance of State aid. The lack of reference to Protocol 9 EEA reflects the intention of the Contracting Parties not to equip ESA with powers to perform State aid surveillance in the fisheries sector. Were ESA to be granted such surveillance competence, a reference to Protocol 9 EEA would indeed have been necessary.

4 The contested decision, whereby ESA refused to investigate aid to the fisheries sector, was therefore based on a correct interpretation of the relevant law. The application seeking the annulment of the contested decision was therefore dismissed.

Judgment of the Court

27 November 2017

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Fish and other marine products – Material scope of the EEA Agreement – Protocol 9 – Surveillance competence)

In Case E-12/16,

Marine Harvest ASA, represented by Torben Foss and Kjetil Raknerud, advocates,

— applicant,

supported by **the Federation of Norwegian Industries (*Norsk Industri*)**, represented by Tore M. Sellæg, advocate,

— intervener,

=V=

EFTA Surveillance Authority, represented by Carsten Zatschler, Maria Moustakali, Michael Sánchez Rydelski, and Ingibjörg Ólöf Vilhjálmsdóttir, members of its Department of Legal & Executive Affairs, acting as Agents,

— defendant,

supported by **the Kingdom of Norway**, represented by Dag Sørlie Lund, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, advocate, Attorney General's Office (Civil Affairs), acting as Agents,

— intervener,

APPLICATION for the annulment of the EFTA Surveillance Authority's Decision of 27 July 2016 in ESA Case No 79116, and for a declaration that the EFTA Surveillance Authority has the competence and obligation to carry out surveillance of State aid to the fisheries sector.

The Court

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having regard to the written arguments of the parties and the interveners and the written observations of the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, Haraldur Steinþórsson, Legal Officer, Ministry of Finance and Economic Affairs, Erna Jónsdóttir, Legal Officer, Ministry of Industries and Innovation, acting as Agents, and Lilja Ólafsdóttir, attorney-at-law, acting as Counsel; and the European Commission ("the Commission"), represented by Viktor Bottka and Marketá Šimerdová, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Marine Harvest ASA ("Marine Harvest" or "the applicant"), represented by Torben Foss and Kjetil Raknerud; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Michael Sánchez Rydelski and Ingibjörg Ólöf Vilhjálmsdóttir; Norway, represented by Dag Sørlie Lund; the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Haraldur Steinþórsson, and Erna Jónsdóttir; and the Commission, represented by Viktor Bottka and Marketá Šimerdová, at the hearing on 26 September 2017,

gives the following

Judgment

I INTRODUCTION

1 On 27 July 2016, in response to a complaint from Marine Harvest, ESA adopted a decision in Case No 79116 ("the contested decision") concluding that State aid to the fisheries sector is excluded from its competence and that such State aid is to be assessed instead by the Contracting Parties to the Agreement on the European Economic Area ("EEA" or "the EEA Agreement").

2 By its application, Marine Harvest seeks the annulment of the contested decision. The application is based on two pleas. By its first plea, the applicant submits that the contested decision is based on a wrongful interpretation of the relevant sources of law, erroneously leading ESA to believe it had no competence to perform State aid surveillance in the fisheries sector. By its second plea, the applicant argues that, since ESA has the necessary competence and an obligation to carry out surveillance of State aid to the fisheries sector pursuant to Article 62 EEA, the contested decision represents an infringement of ESA's obligations under Article 62(1) EEA.

II LEGAL BACKGROUND

EEA LAW

3 Article 1(1) and Article 1(2)(e) EEA read:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to*

creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

...

(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; ...

4 Article 8(3) EEA reads:

Unless otherwise specified, the provisions of this Agreement shall apply only to:

(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.

5 Article 20 EEA reads:

Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9.

6 Article 61 EEA regulates the prohibition on State aid and the exceptions made for certain types of aid that is or may be compatible with the functioning of the EEA Agreement. The first paragraph reads:

Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall,

in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

7 Article 62 EEA reads:

> *1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:*
>
> *(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;*
>
> *(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.*
>
> *2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.*

8 Article 108(1) EEA reads:

> *The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.*

9 Article 4 of Protocol 9 EEA on trade in fish and other marine products reads:

1. *Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.*

2. *Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition.*

3. *The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties.*

10 Article 6 of Protocol 9 EEA reads:

Should the necessary legislative adaptations not have been effected to the satisfaction of the Contracting Parties at the time of entry into force of the Agreement, any points at issue may be put to the EEA Joint Committee. In the event of failure to reach agreement, the provisions of Article 114 of the Agreement shall apply mutatis mutandis.

11 Point 1 of the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9 on trade in fish and other marine products ("the Joint Declaration"), annexed to the Final Act of the EEA Agreement, reads:

While the EFTA States will not take over the "acquis communautaire" concerning the fishery policy, it is understood that, where reference is made to aid granted through State resources, any distortion of competition is to be assessed by the Contracting Parties in the context of Articles 92 and 93 of the EEC Treaty and in relation to relevant provisions of the "acquis communautaire" concerning the fishery policy and the content of the Joint Declaration regarding Article 61(3)(c) of the Agreement.

12 Article 1 of Protocol 26 EEA on the powers and functions of the EFTA Surveillance Authority in the field of State aid reads:

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community, enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2)(e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14.

13 The first paragraph of Article 24 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

III FACTS AND PRE-LITIGATION PROCEDURE

14 On 2 May 2016, the applicant and Marine Harvest Scotland Ltd., a company that forms part of the same group as the applicant, submitted a complaint to ESA concerning alleged State aid to the Norwegian fisheries sector distributed through the Norwegian Seafood Council. According to the complaint, a substantial portion of the proceeds from levies imposed on fish exporters and exported fish products is used to finance the activities of the Seafood Council. These activities cover the dissemination of information to the operators of the industry, their organisations and to the authorities.

The Seafood Council may engage in marketing and export promoting activities, abroad and domestically. A considerable part of the levies is targeted at certain sectors. Moreover, the Seafood Council has discretionary powers to formulate specific projects targeted at aiding individual exporters' marketing efforts, thus relieving them from marketing expenses which otherwise would have been borne by their budgets. The complaint concluded that these measures constitute State aid incompatible with the EEA Agreement.

15 In its complaint, Marine Harvest contended that ESA is competent to assess State aid in the fisheries sector, notwithstanding the finding in Decision No 195/96/COL of 30 October 1996. In that decision, ESA concluded that it does not have the competence to assess State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement. ESA also reached the same conclusion in Decision No 176/05/COL of 15 July 2005 and Decision No 729/08/COL of 26 November 2008.

16 On 10 June 2016, the complainants and ESA held a meeting to discuss the complaint, including ESA's competence to assess State aid to the fisheries sector. On 13 June 2016, the Norwegian Government submitted observations on the complaint, contending that ESA lacked competence to perform State aid surveillance in the fisheries sector.

17 In the contested decision, ESA argued that the provisions of the EEA Agreement and of the SCA defining ESA's State aid competences do not empower it to carry out the surveillance in question. The conclusion reads as follows:

On the basis of the foregoing, and in line with the Authority's previous decisions on its competence to control state aid in the fisheries sector, the Authority finds that it lacks the competence to carry out surveillance of state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

Accordingly, the case is closed.

The present letter is a challengeable act. Any appeal must be brought before the EFTA Court within two months, in accordance with Article 36(3) SCA.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

18 By letter registered at the Court on 20 September 2016, Marine Harvest lodged the present application. ESA submitted its statement of defence, which was registered at the Court on 22 November 2016. The reply of the applicant was registered at the Court on 22 December 2016 and the rejoinder from ESA was registered on 7 February 2017.

19 The applicant, Marine Harvest, requests the Court to declare that:

1. *The EFTA Surveillance Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law, and is consequently void.*

2. *The EFTA Surveillance Authority does have the competence and obligation to perform surveillance of state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and is therefore obliged to assess the claims made by the Applicant through the formal complaint filed on 2 May 2016.*

3. *The EFTA Surveillance Authority shall bear the costs of these proceedings.*

20 ESA requests the Court to:

1. *Dismiss the Application as unfounded.*

2. *Order the Applicant to pay the costs of the proceedings.*

21 On 20 and 25 January 2017, respectively, the Commission and the Government of Iceland submitted written observations pursuant to Article 20 of the Statute of the Court ("the Statute").

22 On 25 January 2017, Norway and the Federation of Norwegian Industries ("Norwegian Industries") filed applications for intervention pursuant to Article 36 of the Statute and Article 89 of the Rules of Procedure ("RoP"). On 21 and 28 February 2017, respectively, ESA and Marine Harvest submitted written observations on the applications. By orders of 31 March 2017, the President of the Court granted both Norway and Norwegian Industries leave to intervene.

23 On 2 May 2017, Norway and Norwegian Industries lodged their statements in intervention. Norwegian Industries requests the Court to rule in favour of the order sought by the applicant, whereas Norway requests the Court to declare the application unfounded in support of the defendant.

24 On 18 May 2017, ESA waived its right to reply to the statements in intervention. On 29 May 2017, the applicant submitted a reply to Norway's statement in intervention.

25 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V LAW

ARGUMENTS SUBMITTED TO THE COURT

26 *Marine Harvest* submits that pursuant to Article 108 EEA, ESA is obliged to ensure that all the obligations in the EEA Agreement –

including its protocols – are fulfilled by the EFTA States. As Article 4 of Protocol 9 EEA contains a prohibition on State aid in the fisheries sector, ESA has the necessary competence under Article 108 EEA to perform surveillance of such aid. The applicant also relies on Article 1 of Protocol 26 EEA. That provision refers, inter alia, to Article 1(2)(e) EEA, entailing the setting up of a system ensuring that competition is not distorted and that competition rules are equally respected. In the applicant's view, there is nothing to suggest that the Contracting Parties wished to exclude fisheries and aquaculture products from this obligation. The starting point must therefore be that ESA is competent in all fields of the EEA Agreement, including the fisheries and aquaculture sectors.

27 On this basis, the applicant contends that any exception to ESA's general competence must be clearly specified. Such exceptions concerning the fisheries and aquaculture sectors are neither to be found in the EEA Agreement nor in any protocols or secondary law.

28 The applicant challenges the finding in the contested decision to the effect that State aid in the fisheries sector is excluded from ESA's competence on the basis that Article 1 of Protocol 26 EEA does not specifically mention the State aid rules in Article 4 of Protocol 9 EEA as part of ESA's competence and powers. In the applicant's view, this exclusion is logical, as the two specific inclusions – the transport and coal and steel sectors – have specific State aid regimes in both the EU and the EEA. No such specific regime exists for the fisheries and aquaculture sectors.

29 The applicant relies further on the Joint Declaration, which indicates that the EFTA States should align their aid systems in accordance with the State aid regulations of Articles 92 and 93 of the Treaty establishing the European Economic Community ("EEC"). The applicant assumes that the Contracting Parties' intention was that these aid rules should correspond with the aid rules in Article 4 of Protocol 9 EEA. A straightforward application of the definition of aid

contained in Article 61(1) EEA and use of the discretionary powers of the two surveillance authorities outlined in Article 61(3) EEA is sufficient to give effect to these rules. On this basis, the applicant contends that the State aid rules pertaining to fisheries and aquaculture correspond with the definition of aid contained in Article 61 EEA, thus making any specific mention in Protocol 26 redundant.

30 The applicant also notes that Protocol 26 EEA refers to Article 62 EEA, which obliges ESA to keep under constant review "[a]ll existing systems of State aid" in the territories of the EFTA States, as well as "any plans to grant or alter State aid". Thus, Protocol 26 EEA specifically provides ESA with the same tools as the Commission to monitor and enforce State aid rules in the fisheries sector.

31 Relying on the Joint Declaration, the applicant argues further that the interpretation of Article 4(1) and (2) of Protocol 9 EEA should be made in the context of the basic State aid regulations of Articles 61 and 62 EEA. In its view, the reference to Article 93 EEC denotes that a system for constant State aid control in the fisheries sector of the EFTA States should be put in place. Moreover, both Articles 61 and 62 EEA effectively impose a ban on granting State aid to the fisheries sector and create a sole competence for the respective surveillance authority to conduct State aid control.

32 The applicant notes that, in the period following the entry into force of the EEA Agreement, the Commission's Guidelines for the examination of State aid to fisheries and aquaculture were communicated in the Official Journal as a text with EEA relevance. Hence, the Commission was aiming to apply a two-pillar system for surveillance in the fisheries sector, which essentially would rest upon a set of identical material and procedural rules.

33 According to the applicant, there is little to support ESA's assessment that the Contracting Parties had reserved for themselves the function of reviewing the State aid provisions of Article 4 of Protocol 9 EEA. Both the text of Protocol 9 EEA itself, as well as numerous references in the Declarations and Agreed Minutes to the Final Act, clearly show that Protocol 9 EEA is a snapshot of the status in negotiations that were in progress at the time of its signature, and that the Contracting Parties intended to continue their work on unresolved issues until the entry into force of the EEA Agreement.

34 In the applicant's view, there is nothing in the context of the negotiations on the institutional provisions of the EEA Agreement to support the defendant's view. The Contracting Parties have no institutional place in the EEA Agreement, except for holding seats in the EEA Council and the EEA Joint Committee. It was never the intention that these bodies should perform functions related to surveillance and judicial control.

35 The applicant questions the value of ESA's previous practice as regards its competence to monitor State aid in the fisheries sector. ESA's first decision on the subject was annulled by the Court on procedural grounds in Case E-2/94 *Scottish Salmon Growers Association* [1994-1995] EFTA Ct. Rep. 59. ESA subsequently adopted a decision, which is routinely referred to as a precedent for closing any complaints. However, that decision is, in the applicant's view, one-sided and only aimed at justifying the decision that was annulled by the Court in 1995. The applicant therefore finds it doubtful whether ESA's practice can be said to be consistent enough to be cited as a source of law capable of creating a precedent.

36 According to the applicant, ESA's contention that the possibility for anti-dumping and countervailing proceedings to offset possible distortion resulting from State aid prevents ESA from exercising a concurrent competence must be based on a misunderstanding. No support for ESA's allegation can be found in the history of the

negotiations, or in the wording of Article 4(3) of Protocol 9 EEA. The inability of the Contracting Parties to extend the scope of Article 26 EEA to trade in fish and other marine resources means that the EU may be faced with countervailing actions from the EFTA side. In addition, throughout the period of the EEA's existence, the Commission has continued to apply its competences vis-à-vis the EU Member States without any restrictions in the State aid field.

37 Upon a question from the bench on whether competition legislation could be used to remedy a potential misuse of public funds, the applicant stated that it could not be ruled out. However, in its view, it would not be effective and it would be a burdensome task for the national court to assess from a competition law perspective complex plans for promoting national fish and fish products using State resources.

38 *ESA* is of the view that the application is unfounded and should be dismissed in its entirety. The defendant refers to its long-standing and consistent practice of not performing State aid surveillance in the fisheries sector. This practice is based on the unambiguous wording of the EEA Agreement and the SCA, which do not confer upon ESA the powers to carry out State aid surveillance in the fisheries sector. In the defendant's view, the applicant misinterprets the EEA Agreement and the SCA in order to construe a competence that does not exist.

39 With reference to Article 4 of Protocol 9 EEA, the defendant notes, first, that it is for the Contracting Parties to ensure that aid in the fisheries sector that distorts competition is abolished. ESA has neither the power to ensure that such aid is abolished, nor does Article 4 of Protocol 9 EEA grant it the competence to perform State aid surveillance in the fisheries sector. Instead, Article 4 excludes the entire fisheries sector from the defendant's State aid competence. This includes surveillance of any State aid measures inseparably

linked to that sector (reference is made to Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 65).

40 Second, the remedies to offset illegal State aid in the fisheries sector are the application of anti-dumping and countervailing procedures in accordance with the first paragraph of Protocol 13 EEA. The defendant submits that the European Union has assumed responsibilities to investigate several anti-dumping and countervailing cases against Norway in the fisheries sector. A concurrent competence of ESA to investigate subsidies in the fisheries sector would stand in sharp contrast to the current structure of competence allocation between the two pillars of the EEA.

41 The defendant submits further that when Article 6 of Protocol 9 EEA states that any points at issue may be put to the EEA Joint Committee, this implies that any issues arising in relation to Article 4 of that Protocol should be dealt with by the Contracting Parties, not ESA. Upon a question from the bench on whether ESA has a role to play if the contracting Parties do not act, ESA stated that it does not. It is for the Contracting Parties to decide whether to discuss any issues in the EEA Joint Committee and ESA will not act in such situations, as it lacks the competence to do so.

42 In the defendant's view, the wording of the Joint Declaration clarifies that it is for the Contracting Parties to ensure that aid to the fisheries sector is not distorting competition. According to the Joint Declaration, the Contracting Parties will conduct their own assessment of any distortions of competition in the fisheries sector pursuant to the elements inherent in and the principles emanating from Articles 92 and 93 EEC, which correspond to Articles 61 and 62 EEA. No evidence has been submitted by the applicant to support the view that ESA's interpretation is not correct.

43 The defendant asserts that its interpretation of Article 4 of Protocol 9 EEA is confirmed by Article 1 of Protocol 26 EEA, which outlines the State aid rules for which ESA has surveillance powers. The State aid provisions in Protocol 9 EEA are, however, not included in that provision. Consequently, ESA has no power to give effect to the State aid rules included in Protocol 9 EEA. Nothing suggests that the Contracting Parties had a different intention when signing the EEA Agreement.

44 The defendant submits further that Article 24 SCA does not include the State aid provisions in Protocol 9 EEA. This is another indication that ESA lacks the competence to perform State aid surveillance in the fisheries sector. Article 24 SCA, together with Protocol 26 EEA, draw up an exhaustive list of provisions according to which ESA can exercise its surveillance powers in the field of State aid. ESA therefore has no competence to perform State aid surveillance in the fisheries sector. No explicit exception to this rule has been provided. In the absence of a specific legal basis in EEA law, ESA is barred from acting (reference is made to *Synnøve Finden*, cited above, paragraph 57).

45 The defendant acknowledges that it has initiated infringement procedures in relation to cases in the fisheries sector. However, these cases all concern specific circumstances in the context of ESA's general surveillance powers. The defendant submits that its competence and procedures concerning general surveillance have to be distinguished from its competence and procedures in the area of State aid. For example, general surveillance provides neither for a prior approval procedure of national measures nor for the recovery of aid granted to undertakings.

46 Consequently, the defendant submits that it has not infringed its obligation under Article 62(1) EEA to keep under constant review existing State aid schemes and any plans to grant or alter State aid.

47 *Norwegian Industries* supports the form of order sought by the applicant, submitting that there is no evidence from the negotiations on the EEA Agreement to support the notion that there should be institutional arrangements for trade in fish and other marine products different from those dealing with trade in other goods. Unlike agricultural products, trade in fish and fish products were made part of the multilateral undertaking characterising the EEA Agreement by means of Protocol 9 EEA.

48 In the view of Norwegian Industries, the defendant has erroneously read the Joint Declaration as being directed exclusively to the EFTA States, despite the fact that the Declaration obliges all Contracting Parties to establish a common regime for the assessment of State aid. While the Joint Declaration does not specify any particular institutional agreement for the implementation of this common regime, it does refer to articles of the EU Treaty, which correspond to Articles 61 and 62 EEA. For Norwegian Industries, it is inconceivable that the Contracting Parties and not ESA should be competent to enforce State aid provisions in the fisheries sector, since Articles 61 and 62 EEA provide the opposite. Norwegian Industries states that common logic makes it highly unlikely that the negotiators of the Joint Declaration created obligations that fall outside the normal system of EEA enforcement.

49 *The Norwegian Government* supports the defendant's interpretation of Article 4 of Protocol 9 EEA. The applicant confuses ESA's general surveillance competences and the specific competence as regards State aid. Further, the applicant fails to take into account Article 8(3) EEA on the scope of the EEA Agreement, which allows for the conclusion that the Contracting Parties wished to exclude fisheries and aquaculture not only from that obligation, but from the scope of the Agreement as such (reference is made to *Synnøve Finden*, cited above, paragraph 57). Since fish and other marine products are not among the products covered by Article 8(3) EEA, these products fall

entirely outside the scope of the Agreement, unless otherwise specified in the Agreement.

50 In Norway's view, the very existence of Protocol 9 EEA and its *lex specialis* status are reasons to conclude that the Contracting Parties did not want the general obligations regarding State aid and competition to apply to fisheries and aquaculture.

51 Norway submits that the defendant's conclusion is supported by all available sources of law. The wording of Article 4(1) of Protocol 9 EEA leaves it to the Contracting Parties to enforce the obligation to endeavour to ensure conditions of competition. This is also explicitly stated in the Joint Declaration. According to Norway, the Joint Declaration represents an authentic interpretation of Protocol 9 EEA. That interpretation is supported by Protocol 26 EEA and Article 24 SCA. These provisions set out ESA's competence in the field of State aid, and neither makes reference to Protocol 9 EEA.

52 *The Icelandic Government*, which supports the conclusion of the defendant, submits that the Contracting Parties agreed to apply specific rules to trade in fish and other marine products. This explains why Article 20 EEA refers to Protocol 9 EEA for provisions and arrangements relating to trade in fish and other marine products. Iceland further refers to the fact that Article 4 of Protocol 9 EEA makes no reference to Articles 61 to 63 EEA. The Joint Declaration confirms the intention of the Contracting Parties to leave the endorsement of Article 4 to the assessment of the Contracting Parties themselves, indicating that the EFTA States would not take over the *acquis communautaire* concerning the Common Fisheries Policy.

53 With regard to the scope of the EEA Agreement, the Icelandic Government agrees with the view put forward by the defendant. According to Article 8(3) EEA, agriculture and fishery products do not fall under the product coverage of the Agreement. The

application of the main provisions of the Agreement, including Articles 61 to 63, to fish and other marine products, would therefore require a clear legal basis (reference is made to *Synnøve Finden,* cited above, paragraph 57, and Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraphs 24 and 25).

54 Iceland submits further that it is clear from the negotiations on the EEA Agreement that the Contracting Parties agreed not to aim for a common fisheries policy. The result of those negotiations is now set out in Protocol 9 EEA, containing, inter alia, a specific provision on State aid. No secondary EEC legislation in the field of State aid to fisheries was included in Protocol 9 EEA or in the Annexes to the EEA Agreement.

55 Iceland submits further that the reference in Article 6 of Protocol 9 EEA to a dispute settlement procedure before the EEA Joint Committee confirms the understanding that the endorsement of the provisions of Protocol 9 EEA is in the hands of the Contracting Parties and not ESA.

56 In Iceland's view, Protocol 26 EEA, together with Article 24 SCA, exhaustively define the powers and functions entrusted to ESA in the field of State aid. These provisions do not mention Article 4 of Protocol 9 EEA. Moreover, the Joint Declaration confirms that different arrangements should apply when it comes to aid in the fisheries sector. The Icelandic Government submits that a clear legal basis is required for ESA to have competence to carry out surveillance of State aid in the fisheries sector. In this regard, the reference in Article 62 EEA to "all existing systems of State aid" and "any plans to grant or alter State aid" must be read in the context of the EEA Agreement and its scope.

57 The *Commission* agrees with the arguments put forward by the defendant. In the Commission's view, ESA has correctly interpreted its competence under the EEA Agreement.

58 The Commission submits that, in referring to Protocol 9 EEA, which creates a *lex specialis* for fish and other marine products, Article 20 EEA removed these products from the scope of the EEA Agreement's general rules. By virtue of Protocol 9 EEA, in particular its Article 4(3) and Article 6, the EFTA States have agreed to respect the EU's State aid rules with regard to fish and other marine products, by applying the special provisions in that protocol. The normal rules on State aid in Articles 61 to 64 EEA do not apply and there is no role for ESA.

59 Article 24 SCA, which defines the competence of ESA, does not refer to Protocol 9 EEA. A similar reference is also absent from Article 1 of Protocol 26 EEA. Furthermore, Protocol 9 EEA and the Joint Declaration also exclude the competence of ESA. According to Article 4(3) of Protocol 9 EEA, it is the responsibility of the EU and the EFTA States to ensure that the conditions of competition are such that the other Contracting Parties will be able to refrain from the imposition of protective measures.

60 It was never the intention of the Contracting Parties to create a homogeneous set of rules in the EEA as regards fish and other marine products. Consequently, there was no need to entrust ESA with the task of monitoring and ensuring homogeneity of the rules.

61 The Commission submits further that since the fisheries sector is an area where the *acquis communautaire* has not been adopted by the EFTA States, the prohibition on the imposition of anti-dumping measures, countervailing duties and measures against illicit commercial practices in Article 26 EEA does not apply. If, however, an EFTA State has not applied the State aid rules in this sector correctly, the Commission can be asked to investigate the matter and apply appropriate safeguard measures.

62 The Commission finally emphasises that it has on repeated occasions imposed anti-dumping duties on imports of salmon from Norway. The EU's competence to impose such duties for the products in question presupposes that they are not covered by the normal rules on State aid in the EEA Agreement, which apply the *acquis communautaire*. Upon a question from the bench on whether it had ever considered taking action other than trade defence measures, the Commission stated that it had no concrete example of any such action. However, the Commission presumed that in connection with the mentioned anti-dumping investigations, discussions had likely taken place in the EEA Joint Committee, as prescribed under the EEA Agreement and Protocol 9 EEA.

FINDINGS OF THE COURT

INTRODUCTORY REMARKS

63 The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules. The Agreement is thus intended to create a homogeneous European Economic Area so that the internal market is extended to the EFTA States. There are, however, certain differences in the scope of the EEA Agreement with regard to agricultural and fishery products, when compared to the Treaties of the European Union (see *Synnøve Finden*, cited above, paragraphs 55 and 56).

64 During the negotiations of the EEA Agreement, it became clear that the Common Fisheries Policy as such would not be made part of the EEA Agreement. The issue of trade in fish and other marine products, however, was addressed. In the end, it was decided that the fisheries sector was in principle excluded from the scope of the EEA

Agreement and that the EFTA States were not to take over the *acquis communautaire*.

65 Consequently, it follows from Article 8(3) EEA that the product coverage of the EEA Agreement does not include fish and other marine products "unless otherwise specified". The reason for excluding certain goods from the general scope of the EEA Agreement is that the Contracting Parties wished to maintain freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement (see *Synnøve Finden*, cited above, paragraph 56 and case law cited).

66 Article 8(3) EEA regulates the application of "the provisions of this Agreement". These words indicate that the Contracting Parties intended to exclude certain products from the scope of the EEA Agreement as a whole, and not only from the rules on free movement of goods. Accordingly, for any EEA rule to apply to such products, a specific legal basis in EEA law is required (see *Synnøve Finden*, cited above, paragraph 57).

67 Although the fisheries sector was excluded from the general scope of the EEA Agreement, the Contracting Parties agreed on special provisions for fish and other marine products. This follows from Article 20 EEA, which states that the provisions and arrangements applicable to such products are set out in Protocol 9 EEA. Accordingly, fish and other marine products are regulated by that protocol.

68 Among the provisions and arrangements contained in Protocol 9 EEA, Article 4 concerns State aid. According to Article 4(1), State aid to the fisheries sector that distorts competition shall be abolished.

STATE AID SURVEILLANCE

69 The general powers and functions of ESA in the field of State aid follow from Protocol 26 EEA and Article 24 SCA. In the contested decision, ESA based its reasoning on those provisions. Marine Harvest has argued that the competence to perform surveillance of State aid in the fisheries sector is inherent in various provisions on ESA's general surveillance competence, in particular Article 108 EEA and Article 22 SCA.

70 ESA's competence to monitor the fulfilment of the obligations under the EEA Agreement is not, however, designed in a fully uniform fashion. It may therefore be necessary to examine ESA's competence in different areas of EEA law. In the field of State aid, such competence is laid down in separate provisions on the powers and functions for surveillance. When assessing ESA's competence in the case at hand, it is therefore essential to look at the specific provisions on State aid surveillance.

71 Article 1 of Protocol 26 EEA states that ESA shall be entrusted with equivalent powers and similar functions to those of the Commission in the area of State aid, enabling ESA to give effect to the general EEA State aid rules and some sector-specific provisions. Reference is made, inter alia, to Article 49 EEA on transport, Articles 61 to 63 EEA, and Protocol 14 EEA on trade in coal and steel products. Article 24 SCA implements the EFTA States' obligation to equip ESA with the powers referred to in Article 1 of Protocol 26 EEA, and contains a detailed listing of the State aid rules that ESA shall enforce.

72 Neither Article 1 of Protocol 26 EEA nor Article 24 SCA refers to Protocol 9 EEA. In the contested decision, ESA has relied upon this fact when stating that its competences in the field of State aid do not cover aid granted in the fisheries sector. Conversely, Marine Harvest

has argued that an explicit mention of Protocol 9 is not necessary, in particular because ESA's competence is inherent in other references.

73 First, Marine Harvest has argued that ESA's competence to monitor State aid in the fisheries sector is inherent in the reference in Article 1 of Protocol 26 to Article 1(2)(e) EEA. However, if the reference to Article 1(2)(e) EEA were to carry such a meaning, there would be no need for references to Articles 49 and 61 to 63 EEA or to Protocol 14 EEA, as these competences would likewise be inherent. This argument can thus not be supported.

74 Second, Marine Harvest has relied upon the statement in the Joint Declaration that where reference is made to State aid, any distortion of competition is to be assessed in the context of Articles 92 and 93 EEC, now Articles 107 and 108 of the Treaty on the Functioning of the European Union, corresponding to Articles 61 and 62 EEA. Marine Harvest appears to interpret this reference as implying that Articles 61 and 62 EEA are, as such, applicable to State aid in the fisheries sector: it argues that Article 62 EEA entails an obligation on ESA to review "all existing systems of State aid", which must include State aid in the fisheries sector. Consequently, the reference to Article 62 EEA in Article 1 of Protocol 26 EEA would grant ESA the competence to monitor State aid also in that sector.

75 The Court does not accept this interpretation. The reference to Articles 92 and 93 EEC cannot be construed as meaning that Articles 61 and 62 EEA become applicable as such to the fisheries sector. This would contradict Article 8(3) and Article 20 EEA. In fact, while Articles 61 and 62 EEA and relevant case law on their interpretation may serve as interpretative factors in applying Article 4(1) of Protocol 9 EEA, the reference to Article 62 EEA in Protocol 26 EEA cannot be interpreted as granting ESA the competence to monitor State aid in the fisheries sector. Such competence falls outside the scope of the provision, as agreed by the Contracting Parties.

76 Third, Marine Harvest has argued that the specific references in Article 1 of Protocol 26 EEA to the State aid provisions relating to the transport and the coal and steel sectors, but not to Protocol 9 EEA, is logical, as the sectors mentioned have specific State aid regimes. As this is not the case for the fisheries sector, there would be no need for a reference to Protocol 9 EEA. In the Court's view, however, the establishment of a separate protocol to the EEA Agreement for fish and marine products, which includes a provision on State aid, shows that the State aid regime in this sector is, in fact, specific.

77 The Court finds that the wording of Article 1 of Protocol 26 EEA and Article 24 SCA suggests that the two provisions are intended to be exhaustive with regard to ESA's competence to perform surveillance of State aid. The lack of reference to Protocol 9 EEA reflects the intention of the Contracting Parties not to equip ESA with powers to perform State aid surveillance in the fisheries sector. Were ESA to be granted such surveillance competence, a reference to Protocol 9 EEA would indeed have been necessary.

78 In the contested decision, ESA has further relied on the wording in Article 4 of Protocol 9 EEA. In the defendant's view, it is clear that the Contracting Parties have reserved the enforcement of that provision for themselves.

79 The Court notes that the obligations laid down in Article 4 of Protocol 9 EEA rest upon the Contracting Parties and the wording makes clear that the responsibility of enforcement lies with them. ESA is not mentioned. The Joint Declaration supports this interpretation, by explicitly stating in its Point 1 that any distortion of competition is to be "assessed by the Contracting Parties". This leaves no room for ESA to perform surveillance in the fisheries sector. The Joint Declaration serves unambiguously as a contextual and contemporary indication of the Contracting Parties' intention. Furthermore, the lack of conferral of competence on ESA is

demonstrated by Article 6 of Protocol 9 EEA, which states that any points at issue may be dealt with in the EEA Joint Committee, a forum for the Contracting Parties. The Court therefore holds that the State aid enforcement competence under Protocol 9 EEA is left to the Contracting Parties, acting individually or collectively in the EEA Joint Committee.

80 This does not entail that no remedies are available. Article 4(3) of Protocol 9 EEA implicitly states that the Contracting Parties are allowed to put in place anti-dumping measures or countervailing duties where they find that the obligations under that provision have not been respected. The applicant argues that the Commission's competence both to perform State aid surveillance in the fisheries sector vis-à-vis EU Member States and to put in place trade measures against the EFTA States should entail that ESA must equally be competent to perform State aid surveillance vis-à-vis the EFTA States regardless of the possibility of trade remedies, in light of Protocol 26 EEA. The defendant, conversely, argues that the availability of such trade remedies, as included in Protocol 9 EEA, explains the fact that it lacks surveillance competence.

81 The Court finds that the possibility under Protocol 9 EEA of using trade measures illustrates that State aid surveillance in the fisheries sector does not fall under the general system of enforcement by ESA, but rests with the Contracting Parties. As for the difference in competences between ESA and the Commission, the Court notes that the Commission's competence to monitor State aid in the fisheries sector in the EU follows from the Common Fisheries Policy. That policy is not part of the EEA Agreement. ESA's lack of an equivalent competence thus follows from the Contracting Parties' choice not to make fish and other marine products fully part of a homogeneous EEA.

82 The Court concludes that, since ESA is not authorised to perform surveillance of State aid in the fisheries sector, it has not infringed its obligations under Article 62(1) EEA. Consequently, the contested decision was based on a correct interpretation of the relevant law. The application submitted by Marine Harvest must therefore be dismissed as unfounded.

VI COSTS

83 Under Article 66(2) RoP, the unsuccessful party is to be ordered to bear the costs of the proceedings if this has been applied for in the successful party's pleadings. The defendant has asked for Marine Harvest to be ordered to pay the costs. Since the latter has been unsuccessful in its application and none of the exceptions in Article 66(3) applies, Marine Harvest must be ordered to pay the costs. Pursuant to Article 66(4), Norway and Norwegian Industries, which have intervened, shall bear their own costs. The costs incurred by the Icelandic Government and the Commission are not recoverable.

On those grounds,

The Court

Hereby:

1. **Dismisses the application as unfounded.**
2. **Orders Marine Harvest ASA to bear its own costs and the costs incurred by the EFTA Surveillance Authority.**
3. **Orders the interveners to bear their own costs.**

Carl Baudenbacher **Per Christiansen** **Páll Hreinsson**

Delivered in open court in Luxembourg on
27 November 2017.

Gunnar Selvik
Registrar

Per Christiansen
Acting President

Order of the President

31 March 2017

(Intervention – Application by the Government of the Kingdom of Norway – eEFTACourt)

In Case E-12/16,

Marine Harvest ASA, established in Bergen (Norway),

represented by Torben Foss and Kjetil Raknerud, advocates, acting as counsel, Advokatfirmaet PricewaterhouseCoopers AS,

— applicant,

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EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

— defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision in Case No 79116 of 27 July 2016 on the basis of a wrongful interpretation of the relevant sources of law and documented facts and further seeking a declaration that the EFTA Surveillance Authority has the competence and obligation to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement, and that the EFTA

Surveillance Authority's refusal to do so constitutes an infringement of Article 62(1) of the EEA Agreement,

The President

makes the following

Order

I MAIN PROCEEDINGS

1 Marine Harvest ASA ("the applicant") is one of the largest seafood companies in the world, and the world's largest producer of Atlantic salmon. On 2 May 2016, the applicant lodged a formal complaint with the EFTA Surveillance Authority ("the defendant") alleging that unlawful State aid was granted to the Norwegian fisheries sector by means of levies imposed on fish exporters and exported fish products. The relevant Ministry imposes these levies based on the Act relating to the Regulation of Exports of Fish and Fish Products (*Lov om regulering av eksporten av fisk og fiskevarer*, LOV-1990-04-27-9). The proceeds from the levies cover the costs of the Norwegian Seafood Council, a public company owned by the Norwegian Ministry of Trade, Industry and Fisheries.

2 By letter dated 27 July 2016, the defendant closed the case stating that it lacked the competence to carry out surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

3 On 23 September 2016, the applicant lodged an application pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), requesting the Court to order as follows:

1. *The EFTA Surveillance Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law, and is consequently void.*

2. *The EFTA Surveillance Authority does have the competence and obligation to perform surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and is therefore obliged to assess the claims made by the Applicant through the formal complaint filed on 2 May 2016.*

3. *The EFTA Surveillance Authority shall bear the costs of these proceedings.*

4 On 22 November 2016, the defendant lodged its statement of defence. The defendant asserts that the surveillance of State aid measures in the fisheries sector is not part of the EEA Agreement, and that the defendant is therefore not competent to handle the applicant's claims. The defendant requests the Court to:

1. *Dismiss the Application as unfounded;*

2. *Order the Applicant to pay the costs of the proceedings.*

5 On 20 and 25 January 2017, the European Commission, and the Government of Iceland, respectively lodged written observations at the Court's Registry. Both invite the Court to dismiss the application as unfounded.

II APPLICATION TO INTERVENE

6 On 25 January 2017, the Norwegian Government sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court ("the Statute") and Article 89 of the Rules of Procedure ("RoP").

7 The Norwegian Government submits that, as notice of the application was published in the Official Journal of the European Union on 15 December 2016, its application is timely. It states that it wishes to support the form of order sought by the defendant to the extent that the defendant seeks dismissal of the application as unfounded.

8 The Norwegian Government submits that the decision adopted by ESA on 27 July 2016, in which ESA held that it lacked the competence to assess State aid in the fisheries sector, is valid and thus the application should be dismissed as unfounded.

9 In relation to the requirement pursuant to Article 89(1)(d) RoP for an address for service at the place where the Court has its seat, the Norwegian Government states that it does not have an address for service in Luxembourg and requests the Court to serve documents either to the address of its Agent, Mr Dag Sørlie Lund, at the Ministry of Foreign Affairs in Oslo, or to the Norwegian Mission to the European Union in Brussels.

10 On 13 February 2017, the application to intervene was served on the parties in accordance with Article 89(2) RoP.

11 On 21 February 2017, the defendant submitted written observations on the application for leave to intervene. The defendant states that it welcomes the Kingdom of Norway's application and notes that, as an EFTA State, it is entitled to intervene as of right in the present proceedings pursuant to the first paragraph of Article 36 of the

Statute. The defendant states further that, as a consequence, it has no specific observations on the application at hand.

III LAW

12 Pursuant to the first paragraph of Article 36 of the Statute, any EFTA State, the EFTA Surveillance Authority, the European Union and the European Commission may intervene in cases before the Court.

13 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 15 December 2016 in the EEA Section of the Official Journal of the European Union. Accordingly, the time limit for submission of an application to intervene was 26 January 2017.

14 The present application to intervene was lodged at the Court's Registry on 25 January 2017, and is therefore timely.

15 Article 89(1)(d) RoP requires that an application for intervention shall contain the intervener's address for service at the place where the Court has its seat. Article 89(1) RoP specifies further that Articles 32 and 33 RoP shall apply.

16 On 9 March 2017, the Decision of the Court on the lodging and service of procedural documents by means of e-EFTACourt (the "Decision") was published in the Official Journal of the European Union (OJ 2017 C 73, p. 18) pursuant to the second subparagraph of Article 32(5) RoP.

17 Pursuant to Article 9 thereof, the Decision entered into force on 10 March 2017.

18 Article 6 of the Decision provides:

Procedural documents, including judgments and orders, shall be served on the parties' representatives by means of e-EFTACourt where they

have expressly accepted this method of service or, in the context of a case, where they have consented to this method of service by lodging a procedural document by means of e-EFTACourt.

Procedural documents shall also be served by means of e-EFTACourt on States which are parties to the Agreement on the European Economic Area, the EFTA Surveillance Authority and institutions, bodies, offices or agencies of the Union, insofar as they have accepted this method of service.

19 The first and third paragraphs of Article 7 of the Decision provide as follows:

The intended recipients of the documents served referred to in Article 6 shall be notified by email of any document served on them by means of e-EFTACourt.

...

Where a party is represented by more than one agent or lawyer, the time to be taken into account in the reckoning of time-limits shall be the time when the first request for access was made.

20 In the present case, the Norwegian Government is represented by two agents: Mr Dag Sørlie Lund and Mr Ketil Bøe Moen. It is sufficient to note that Mr Dag Sørlie Lund has registered for e-EFTACourt and therefore expressly accepted this method of service in accordance with Article 6 of the Decision. Consequently, all procedural documents, including judgment and orders, may be served via eEFTACourt on the Norwegian Government in the present case.

21 In light of the above, the Kingdom of Norway is granted leave to intervene in the case in support of the first part of the form of order sought by the defendant.

On those grounds,

The President

hereby orders:

1. **The Kingdom of Norway is granted leave to intervene in Case E-12/16 in support of the first part of the form of order sought by the defendant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg,
31 March 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Order of the President

31 March 2017

(Intervention – Trade association)

In Case E-12/16,

Marine Harvest ASA, established in Bergen (Norway),

represented by Torben Foss and Kjetil Raknerud, advocates, acting as counsel, Advokatfirmaet PricewaterhouseCoopers AS,

— applicant,

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EFTA Surveillance Authority,

represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, Members of the Legal & Executive Affairs Department, acting as Agents,

— defendant,

APPLICATION pursuant to the second paragraph of Article 36 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking the annulment of the EFTA Surveillance Authority's decision in Case No 79116 of 27 July 2016 on the basis of a wrongful interpretation of the relevant sources of law and documented facts and further seeking a declaration that the EFTA Surveillance Authority has the competence and obligation to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement, and that the EFTA

Surveillance Authority's refusal to do so constitutes an infringement of Article 62(1) of the EEA Agreement,

The President

makes the following

Order

I MAIN PROCEEDINGS

1 Marine Harvest ASA ("the applicant") is one of the largest seafood companies in the world, and the world's largest producer of Atlantic salmon. On 2 May 2016, the applicant lodged a formal complaint with the EFTA Surveillance Authority ("the defendant") alleging that unlawful State aid was granted to the Norwegian fisheries sector by means of levies imposed on fish exporters and exported fish products. The relevant Ministry imposes these levies based on the Act relating to the Regulation of Exports of Fish and Fish Products (*Lov om regulering av eksporten av fisk og fiskevarer*, LOV-1990-04-27-9). The proceeds from the levies cover the costs of the Norwegian Seafood Council, a public company owned by the Norwegian Ministry of Trade, Industry and Fisheries.

2 By letter dated 27 July 2016, the defendant closed the case stating that it lacked the competence to carry out surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

3 On 23 September 2016, the applicant lodged an application pursuant to the second paragraph of Article 36 of the Agreement between the

EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), requesting the Court to order as follows:

1. *The EFTA Surveillance Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law, and is consequently void.*

2. *The EFTA Surveillance Authority does have the competence and obligation to perform surveillance of State aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and is therefore obliged to assess the claims made by the Applicant through the formal complaint filed on 2 May 2016.*

3. *The EFTA Surveillance Authority shall bear the costs of these proceedings.*

4 On 22 November 2016, the defendant lodged its statement of defence. The defendant asserts that the surveillance of State aid measures in the fisheries sector is not part of the EEA Agreement, and that the defendant is therefore not competent to handle the applicant's claims. The defendant requests the Court to:

1. *Dismiss the Application as unfounded;*

2. *Order the Applicant to pay the costs of the proceedings.*

5 On 20 and 25 January 2017, the European Commission, and the Government of Iceland, respectively lodged written observations at the Court's Registry. Both invite the Court to dismiss the application as unfounded.

II APPLICATION TO INTERVENE

6 On 25 January 2017, the Federation of Norwegian Industries ("FNI") applied for leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court ("the Statute"). It supports

the form of order sought by the applicant, namely, that the defendant's decision of 27 July 2016 in Case No 79116 should be declared void and declaring that the defendant is competent and obliged to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

7 FNI is an organisation that seeks to influence the conditions under which businesses can operate across many sectors and industries, including aquaculture, and aquaculture suppliers. It represents more than 2 400 member companies including the applicant and is the largest association within the Confederation of Norwegian Enterprise. FNI states that its most important task is to ensure that the authorities adopt a long-term fiscal policy and framework conditions that are conducive to a competitive Norwegian industry. This includes working towards equal conditions of competition both in Norway and abroad including within the Single Market.

8 FNI submits that it has an interest in the result of the case within the meaning of the second paragraph of Article 36 of the Statute (reference is made to the Order of the President of 30 May 2013 in Case E-4/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 1211 ("*DB Schenker IV*"), paragraph 19). In its view, the principle of procedural homogeneity should inform the finding of whether an applicant to intervene has established an interest in the result of the case, as Article 36 of the Statute is essentially identical to Article 40 of the Statute of the Court of Justice of the European Union ("ECJ") (reference is made to the Order of the President of 1 July 2013 in Case E-5/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 304 ("*DB Schenker V*"), paragraph 39).

9 FNI submits that it clearly has an interest in the outcome of the present case as it directly affects its members. Further, it has an interest of its own in ensuring that equal market conditions created by the EEA's two pillar system are enforced and protected. In addition, FNI contends that, before the European Union courts,

representative associations are allowed to intervene in cases which raise questions of principle liable to affect their members (reference is made to the Order of the President of the General Court in *Poste Italiana SpA* v *Commission*, T53/01 R, EU:T:2001:143, paragraph 51 et seq.). Consequently, the request to intervene should be granted.

10 On 13 February 2017, the application to intervene was served on the parties in accordance with Article 89(2) of the Rules of Procedure ("RoP").

11 On 21 February 2017, the defendant submitted written observations on the application for leave to intervene. In its view, it is not readily apparent that FNI has substantiated a sufficient interest in the result of the case within the meaning of the second paragraph of Article 36 of the Statute, as required by Article 89(1)(f) RoP. The defendant contends that "an interest in the result of the case" has previously been defined in light of the actual subject matter of the dispute and understood as meaning a direct and existing interest in the ruling on the form or forms of order sought (reference is made to Order of the President in *DB Schenker IV*, paragraph 19; compare the Order of the President of the ECJ in *Schenker* v *Air France*, C-589/11 P(I), EU:C:2012:332, paragraph 10).

12 The defendant notes that the European Union courts have found it appropriate to ascertain whether an applicant to intervene is directly affected by the contested measure and whether its interest in the result of the case is established (compare the Order of the President of the ECJ in *An Post* v *Deutsche Post and Others*, C130/06 P(I), EU:C:2006:248, paragraph 8. In addition, reference is made to the Order of the President of the ECJ in *National Power and PowerGen*, C151/97 P(I) and C157/97 P(I), EU:C:1997:307, paragraphs 51 to 53 and 57).

13 The defendant contends that FNI's interest in the result of the case seems rather indirect, future and hypothetical, and does not comply

with the legal test set out above. It acknowledges, however, that this is a matter for the Court to determine, on a case-by-case basis, bearing in mind any advantages in terms of informing the Court fully of the relevant context of the case, as well as any disadvantages in terms of procedural economy and the additional burdens placed on both the Court and the existing parties to the proceedings. Consequently, the defendant leaves it to the Court's discretion whether or not to grant FNI's application for leave to intervene.

14 On 28 February 2017, the applicant submitted written observations on the application for leave to intervene. It fully supports FNI's application for leave to intervene since, as a representative for a large number of Norwegian industries, FNI has a clear interest in the outcome of the case.

III LAW

15 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 15 December 2016 in the EEA Section of the Official Journal of the European Union. Accordingly, the time limit for submission of an application to intervene was 26 January 2017.

16 The present application to intervene was lodged at the Court's Registry on 25 January 2017, and is therefore timely.

17 Under the second paragraph of Article 36 of the Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case. The third paragraph of Article 36 of the Statute provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.

18 The assessment of whether an applicant for intervention has established an interest in the result of the case within the meaning of the Statute requires that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and, thus, in the ruling on the specific act whose annulment is sought (see the Order of the President of 24 March 2015 in Case E-22/14 *DB Schenker* v *ESA* [2015] EFTA Ct. Rep. 350, paragraph 31 and the case law cited).

19 Associations may be admitted to intervene to protect the interests of their members in cases raising matters of principle capable of affecting those interests (compare the Order of the President of the General Court of 7 July 2004 in *Autonomous Region of the Azores* v *Council*, T37/04 R, EU:T:2004:215, paragraph 59, and the Order of the President of the ECJ of 28 September 1998 in *Pharos* v *Commission*, C151/98 P EU:C:1998:440, paragraph 6, and the orders cited therein).

20 FNI is a trade association which represents many undertakings covering a large part of Norwegian industry, including aquaculture and aquaculture suppliers. The applicant is a member of FNI. FNI's main objective is to ensure that the authorities adopt a long-term fiscal policy and framework conditions that are conducive to a competitive Norwegian industry. This includes working towards equal conditions of competition both in Norway and abroad including within the Single Market.

21 As noted in the defence, it is ESA's long-standing and consistent decision-making practice not to perform State aid surveillance in the fisheries sector. ESA contends that the wording of the EEA Agreement and SCA is unambiguous in not conferring upon it the powers to carry out State aid surveillance in the fisheries sector. Consequently, the annulment of ESA's decision in Case No 79116 of 27 July 2016 and a declaration that ESA has the competence and obligation to perform surveillance of State aid in the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and that ESA's refusal to

do so constitutes an infringement of Article 62(1) EEA would have a direct, and potentially substantial, effect on fishing activities in the waters of EEA/EFTA States.

22 Therefore, while the scope of FNI's membership covers a wide and disparate range of sectors other than aquaculture and aquaculture suppliers, its activities are limited to Norwegian industry. Consequently, FNI's interests are neither too broad nor too general as not to be significantly affected by the outcome of the present proceedings (compare the Order of the President of the General Court in *Autonomous Region of the Azores* v *Council*, cited above, paragraphs 63 to 71).

23 In light of the above, the Federation of Norwegian Industries is granted leave to intervene in Case E-12/16 in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.

On those grounds,

The President

hereby orders:

1. **The Federation of Norwegian Industries is granted leave to intervene in Case E-12/16, in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.**

2. **Costs are reserved.**

Luxembourg,
31 March 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Report for the Hearing

in Case E-12/16

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

Marine Harvest ASA,

supported by **the Federation of Norwegian Industries (*Norsk Industri*)**,

and

EFTA Surveillance Authority,

supported by **the Kingdom of Norway**,

seeking the annulment of a decision of 27 July 2016 concluding that the EFTA Surveillance Authority lacks the competence to carry out surveillance of State aid to the fisheries sector.

I LEGAL BACKGROUND

EEA LAW

1 Article 1(1) and Article 1(2)(e) of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement") read:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to*

creating a homogeneous European Economic Area, hereinafter referred to as the EEA.

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

...

(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; ...

2 Article 8(3) EEA reads:

Unless otherwise specified, the provisions of this Agreement shall apply only to:

(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.

3 Article 20 EEA reads:

Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9.

4 Article 61 EEA reads:

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

5 Article 62 EEA reads:

> *1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:*
>
> *(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;*
>
> *(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.*
>
> *2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.*

6 Article 108(1) EEA reads:

> *The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.*

7 Protocol 9 to the EEA Agreement relates to trade in fish and other marine products. Article 4 of Protocol 9 EEA reads:

> *1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished.*

2. Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition.

3. The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties.

8 Article 6 of Protocol 9 EEA reads:

Should the necessary legislative adaptations not have been effected to the satisfaction of the Contracting Parties at the time of entry into force of the Agreement, any points at issue may be put to the EEA Joint Committee. In the event of failure to reach agreement, the provisions of Article 114 of the Agreement shall apply mutatis mutandis.

9 Point 1 of the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9 EEA ("the Joint Declaration") reads:

While the EFTA States will not take over the "acquis communautaire" concerning the fishery policy, it is understood that, where reference is made to aid granted through State resources, any distortion of competition is to be assessed by the Contracting Parties in the context of Articles 92 and 93 of the EEC Treaty and in relation to relevant provisions of the "acquis communautaire" concerning the fishery policy and the content of the Joint Declaration regarding Article 61(3)(c) of the Agreement.

10 Protocol 26 to the EEA Agreement relates to the powers and functions of the EFTA Surveillance Authority in the field of State aid. Article 1 of Protocol 26 EEA reads:

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community,

enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2)(e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14.

11 The first paragraph of Article 24 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27, and Annexes XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in Protocol 3 to the present Agreement, give effect to the provisions of the EEA Agreement concerning State aid as well as ensure that those provisions are applied by the EFTA States.

12 The first and second paragraphs of Article 36 SCA read:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

II FACTS AND PRE-LITIGATION PROCEDURE

13 On 2 May 2016, Marine Harvest ASA ("the applicant") and another company in the same group submitted a complaint to the EFTA Surveillance Authority ("ESA" or "the defendant") concerning alleged State aid distributed through the Norwegian Seafood Council. According to the complaint, a substantial portion of the proceeds from levies imposed on fish exporters and exported fish products is used to finance the activities of the Seafood Council. These activities cover the dissemination of information to the operators of the industry, their organisations and to the authorities. The Seafood Council may engage in marketing and export promoting activities, abroad and domestically. A considerable part of the levies is targeted at certain sectors. Moreover, the Seafood Council has discretionary powers to formulate specific projects targeted at aiding individual exporters' marketing efforts, thus relieving them from marketing expenses which otherwise would have been borne by their budgets. The complaint concluded that these measures constitute State aid incompatible with the EEA Agreement. The complaint also contended that ESA is competent to assess State aid in the fisheries sector, notwithstanding the finding to the contrary in Decision No 195/96/COL.[1]

14 On 10 June 2016, the complainants and ESA held a meeting to discuss the complaint, including ESA's competence to assess State aid to the fisheries sector.

15 On 13 June 2016, the Norwegian Government submitted observations on the complaint, contending that ESA lacked competence to perform State aid surveillance in the fisheries sector.

1 Decision No 195/96/COL of 30 October 1996.

16 On 27 July 2016, in response to the complaint, ESA adopted a decision concluding that State aid to the fisheries sector is excluded from its competence, and that such State aid is to be assessed instead by the Contracting Parties ("the contested decision"). The conclusion reads as follows:

On the basis of the foregoing, and in line with the Authority's previous decisions on its competence to control state aid in the fisheries sector, the Authority finds that it lacks the competence to carry out surveillance of state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 to the EEA Agreement.

III PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

17 The applicant lodged an application at the Court Registry on 20 September 2016 seeking a declaration that:

1. *The EFTA Surveillance Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law, and is consequently void.*

2. *The EFTA Surveillance Authority does have the competence and obligation to perform surveillance of state aid to the fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and is therefore obliged to assess the claims made by the Applicant through the formal complaint filed on 2 May 2016.*

3. *The EFTA Surveillance Authority shall bear the costs of these proceedings.*

18 On 22 November 2016, the defendant lodged its defence, requesting the Court to:

1. *Dismiss the Application as unfounded.*

2. *Order the Applicant to pay the costs of the proceedings.*

19 On 22 December 2016, the applicant submitted its reply. On 7 February 2017, the defendant submitted its rejoinder.

20 On 20 January 2017, the European Commission ("the Commission") submitted written observations. On 25 January 2017, the Government of Iceland submitted written observations.

21 On 25 January 2017, Norway and the Federation of Norwegian Industries ("Norwegian Industries") filed applications for intervention. On 21 and 28 February 2017, respectively, the defendant and the applicant submitted written observations on the applications. By orders of 31 March 2017, the President of the Court granted both Norway and Norwegian Industries leave to intervene.

22 On 2 May 2017, Norway and Norwegian Industries lodged their statements in intervention. Norwegian Industries requests the Court to rule in favour of the order sought by the applicant, whereas Norway requests the Court to declare the application unfounded.

23 On 18 May 2017, the defendant waived its right to reply to the statements in intervention. On 29 May 2017, the applicant submitted a reply to Norway's statement in intervention.

IV WRITTEN PROCEDURE BEFORE THE COURT

24 Written arguments have been received from the parties and the interveners:

- The applicant, represented by Torben Foss and Kjetil Raknerud, advocates;
- The defendant, represented by Carsten Zatschler, Maria Moustakali and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents;
- Norwegian Industries, represented by Tore M. Sellæg, advocate;

– Norway, represented by Dag Sørlie Lund, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, advocate, Attorney General's Office (Civil Affairs), acting as Agents;

25 Pursuant to Article 20 of the Statute of the Court, written observations have been received from:

– the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, Haraldur Steinþórsson, Legal Officer, Ministry of Finance and Economic Affairs, and Erna Jónsdóttir, Legal Officer, Ministry of Industries and Innovation, acting as Agents, and Lilja Ólafsdóttir, attorney-at-law;

– the Commission, represented by Viktor Bottka and Marketa Simerdova, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS AND OBSERVATIONS SUBMITTED TO THE COURT

THE APPLICANT

26 The applicant submits that, pursuant to Article 108 EEA, ESA is obliged to ensure that all the obligations in the EEA Agreement – including its protocols – are fulfilled by the EFTA States. Article 4 of Protocol 9 EEA contains a prohibition on State aid in the fisheries sector. The applicant also relies on Article 1 of Protocol 26 EEA, which refers, inter alia, to Article 1(2)(e) EEA, entailing the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected. In its view, there is nothing to suggest that the Contracting Parties wished to exclude fisheries and aquaculture products from this obligation. The starting point

must therefore be that ESA is competent in all fields of the EEA Agreement, including the fisheries and aquaculture sectors.

27 On this basis, the applicant contends that any exception to ESA's general competence must be clearly specified. Such exceptions concerning the fisheries and aquaculture sectors are neither to be found in the EEA Agreement nor in any protocols or secondary law.

28 The applicant challenges the finding in the contested decision to the effect that State aid in the fisheries sector is excluded from ESA's competence on the basis that Article 1 of Protocol 26 EEA does not specifically mention the State aid rules in Article 4 of Protocol 9 EEA as part of the defendant's competence and powers. In the applicant's view, this exclusion is natural, as the two specific inclusions – transport and coal/steel sectors – have specific State aid regimes in both the EU and the EEA. No such specific regime exists for the fisheries and aquaculture sectors.

29 The applicant relies further on the Joint Declaration, which indicates that the EFTA States should align their aid systems in accordance with the State aid regulations of Articles 92 and 93 of the EEC Treaty. The applicant assumes the Contracting Parties to have meant that these aid rules should correspond with the aid rules in Article 4 of Protocol 9 EEA. A straightforward application of the definition of aid contained in Article 61(1) EEA and use of the discretionary powers of the two surveillance authorities outlined in Article 61(3) EEA is sufficient to give effect to these rules. On this basis, the applicant contends that the State aid rules pertaining to fisheries and aquaculture correspond with the definition of aid contained in Article 61 EEA, thus making any specific mention in Protocol 26 redundant.

30 The applicant also notes that Protocol 26 EEA refers to Article 62 EEA, which obliges ESA to keep under constant review "[a]ll existing systems of State aid" in the territories of the EFTA States, as well as

"any plans to grant or alter State aid". Thus, Protocol 26 EEA specifically provides ESA with the same tools to monitor and enforce State aid rules in the fisheries sector as the Commission has.

31 Relying on the Joint Declaration, the applicant argues further that the interpretation of Article 4(1) and (2) of Protocol 9 EEA should be made in the context of the basic State aid regulations of Articles 61 and 62 EEA. In its view, the reference to Article 93 of the EEC Treaty denotes that a system for constant State aid control in the fisheries sector of the EFTA States should be put in place. Moreover, both Articles 61 and 62 EEA effectively impose a ban on granting State aid to the fisheries sector and create a sole competence for the respective surveillance authority to conduct State aid control.[2]

32 The applicant notes that, in the period following the entry into force of the EEA Agreement, the Commission's Guidelines for the examination of State aid to fisheries and aquaculture were communicated in the Official Journal as a text with EEA relevance.[3] Hence, the Commission was aiming for the application of a two-pillar system for surveillance in the fisheries sector, which essentially would rest upon a set of identical material and procedural rules.

33 According to the applicant, there is little to support ESA's assessment that the Contracting Parties had reserved to themselves the function of reviewing the State aid provisions of Article 4 of Protocol 9 EEA. In the applicant's view, both the text of Protocol 9 EEA itself, as well as numerous references in the Declarations and Agreed Minutes to the Final Act, clearly show that Protocol 9 EEA is a snapshot of the status in negotiations that were in progress at the time of its signature, and that the Contracting Parties intended to continue

2 Reference is made to Stefánsson, S.M., *The EEA Agreement and Fish and Other Marine Products*, Nordisk Råd for Forskning i Europæisk Integrationsret, Fiskeripolitikken i EU/EØS, 1996.

3 Reference is made to OJ 1994 C 260.

their work on unresolved issues until the entry into force of the EEA Agreement.

34 In the applicant's view, there is nothing in the context of the negotiations on the institutional provisions of the EEA Agreement to support the defendant's view. The Contracting Parties have no institutional place in the EEA Agreement, except for holding seats in the EEA Council and the EEA Joint Committee. It was never the intention that these bodies should perform functions related to surveillance and judicial control.

35 The applicant argues that Protocol 9 EEA is not a comprehensive trade system for the fisheries sector. This is supported by several ESA decisions[4] which, in the applicant's view, make it clear that Article 20 EEA, being set in Part II on the free movement of goods and dealing exclusively with trade in fish and other marine products, in no way excludes the fisheries sector from the application of relevant rules in other parts of the Agreement. In the applicant's view, Protocol 9 EEA neither specifies the aid concept used in its Article 4(1), nor does it establish a specific system for constant review. For both issues one has to turn to the Joint Declaration.

36 The applicant points out that fish and other marine products are treated basically in the same manner as industrial goods. Fish products have their place of origin determined in accordance with Protocol 4 EEA and are subject to the same provisions with regard to documentation and customs clearance as industrial goods.

37 The applicant questions the value of ESA's previous practice. Decision No 195/96/COL is, in the applicant's view, one-sided and only aimed at justifying a decision from 1994 which had been

4 Decision No 337/01/COL of 15 November 2001, Decision No 66/04/COL of 2 April 2004, Decision No 186/12/COL of 11 July 2012, and a letter of 18 October 2016 in Case No 79122.

annulled by the Court.[5] Subsequent decisions routinely refer to Decision No 195/96/COL as a precedent for closing the complaints. The applicant therefore finds it doubtful whether ESA's practice can be said to be consistent enough to be cited as a source of law capable of creating a precedent.

38 According to the applicant, ESA's contention that the possibility for anti-dumping and/or countervailing proceedings to offset possible distorting State aid prevents ESA from exercising a concurrent competence must be based on a misunderstanding. No support for ESA's allegation can be found in the history of the negotiations, or in the wording of Article 4(3) of Protocol 9 EEA. In the applicant's view, investigation into the existence of possible countervailing subsidies is something different from the constant surveillance of State aid in the context of the EEA Agreement, both in terms of substance and procedure. The inability of the Contracting Parties to extend the scope of Article 26 EEA to the trade in fish and other marine resources entails that the EU may be faced with countervailing actions from the EFTA side. In addition, throughout the period of the EEA's existence, the Commission has continued to apply its competences vis-à-vis the EU Member States without any restrictions in the State aid field.

39 The applicant is further of the view that general policy considerations support the declaration sought before the Court. According to the applicant, it does not make sense that the Contracting Parties included a specific provision on State aid in the fisheries sector that was never meant to be enforced.

40 As regards Norway's argument that the starting point for interpretation should be the customary rules of interpretation of

5 Reference is made to Case E-2/94 *Scottish Salmon Growers Association* [1994-1995] EFTA Ct. Rep. 59.

public international law, as reflected in the Vienna Convention on the Law of Treaties ("the Vienna Convention"), the applicant submits that the EEA Agreement envisages the achievement of a long series of objectives which go far beyond a traditional treaty under international law. In addition, there is no dispute over the content of the material rules that commits the parties to the EEA Agreement, but in the control and enforcement of these obligations. Further, the applicant requests the Court to take account of Article 32 of the Vienna Convention, which deals with the text of treaties which are so ambiguous or obscure that it leads to a result which is manifestly absurd or unreasonable. In this regard, it contends that the result sought by the defendant would create an asymmetry in the system of surveillance and enforcement of the State aid rules in the EEA, meaning that equal conditions of competition will not be assured in an important and rapidly growing economic sector of the EEA. In addition, individuals and economic operators of the EFTA States would lose an important right to judicial recourse in defence of their rights.

41 As a comment on Norway's reference to the principle of conferral, the applicant requests the Court to consider whether the aid system formulated in the Joint Declaration of itself constitutes a direct referral to ESA to act in parallel with the Commission to perform the tasks under Articles 61 and 62 EEA.

THE DEFENDANT

42 The defendant is of the view that the application is unfounded and should be dismissed in its entirety. It refers to its long-standing and consistent practice of not performing State aid surveillance in the

fisheries sector.[6] This practice is based on the unambiguous wording of the EEA Agreement and the SCA, which do not confer upon ESA the powers to carry out State aid surveillance in the fisheries sector. In addition, this practice is acknowledged by all Contracting Parties to the EEA. In the defendant's view, the applicant misinterprets the EEA Agreement and the SCA in order to construe a competence which does not exist.

43 With reference to Article 4 of Protocol 9 EEA, the defendant notes, first, that it is for the Contracting Parties to ensure that aid in the fisheries sector, which distorts competition, is abolished. ESA has neither the power to ensure that such aid is abolished, nor is ESA mentioned in Article 4 of Protocol 9 EEA to perform State aid surveillance in the fisheries sector. Instead, Article 4 of Protocol 9 EEA excludes the entire fisheries sector from ESA's State aid competence, including the surveillance of any State aid measures inseparably linked to that sector.[7] Second, the remedies to offset illegal State aid in the fisheries sector are the application of anti-dumping and/or countervailing procedures.[8] In this context the defendant submits that the European Union has assumed responsibilities to investigate several anti-dumping and countervailing cases against Norway in the fisheries sector.[9] A concurrent competence of ESA to investigate subsidies in the

6 Reference is made to Decision No 195/96/COL of 30 October 1996, Decision No 176/05/COL of 15 July 2005, and Decision No 729/08/COL of 26 November 2008.

7 Reference is made to Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 65.

8 Reference is made to the first paragraph of Protocol 13 EEA on the non-application of anti-dumping and countervailing measures, which, in the defendant's view, confirms that trade remedies may still apply to the fisheries sector.

9 Reference is made to Council Regulation (EC) No 1677/2001 of 13 August 2001 (OJ 2001 L 227, p. 15) and Council Regulation (EC) No 1593/2002 of 3 September 2002 (OJ 2002 L 240, p. 22), both amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 1999 L 101, p. 1).

fisheries sector would stand in sharp contrast to the current structure of competence allocation between the two pillars of the EEA. The applicant's assertion that the concept of subsidy is completely different from the notion of State aid is incorrect.

44 The defendant submits further that, in stating that any points at issue may be put to the EEA Joint Committee, Article 6 of Protocol 9 EEA implies that any issues arising in relation to Article 4 of that Protocol should be dealt with by the Contracting Parties and not ESA.

45 In the defendant's view, the wording of the Joint Declaration clarifies that it is for the Contracting Parties to ensure that aid to the fisheries sector is not distorting competition. According to the Joint Declaration, the Contracting Parties will conduct their own assessment of any distortions of competition in the fisheries sector pursuant to the elements inherent in and the principles emanating from Articles 92 and 93 of the EEC Treaty, which correspond to Articles 61 and 62 EEA. No evidence has been submitted by the applicant to support the view that ESA's interpretation is incorrect.

46 The defendant argues that its interpretation is not contradicted by the applicant's reference to the Commission's Guidelines for the examination of State aid to fisheries and aquaculture. In the defendant's view, the fact that these guidelines were communicated in the Official Journal as a text with EEA relevance confirms that the "*acquis communautaire*" has EEA relevance in the context of Article 4 of Protocol 9 EEA and the Joint Declaration, namely for the Contracting Parties to take note of the relevant provisions of the "*acquis communautaire*" in the fisheries sector, in the course of their own State aid assessment.

47 The defendant asserts further that its interpretation of Article 4 of Protocol 9 EEA is confirmed by Article 1 of Protocol 26 EEA. Protocol 26 EEA outlines the State aid rules for which ESA has surveillance

powers. The State aid provisions in Protocol 9 EEA are, however, not included in Article 1 of Protocol 26 EEA. Consequently, ESA has no power to give effect to the State aid rules included in Protocol 9 EEA. Nothing suggests that the Contracting Parties had a different intention when signing the EEA Agreement.

48 The defendant submits further that Article 24 SCA does not include the State aid provisions in Protocol 9 EEA. This is another indication that ESA lacks the competence to perform State aid surveillance in the fisheries sector. Article 24 SCA, together with Protocol 26 EEA, draw up an exhaustive list of provisions according to which ESA can exercise its surveillance powers in the field of State aid. ESA therefore has no competence to perform State aid surveillance in the fisheries sector. No explicit exception to this rule has been provided. General policy considerations, as referred to by the applicant, cannot serve as a legal basis for ESA to enforce State aid law in the fisheries sector. Moreover, in the absence of a specific legal basis in EEA law, ESA is barred from acting.[10]

49 The defendant acknowledges that it has initiated infringement procedures in relation to cases in the fisheries sector. However, these cases all concern specific circumstances in the context of ESA's general surveillance powers. The defendant submits that its competence and procedures concerning general surveillance have to be distinguished from its competence and procedures in the area of State aid. For example, general surveillance does neither provide for a prior approval procedure of national measures nor the recovery of aid granted to undertakings.

50 The defendant submits that the applicant has failed to support claims with any concrete evidence. The applicant refers to agreements, declarations and agreed minutes, which allegedly

10 Reference is made to *Synnøve Finden*, cited above, paragraph 57.

provides a clear picture of how to interpret Protocol 9 EEA. However, it does not identify any of those documents.

51 The defendant rejects the applicant's view that the burden of proof is on ESA to demonstrate that the Contracting Parties never intended for the fisheries sector to fall outside the scope of ESA's State aid powers. Both primary EEA law and the Joint Declaration demonstrate that ESA has no competence to enforce State aid law in the fisheries sector. If the applicant puts forward a different plea, the onus is on the applicant to substantiate this.

52 Consequently, the defendant submits that it has not infringed its obligation under Article 62(1) EEA to keep under constant review existing State aid schemes as well as any plans to grant or alter State aid.

NORWEGIAN INDUSTRIES

53 Norwegian Industries supports the form of order sought by the applicant. Norwegian Industries submits that there is no evidence from the negotiations to establish the EEA that supports the notion that there should be institutional arrangements for trade in fish and other marine products different to those dealing with trade in other goods. Trade in fish and fish products were, unlike agricultural products, made part of the multilateral undertaking, which characterises the EEA Agreement, by means of Protocol 9 EEA.

54 In the view of Norwegian Industries, the defendant has erroneously read the Joint Declaration as being directed exclusively to the EFTA States, despite the fact that the Declaration records a binding obligation on all Contracting Parties to establish a common regime for the assessment of State aid. While the Joint Declaration does not specify any particular institutional agreement for the implementation of this common regime, it does refer to articles of the EU Treaty, which are incorporated as Articles 61 and 62 EEA.

This makes it evident that the notion of EFTA States becoming entrusted with the tasks of carrying out constant review of State aid to the fisheries sector, or of assessing State aid measures in this sector for compatibility with the Agreement, was not an option. In the case of the EFTA States, the relevant surveillance functions can only be carried out by ESA.

55 Norwegian Industries submits that it is inconceivable that the Contracting Parties and not ESA should be competent to enforce State aid provisions in the fisheries sector, since Articles 61 and 62 EEA provide the opposite. Norwegian Industries states that common logic makes it highly unlikely that the negotiators in the Joint Declaration have created obligations which should be outside the normal system of EEA enforcement. Norwegian Industries also finds the defendant's interpretation potentially harmful in economic terms.

NORWAY

56 Norway supports the defendant's interpretation of Article 4 of Protocol 9 EEA, and submits that the application should be dismissed as unfounded.

57 Norway submits that the starting point for the Court's interpretation should be the customary rules on interpretation of public international law, as reflected in Articles 31 to 33 of the Vienna Convention. This is supported by the approach taken by the Court of Justice of the European Union ("the ECJ") in similar matters.[11]

11 Reference is made to the judgment in *Commission* v *Council*, C-91/05, EU:C:2008:288, and the opinions of Advocate General Jacobs in *Commission* v *Council*, C-299/99, EU:C:2001:680, point 148, and Advocate General Trstenjak in *United Kingdom* v *Council*, C-77/05, EU:C:2007:419, point 88.

58 Norway submits that EEA law, like international law more generally, is based on the principle of speciality or conferral, meaning that competence that has not been transferred to an EFTA institution, remains with the EFTA States.[12] Norway refers further to Articles 4 and 5 of the Treaty on European Union, where the same principle is reflected. Although not explicitly mentioned in the EEA Agreement, Norway submits that this principle is also a part of EEA law when it comes to questions of the attribution of powers to the EFTA institutions.

59 In Norway's view, the applicant confuses ESA's general surveillance competences and the specific competence as regards State aid. Further, the applicant fails to take account of Article 8(3) EEA regarding the scope of the EEA Agreement, which very much permits the conclusion that the Contracting Parties wished to exclude fisheries and aquaculture not only from that obligation, but from the scope of the Agreement as such.[13] Since fish and marine products are not among the products covered by Article 8(3), these products falls entirely outside the scope of the Agreement, unless otherwise specified elsewhere in the Agreement.

60 In Norway's view, the very existence of Protocol 9 EEA and its *lex specialis* status[14] are reasons to conclude that the Contracting Parties in particular did not want the general obligations regarding State aid and competition to apply to fisheries and aquaculture.

61 Norway submits that the defendant's conclusion is supported by all available sources of law. The wording of Article 4(1) of Protocol 9 EEA leaves it to the Contracting Parties to enforce the obligation to

12 Reference is made to an Advisory Opinion by the International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, pp. 78 and 79, paragraph 25.

13 Reference is made to *Synnøve Finden*, cited above, paragraph 57.

14 Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 36.

endeavour to ensure conditions of competition, which is also explicitly stated in the Joint Declaration. According to Norway, the Joint Declaration represents an authentic interpretation of Protocol 9 EEA. That interpretation is supported by Protocol 26 EEA and Article 24 SCA. These provisions set out ESA's competence in the field of State aid, and neither makes reference to Protocol 9 EEA. Referring to the principle of conferral, Norway takes this to mean that ESA has not been entrusted with powers to perform surveillance in the fisheries sector.

62 Norway submits further that the defendant's interpretation was supported by all Contracting Parties when the same question was before the Court in *Scottish Salmon Growers Association*, cited above. Norway stresses that the interpretation presented in that case took place shortly after the entry into force of the EEA Agreement. Such contemporaneous practice by the Contracting Parties should be given a particular weight when interpreting Protocol 9 EEA. It also demonstrates that the Contracting Parties never expressed any desire to grant ESA competence to assess and enforce State aid rules in the fisheries sector. Finally, the defendant's interpretation has consistently been upheld in its decisional practice.

THE ICELANDIC GOVERNMENT

63 The Icelandic Government, which supports the conclusion of the defendant, submits that the Contracting Parties agreed to apply specific rules to trade in fish and other marine products. This explains why Article 20 EEA refers to Protocol 9 EEA for provisions and arrangements relating to trade in fish and other marine products. Iceland further refers to the fact that Article 4 of Protocol 9 EEA makes no reference to Articles 61 to 63 EEA The Joint Declaration confirms the intention of the Contracting Parties to leave the endorsement of Article 4 of Protocol 9 EEA to the assessment of the Contracting Parties themselves, indicating that

the EFTA States would not take over the "*acquis communautaire*" concerning the EEC fishery policy.

64 With regard to the scope of the EEA Agreement, the Icelandic Government agrees with the view put forward by the defendant. According to Article 8(3) EEA, agriculture and fishery products do not fall under the product coverage of the Agreement. To apply the main provisions of the Agreement, including Articles 61 to 63, to fish and other marine products, would therefore require a clear legal basis.[15]

65 Iceland submits further that the statements made during the Commission/EFTA High Level Steering Group Meeting of 20 October 1989 made it clear that the EFTA States and the EEC agreed not to aim at a common fishery policy in the coming EEA negotiations.[16] Iceland claims that the result of those negotiations is now set out in Protocol 9 EEA, which contains, inter alia, a specific provision on State aid. No secondary EEC legislation in the field of State aid to fisheries was included in Protocol 9 EEA or in the Annexes to the EEA Agreement.

66 The Icelandic Government considers it to be an obvious clerical error that the Commission's Guidelines for the examination of State aid to fisheries and aquaculture was marked as a text with EEA relevance in 1994.

67 Iceland submits further that the reference in Article 6 of Protocol 9 EEA to a dispute settlement procedure before the EEA Joint Committee confirms the understanding that the endorsement of the provisions of Protocol 9 EEA is in the hands of the Contracting Parties and not ESA.

15 Reference is made to *Synnøve Finden,* cited above, paragraph 57, and Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, paragraphs 24 and 25.

16 Reference is made to Results of the Commission/EFTA High Level Steering Group Meeting, Brussels, 20 October 1989, paragraph 5, pp. 2 and 3.

68 In Iceland's view, Protocol 26 EEA, together with Article 24 SCA, exhaustively define the powers and functions entrusted to ESA in the field of State aid. These provisions do not mention Article 4 of Protocol 9 EEA. Moreover, the Joint Declaration confirms that different arrangements should apply when it comes to aid in the fisheries sector. The Icelandic Government submits that a clear legal basis is required for ESA to have competence to carry out surveillance of State aid in the fisheries sector. In this regard, the reference in Article 62 EEA to "all existing systems of State aid" and "any plans to grant or alter State aid" must be read in the context of the EEA Agreement and its scope.

THE COMMISSION

69 The Commission agrees with the arguments put forward by the defendant. In the Commission's view, ESA has correctly interpreted its competence under the EEA Agreement.

70 The Commission submits that, in referring to Protocol 9 EEA, which creates a *lex specialis* for fish and other marine products, Article 20 EEA removed these products from the scope of the EEA Agreement's normal rules. By virtue of Protocol 9 EEA, in particular its Article 4(3) and Article 6, the EFTA States have agreed to respect the EU's State aid rules with regard to fish and other marine products, by applying the special provisions in that protocol. The normal rules on State aid in Articles 61 to 64 EEA do not apply and there is no role for ESA.

71 The Commission submits that Article 61(1) EEA, which only applies if not otherwise provided for in the EEA Agreement, confirms that the State aid provisions must be read together with the remaining parts of the EEA Agreement, in particular Article 20 EEA. The Commission considers that Protocol 9 EEA, read in conjunction with Article 20 EEA, makes a specific provision for State aid in respect of fish and

other marine products. Since the alleged aid measure in the present case relates to the marketing of fish and other marine products, it can be reasonably held to be inseparably linked to trade in these products, and hence it falls under the scope of Protocol 9 EEA.[17]

72 The Commission submits that Article 24 SCA, which defines the competence of ESA, does not refer to Protocol 9 EEA. A similar reference is also absent from Article 1 of Protocol 26 EEA. There is no provision in the EEA Agreement, or in the SCA, which would give ESA any competence in relation to products which fall within Protocol 9 EEA.

73 The Commission submits that Protocol 9 EEA and the Joint Declaration excludes the competence of ESA. According to Article 4(3) of Protocol 9 EEA, it is the responsibility of the EU and the EFTA States to ensure that the conditions of competition are such that the other Contracting Parties will be able to refrain from the imposition of protective measures. The claim by the applicant that Protocol 9 EEA is a snapshot of the status in negotiations that were still in progress is unconvincing in light of the clear reference to Protocol 9 EEA in Article 20 EEA, which also excludes these products from the normal rules under the EEA Agreement.

74 The Commission submits that it was never the intention of the Contracting Parties to create a homogenous set of rules in the EEA as regards fish and other marine products. Consequently, there was no need to entrust ESA with the task of monitoring and ensuring homogeneity of the rules.

75 The Commission agrees with the defendant that the wording of the Joint Declaration clarifies that it is for the Contracting Parties to assess State aid in the fisheries sector and to ensure that it is not distorting competition.

17 Reference is made to *Synnøve Finden*, cited above, paragraphs 59 and 60.

76 The Commission submits that since the fisheries sector is an area where the "*acquis communautaire*" has not been adopted by the EFTA States, the prohibition on the imposition of anti-dumping measures, countervailing duties and measures against illicit commercial practices in Article 26 EEA does not apply. If, however, an EFTA State has not applied the State aid rules in this sector correctly, one can request the Commission to investigate the matter and apply appropriate safeguard measures. The Commission has on repeated occasions imposed anti-dumping duties on imports of salmon from Norway. The EU's competence to impose such duties for the products in question presupposes that they are not covered by the normal rules on State aid in the EEA Agreement, which apply the "*acquis communautaire*". A failure by the Commission to investigate a complaint about a trade subsidy is susceptible to challenge before the ECJ by parties who are directly and individually concerned.[18]

Per Christiansen
Judge-Rapporteur

18 Reference is made to the judgments in *FEDIOL* v *Commission*, 191/82, EU:C:1983:259 and *Timex* v *Council and Commission*, 264/82, EU:C:1985:119.