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Case No: 79588
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EFTA SURVEILLANCE
AUTHORITY

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

STATEMENT OF DEFENCE

submitted pursuant to Article 35 of the Rules of Procedure of the EFTA Court by
the

EFTA SURVEILLANCE AUTHORITY

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

IN CASE E-12/16

Marine Harvest ASA

v

EFTA Surveillance Authority

in which *Marine Harvest ASA* has submitted an application pursuant to Article 36(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice seeking a ruling from the EFTA Court to annul the EFTA Surveillance Authority's Decision of 27 July 2016 in Case No. 79116 and seeking further a declaration from the EFTA Court that the EFTA Surveillance Authority has the competence and obligation to perform State aid surveillance in the fisheries sector.

I. INTRODUCTION

1. By letter dated 26 September 2016, the Registrar of the EFTA Court notified the EFTA Surveillance Authority (hereinafter “**the Authority**”) of an application for annulment lodged with the Court on 20 September 2016 by Marine Harvest ASA (hereinafter “**the Applicant**”). The application for annulment (hereinafter “**the Application**”) initiated proceedings against a decision of the Authority dated 27 July 2016 (Case No. 79116), in which the Authority declared that it had no competence to perform State aid surveillance in the fisheries sector (hereinafter “**the contested Decision**”).
2. It is the Authority’s long-standing and consistent decision-making practice not to perform State aid surveillance in the fisheries sector.¹ This decision-making practice is based on the unambiguous wording of the EEA Agreement (hereinafter “**EEA**”) and the Surveillance and Court Agreement (hereinafter “**SCA**”), which do not confer upon the Authority the powers to carry out State aid surveillance in the fisheries sector. The Authority’s decision-making practice is further acknowledged by all Contacting Parties to the EEA. Despite this settled legal framework, the Applicant takes the view that the EEA and SCA should be interpreted differently, as to confer the Authority the competence to assess and enforce State aid law in the fisheries sector. It is indeed this sole argument around which the Application revolves. In the Authority’s principled view, the Applicant misinterprets the EEA and SCA, in order to construe a competence which does not exist. Consequently, as will be demonstrated in the following, the Application is unfounded and should be dismissed in its entirety.
3. The Authority will first, under Section II, give a brief account of the facts and pre-litigation procedure. Section III then deals with the Applicant’s allegation, namely that the Authority committed errors in law and procedure by refusing to assume competence to perform State aid surveillance in the fisheries sector, and provides

¹ 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.

the Authority's counter-arguments. Finally, the form of order sought by the Authority is set out in Section IV hereof.

II. FACTS AND PRE-LITIGATION PROCEDURE

4. On 2 May 2016, the Applicant lodged a complaint with the Authority, alleging that "incompatible State aid" was granted to the Norwegian fisheries sector, which was financed by levies imposed on fish exporters in Norway and exported fish products from Norway.² According to the complaint, the proceeds from those levies were used to cover the costs for the activities of the Norwegian Seafood Council, a limited company, owned by the Norwegian State, dealing with disseminating information to the operators in the industry and conducting joint marketing and communication risk management. By letter dated 13 May 2016, the Authority acknowledged receipt of the complaint.³
5. On 10 June 2016, at the request of the Applicant, a meeting was held in Brussels between the Applicant and the Authority. At that meeting, the complaint was discussed in some detail, as well as the Authority's opinion that it lacked competence to perform State aid surveillance in the fisheries sector.
6. The Authority also informed the Norwegian Government of the complaint and invited the Government to present its comments on the complaint. By letter dated 13 June 2016, the Norwegian Ministry of Trade, Industry and Fisheries submitted its comments on the complaint.⁴ In that letter, the Norwegian Government confirmed its agreement with the Authority's view that it lacked competence to perform State aid surveillance in the fisheries sector.
7. By letter dated 27 July 2016, the Authority informed the Applicant that it lacked competence to perform State aid surveillance in the fisheries sector and

² The complaint was submitted together with the Application as **Annex 2**.

³ The Authority's letter of 13 May 2016 was submitted together with the Application as **Annex 3**.

⁴ The letter from the Norwegian Ministry of Trade, Industry and Fisheries dated 13 June 2016 was submitted together with the Application as **Annex 4**.

consequently closed the case.⁵ It is this decision of 27 July 2016, which the Applicant is now challenging before the Court.

III. ALLEGED ERRORS IN LAW AND PROCEDURE

Introduction

8. The Applicant claims that the contested Decision is invalid. The Applicant in essence puts forward two pleas in support of this claim: In the first plea, the Applicant submits that the contested Decision is based on a wrongful interpretation of the relevant sources of law, which erroneously led the Authority to believe it had no competence to perform State aid surveillance in the fisheries sector. In the second plea, the Applicant alleges that, by not performing State aid surveillance in the fisheries sector, the Authority 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, in the EFTA States which are Contracting Parties to the EEA. The Authority will now address these two pleas in turn.

First plea: The Authority's competence to assess State aid to the fisheries sector

9. The Applicant submits that it follows from Article 1 of Protocol 26 EEA and Article 4(1) of Protocol 9 EEA that the Authority has competence to perform State aid surveillance in the fisheries sector. More specifically, the Applicant argues that Protocol 26 EEA, which sets out the Authority's powers and functions in the field of State aid and which "*does not specifically refer to the fisheries and aquaculture sectors*", must not be interpreted as an exhaustive enumeration of the Authority's competences.⁶ With regard to Article 4(1) of Protocol 9 EEA, the Applicant alleges that since this provision lays down that "[a]id granted through State resources to the fisheries sector which distorts competition shall be abolished", it is for the Authority to enforce this provision, in particular, because the aid referred to in that provision is covered by the State aid notion in Article 61(1) EEA.⁷ In the Applicant's view, the

⁵ The Authority's letter of 27 July 2016 was submitted together with the Application as **Annex 1**.

⁶ Which is insinuated on page 3, paragraphs 3 and 4, of the Application.

⁷ On page 8, paragraphs 2 to 5, of the Application.

rule is that the Authority must enforce State aid law in the fisheries sector and that an exception to that rule has not been provided for.⁸

10. The Authority submits that the first plea is unfounded. None of the Applicant's arguments and allegations cast doubts on the Authority's assessment and conclusions in its letter of 27 July 2016, by which the Authority informed the Applicant that it lacked competence to perform State aid surveillance in the fisheries sector. The Authority rightly refused to carry out State aid surveillance in the fisheries sector, as there is no legal basis in the EEA and SCA, which would allow the Authority to perform such tasks.
11. Article 20 EEA states that provisions and arrangements that apply to fish and other marine products are set out in Protocol 9 EEA.⁹ The relevant provision in Protocol 9 EEA, for the purpose of these proceedings, is Article 4, which 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." (emphasis added)

12. In the Authority's submission, two important aspects follow from Article 4 and in particular from its third paragraph:

- First, it is for the Contracting Parties to ensure that aid to the fisheries sector, which distorts competition, is abolished. Hence, the Authority has neither the powers to ensure that such aid is abolished nor is the Authority

⁸ On page 8, paragraph 6, of the Application.

⁹ Entitled: "Protocol 9 on trade in fish and other marine products".

mentioned in Article 4 to perform State aid surveillance in the fisheries sector.

- Second, the remedies to off-set possible distorting State aid in the fisheries sector are the application of anti-dumping and/or countervailing proceedings. Indeed, the European Union has assumed responsibilities to investigate several anti-dumping and countervailing cases against Norway in the fisheries sector.¹⁰ In this context, a concurrent competence of the Authority to investigate subsidies in the fisheries sector would not fit the current structure of competence allocation between the two pillars of the EEA.

13. The Authority's interpretation of Article 4 of Protocol 9 EEA is confirmed by the Joint Declaration on the agreed interpretation of Article 4(1) and (2) of Protocol 9 EEA, annexed to the Final Act of the EEA (hereinafter "**Joint Declaration**"), which reads:

"1. 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. ...". (emphasis added)

14. 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. That the Contracting Parties have reserved the enforcement of Article 4(1) of Protocol 9 EEA to themselves is also in line with the Authority's long-standing and consistent decision-making practice not to assume competence in the area of State aid to the

¹⁰ For example: Council Regulation (EC) No. 1677/2001 of 13 August 2001 amending Regulation (EC) No. 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 2001 L 227, page 15); Council Regulation (EC) No. 1593/2002 of 3 September 2002 amending Regulation (EC) No. 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 2002 L 240, page 22).

fisheries sector.¹¹ The Authority submits that, 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 ECC (Articles 61 and 62 EEA).

15. The Applicant argues that the Authority's interpretation on this point is not correct and insinuates that the Contracting Parties actually wanted the Authority to assume State aid competence for the fisheries sector.¹² However, the Applicant has submitted no evidence to substantiate this allegation. This is not surprising, because no evidence exists that would support the Applicant's opinion on this point.
16. The Applicant alleges further that the Authority committed an "over-interpretation, especially considering the fact that the term "Contracting Parties" is in fact not included in the official Norwegian version of the Joint Declaration ...".¹³ However, the Applicant ignores that according to Article 129(1) EEA, the text of the EEA (and its Joint Declarations) is authentic in all different language versions of the Contracting Parties.¹⁴ All other language versions refer to the term "Contracting Parties".¹⁵ The Norwegian version can therefore only be qualified as containing an unfortunate translation error.

¹¹ 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.

¹² On page 10, paragraphs 3 to 7, and page 11, paragraphs 1 to 3, of the Application.

¹³ On page 10, paragraph 6, of the Application.

¹⁴ On the interpretation of different authentic languages versions: Case E-9/97 *Erla María Sveinbjörnsdóttir v The Government of Iceland* [1998] EFTA Ct.Rep. 97, paragraphs 26 to 28.

¹⁵ See, for example, the German version: „Solange die EFTA-Staaten nicht die geltenden Gemeinschaftsvorschriften für die Fischereipolitik übernehmen, ist in dem Fall, daß auf aus staatlichen Mitteln gewährte Beihilfen Bezug genommen wird, jede Wettbewerbsverfälschung von den Vertragsparteien nach Artikel 92 und 93 des EWG-Vertrags und in Verbindung mit dem einschlägigen Gemeinschaftsrecht für die Fischerei und der Gemeinsamen Erklärung zu Artikel 61 Absatz 3 Buchstabe c des Abkommens zu prüfen.“ (emphasis added). See also the French version: „Bien que les États de l'AELE ne reprendront pas l'acquis communautaire en ce qui concerne la politique de la pêche, il est entendu que, lorsqu'il est fait référence à des aides accordées au moyen de ressources d'État, toute distorsion de la concurrence doit être évaluée par les parties contractantes dans le cadre des articles 92 et 93 du traité CEE et sur la base des dispositions pertinentes de l'acquis communautaire concernant la politique de la pêche et du contenu de la déclaration commune sur l'article 61 paragraphe 3 point c) de l'accord.“ (emphasis added) See further the Icelandic version: „Enda þótt EFTA-rikin taki ekki upp réttarreglur bandalagsins varðandi sjávarútvegsstefnuna er litið svo á, þar sem vísað er til veittrar aðstoðar af ríkisfjármunum, að samningsaðilar meti röskun á samkeppni með hliðsjón af 92. og 93. gr. EBE-sáttmálans og í tengslum við viðeigandi ákvæði í réttarreglum bandalagsins um sjávarútvegsstefnuna og efni sameiginlegu yfirlýsingarinnar um c-lið 3. mgr. 61. gr. EES-samningsins.“ (emphasis added)

17. The Authority's interpretation of Article 4 of Protocol 9 EEA is also not contradicted by the Applicant's submission that "[i]t is moreover of considerable significance that the Commission's Guidelines for the examination of State aid to Fisheries and aquaculture during the period following the entry into force of the EEA Agreement were communicated by the Commission in the Official Journal with the subtitle "text with EEA relevance"". ¹⁶ To the contrary, in the Authority's view, this submission 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.
18. The Authority's interpretation of Article 4 of Protocol 9 EEA is further confirmed by Article 1 of Protocol 26 EEA and Article 24 SCA. Protocol 26 EEA outlines the State aid rules for which the Authority has surveillance powers. These include the general State aid provisions in Articles 61 to 63 EEA, as well as the sector-specific provisions of Article 49 EEA on transport and of Protocol 14 EEA on trade in coal and steel products. However, the State aid provisions in Protocol 9 EEA are not included in Article 1 of Protocol 26 EEA. Consequently, the Authority has no power to give effect to the State aid rules falling under Protocol 9 EEA. There is no other interpretation possible, since the Authority has neither documentation nor information at its disposal that would suggest that the Contracting Parties to the EEA had a different intention when signing the EEA. The Applicant has failed to submit any documentation or information that would undermine the Authority's interpretation on this point.
19. The competences of the Authority in the field of State aid are also specified in SCA. Article 24 SCA mentions the provisions in accordance to which the Authority must exercise its surveillance powers in the field of State aid. Again, the State aid provisions in Protocol 9 EEA are not included in Article 24 SCA. This is another indication that the Authority lacks the competence to perform State aid surveillance in the fisheries sector.

¹⁶ On page 9, paragraph 6, of the Application.

20. Consequently, Protocol 26 EEA together with Article 24 SCA constitute an exhaustive list of provisions, according to which the Authority can exercise its surveillance powers in the field of State aid. The fisheries sector is not part of this exhaustive list of provisions. The Applicant has adduced no evidence which would undermine this conclusion.
21. The Applicant tries to “turn the world up-side down” by arguing that the rule is for the Authority to enforce State aid law in the fisheries sector and that an exception to that rule has not been provided for.¹⁷ As demonstrated above, the opposite is actually true, namely that the rule is that the Authority has no competence to perform State aid surveillance in the fisheries sector and that a possible explicit exception to that rule has not been provided for.
22. In light of the above, it is the Authority’s submission that the first plea must be dismissed as unfounded.

Second plea: The Authority has infringed Article 62(1) EEA

23. By its second plea, the Applicant submits that the Authority has infringed Article 62(1) EEA, because it is the Authority’s obligation to keep under constant review all existing State aid schemes, as well as any plans to grant or alter State aid, which includes State aid in the fisheries sector.¹⁸
24. As the Authority explained above, the Authority lacks competence to perform State aid surveillance in the fisheries sector, which includes both new aid and existing aid schemes. Consequently, the Authority 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, in the fisheries sector in the EFTA States which are Contracting Parties to the EEA.
25. Consequently, it is the Authority’s submission that also the second plea must be dismissed as unfounded.

¹⁷ On page 8, paragraph 6, of the Application.

¹⁸ On page 3, paragraph 2, and page 9, paragraphs 1 and 2, of the Application.

IV. FORM OF ORDER SOUGHT BY THE AUTHORITY

For the reasons set out above, the Authority respectfully requests the Court to:

1. Dismiss the Application as unfounded.
2. Order the Applicant to pay the costs of the proceedings.



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Michael Sánchez Rydelski

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