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ORIGINAL

Bergen, 20 September 2016

Our ref: 03572984-T010

Advocate in charge: Torben Foss

TO THE EFTA COURT

APPLICATION

submitted pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by

MARINE HARVEST ASA

a Norwegian public limited company with its registered office at Sandviksbodene 77A/B, 5035 Bergen, Norway, Norwegian company ID 964 118 191

represented by Advokatfirmaet PricewaterhouseCoopers AS with
Torben Foss, Advocate
and Kjetil Raknerud, Advocate
as Counsel

AGAINST

THE EFTA SURVEILLANCE AUTHORITY

Seeking a declaration that the Authority's decision in Case No. 79116 on 27 July 2016 is based on a wrongful interpretation of the relevant sources of law and documented facts, and consequently shall be declared void. Further seeking a declaration that Authority has the competence and obligation to perform surveillance of state aid to fisheries sector, pursuant to Article 4(1) of Protocol 9 EEA, and that ESAs refusal to do so constitutes an infringement of Article 62.1 of the EEA Agreement.



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1 Introduction

The present application by Marine Harvest ASA (subsequently referred to as "Marine Harvest" or "the Applicant"), seeks the annulment of the decision by the EFTA Surveillance Authority ("ESA") in case 79116 dated 27 July 2016. The Decision is the last in a number of Decisions since 1994¹, in which ESA declines to review whether aid to the production and marketing of fisheries and aquaculture products is compatible with the Agreement on the European Economic Area ("EEA Agreement") with reference to a purported lack of competence. The applicant disagrees with this decision on grounds that will be outlined below.

Annex 1: EFTA Surveillance Authority's decision in case 79116 dated 27 July 2016

Marine Harvest submits that ESA has the necessary competence to carry out such surveillance pursuant to Article 62 of the EEA Agreement, cf. Protocol 26 of the EEA Agreement, and further that ESA is also obliged to carry out such surveillance pursuant to the same article. Accordingly, the decision represents an infringement of ESA's obligations pursuant to Article 62.1 EEA.

In legal terms, the issue essentially involves the interpretation of Protocol 26 of the Agreement, which sets out the competences of the EFTA Surveillance Authority, but does not specifically refer to the fisheries and aquaculture sectors, and which, according to ESAs decision, should be regarded as exhaustive.

The applicant finds this interpretation to add a qualification to this Protocol that is not supported by the objectives and basic provisions of the Agreement, which the Protocol itself enumerates, and seek the Decision annulled.

2 Factual basis/Administrative proceedings

The applicant lodged a formal complaint with ESA on 2 May 2016, together with its wholly owned UK subsidiary Marine Harvest Scotland Ltd., submitting that illegal state aid is granted to the Norwegian fisheries sector through funds managed by the Norwegian Seafood Council, a Norwegian limited company in which the Norwegian Government holds all shares. The complaint was acknowledged by ESA by letter dated 13 May 2016.

Annex 2: Formal complaint lodged 2 May 2016

Annex 3: Letter of acknowledgement dated 13 May 2016

Subsequent to the lodging of the formal complaint, a meeting between Marine Harvest and ESA was held at ESAs premises in Brussels, in which a Marine Harvest representative was present together with legal counsel. Present in the meeting, in support of Marine Harvest, was also a representative from The Federation of Norwegian Industries. ESA were represented by Directors Gjermund Mathisen and Ólafur Einarsson, as well as case handlers Christian Jordal and Charlotte Fornø. The purpose of the meeting was further elaboration of the material and procedural basis for the complaint.

¹ ESA's letter dated 24 March 1994, ESA Decisions 195/96/COL, 176/05/COL and 729/08/COL



The Norwegian government was invited to present its comments on the formal complaint, and such comments were presented in a letter from the Norwegian Ministry of Trade, Industry and Fisheries dated 13 June 2016.

Annex 4: Comments from the Norwegian Ministry of Trade, Industry and Fisheries

In letter dated 27 July 2016, ESA concluded that it lacked the necessary competence and closed the case. This decision is a challengeable Act and may be brought before the EFTA Court in accordance with Article 36(3) SCA.

3 Relevant sources of law

3.1 The EEA Agreement

Article 1(2) EEA outlines the general objectives and principles of the EEA Agreement:

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

- (a) the free movement of goods;*
- (b) the free movement of persons;*
- (c) the free movement of services;*
- (d) the free movement of capital;*
- (e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as*
- (f) closer cooperation in other fields, such as research and development, the environment, education and social policy."*

Article 2(a) concerning the definition of the term "Agreement" for the purposes of the EEA Agreement provides that:

"the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;"

Article 8 EEA concerning the basic principles for free movement of goods provides that:

"1. Free movement of goods between the Contracting Parties shall be established in conformity with the provisions of this Agreement.

2. Unless otherwise specified, Articles 10 to 15, 19, 20 and 25 to 27 shall apply only to products originating in the Contracting Parties.

3. 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."

Article 61 EEA on State Aid provides that:

- "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."*

Article 62 EEA on the specific surveillance in the field of state provides that:

- " 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."*

Article 108(1) EEA on the establishment of a surveillance authority provides that:

"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."

3.2 Protocol 9 to the EEA Agreement

Article 4 of Protocol 9 to the EEA Agreement concerning State Aid in the fisheries sector provides that:

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."*

Article 6 of Protocol 9 to the EEA Agreement concerning the procedure when necessary legislative adaptations were not in place at the time of entry into force of the Agreement, states that:

"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."

The joint declaration on the agreed interpretation of article 4(1) and (2) of protocol 9 on trade in fish and other marine products (hereinafter "Joint Declaration") paragraph 1 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."

The Agreed Minutes of the Negotiations, ad. Protocol 9, states that:

"before the entry into force of the Agreement, the Community and the interested EFTA States shall continue their discussions of legislative adaptations in relation to the issue of transit of fish and fishery products in order to find a satisfactory arrangement;"



3.3 Protocol 26 to the EEA Agreement

Article 1 of Protocol 26 to the EEA Agreement concerning the powers of the EFTA Surveillance Authority provides that:

"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."

3.4 The Surveillance and Court Agreement

Article 5 of the Surveillance and Court Agreement ("SCA") concerning the powers of ESA provides that:

"1. The EFTA Surveillance Authority shall, in accordance with the provisions of this Agreement and the provisions of the EEA Agreement and in order to ensure the proper functioning of the EEA Agreement:

- (a) ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement and this Agreement;*
- (b) ensure the application of the rules of the EEA Agreement on competition;*
- (c) monitor the application of the EEA Agreement by the other Contracting Parties to that Agreement"*

Article 24 SCA concerning the specific powers of ESA in the field of state aid provides that:

"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.

In application of Article 5(2)(b), the EFTA Surveillance Authority shall, in particular, upon the entry into force of this Agreement, adopt acts corresponding to those listed in Annex I."

4 Marine Harvest's submissions

4.1 The starting point: ESA is competent in all fields of the EEA Agreement

It follows from Article 108 EEA that the contracting parties to the EEA Agreement, EU and the EFTA States, sought to establish a surveillance authority with powers and an obligation to ensure that all the obligations in the EEA Agreement are fulfilled by the Contracting Parties. The Protocols, including Protocol 9 EEA, are to be regarded as an integrated part of the Agreement, cf. Article 2(a) EEA.

It is obvious that Article 4 of Protocol 9 EEA contains a clear prohibition against state aid in the fisheries sector. Accordingly, the starting point must be that ESA is both competent and obliged to ensure that the contracting parties fulfill their obligation to abolish state aid in the fisheries sector, as the Protocol itself is an integrated part of the EEA Agreement.

ESAs competence is further outlined in Article 1 of Protocol 26 EEA, referring to, amongst others, Article 1(2) e) EEA, which requires of the Contracting Parties "*the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected*". The latter is a reference that the contested decision opts to exclude.

There is nothing in the Agreement that permits to conclude that the Contracting Parties wanted to exclude fisheries and aquaculture products from this obligation. Accordingly, the clear starting point must be that ESA is competent in all fields of the EEA Agreement – including the fisheries and aquaculture sectors.

Secondly, Article 61 EEA contains a definition of State aid that has a very broad and almost general application in the various economic sectors of a State. It therefore becomes very difficult to understand why ESA has not attempted to establish whether the concept of aid referred to in Article 4.1 of Protocol 9 EEA fits into that definition, rather than *a priori* proceeding in the opposite direction. It is likely that the contracting parties – after having established a set of rights and obligations – did assume that the general system of enforcement should comprise these rights and obligations.

4.2 An exception from ESA's general competence must be clearly specified

On the basis stated in section 4.1 above, it is evident that any exception to the general competence of ESA must be clearly specified. Such exceptions are not to be found concerning the fisheries and aquaculture sectors, neither in the Agreement nor in any Protocols or secondary law.

In the contested decision, ESA argues that state aid in the fisheries sector is excluded from ESA's competence because Article 1 of Protocol 26 does not specifically mention the state aid regulation in Article 4 of Protocol 9 EEA as part of ESA's competence and powers. Said article only mentions the general provisions in Articles 61 to 63 EEA and the sector-specific provisions in Article 49 EEA on Transport and Protocol 14 EEA on trade in coal and steel products.

However, in the applicant's view, the exclusion is natural, as the two specific inclusions – transport and coal/steel – refers to the fact that the two sectors in question also have specific state aid regimes in both the EU and the EEA. No such specific regime exists for the fisheries and aquaculture sectors.

Secondly, the Joint Declaration states that the EFTA states should align their aid systems according to the state aid regulations in Articles 92 and 93 of the EEC Treaty. The applicant assumes that the meaning of the Contracting Parties were 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 the use of the discretionary powers of the two surveillance authorities outlined in paragraph 3 of the same Article is sufficient to give effect to these rules. Hence, the State aid rules pertaining to fisheries and aquaculture corresponds with the definition of aid contained in Article 61 EEA, thus making any specific mention in Protocol 26 redundant.

Thirdly, the reference to Article 62 EEA in Protocol 26 EEA makes it abundantly clear that the obligation keep State aid under a constant review, pertains to:

"[...] all existing systems of State aid in the territories of the Contracting Parties, as well as any plans to grant or alter State aid [...]"

to be carried out:

"[...] as regards the EFTA States by the EFTA Surveillance Authority [...]"

(Emphasis added).

4.3 Protocol 9 EEA does not set up a state aid regime of its own

The Joint Declaration on the agreed interpretation of Article 4(1) and (2) clearly states that any distortion of competition in the fisheries sector should be assessed in the Context of Articles 92 and 93 of the EEC, which has its equivalent in Articles 61 and 62 EEA. Accordingly, the interpretation of Article 4 of Protocol 9 EEA should be in the context of the basic state aid regulations in Articles 61 and 62 EEA. The two further elements to be considered are elements that would be incorporated in the practices and guidelines of the two Surveillance Authorities during the exercise of their discretionary powers emanating from Article 61.3 EEA.

The fact that the EU side had given consent to the EFTA states not taking over the "*acquis communautaire*" implies that no aid elements emanating from Community sources should be copied by the EFTA States.

This is furthermore confirmed by the Joint Declaration on aid granted through the EC Structural Funds or other financial instruments, which provides that such aid shall be in keeping with the provisions on State aid "*of this Agreement*".

It is moreover of considerable significance in this context 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*".² This procedure was repeated several times during the 1990's, but obviously ignored by ESA.

² Cf. OJC 260 of 17.9.94

Hence, it emerges that the Commission was aiming at applying a two-pillar system for surveillance in the fisheries sector, which essentially would rest upon a set of identical material and procedural rules.

4.4 Surveillance of State aid in the fisheries sector is not the competence of the Parties

In the contested decision, ESA argues that state aid in the fisheries sector is a matter that should be assessed by the Contracting parties. ESA finds support for this view in Article 4(3) of Protocol 9 EEA, as well as in the Joint Declaration and several references to "*the Contracting Parties*" in a number of Declarations and Agreed Minutes in the Final Act of the Agreement, which all deal with a general problem arising in the negotiations of the dossier on fisheries.

The Applicant assumes that as the date for the signature of the Agreement was approaching, the negotiators saw a clear need to continue negotiations beyond that date in the hope of finding solutions before the entry into force of the Agreement. These issues were first and foremost Article 6 of protocol 9 EEA, where the EU side demands a verification that the legislative adaptations in the EFTA states should have been effected to their satisfaction at the time of the entry into force of the Agreement. Failing that, the issues would be brought before the EEA Committee under procedures that eventually could result in rebalancing measures. The Joint Declaration on Article 4 (1) and (2) relates exclusively to that review which ended favorably.

However, a disagreement had arisen on the interpretation of Article 5 in relation to transit of landed goods in Norwegian harbors, which was not to be resolved in the context of the EEA negotiations, cf. the agreed minutes Ad Protocol 9. Similarly, the agreement between the Contracting Parties to follow-up on the intentions of Protocol 13 with regard to anti-dumping and countervailing duties referred to in Article 4.3 of Protocol 9 were not to succeed.

It emerges consequently that in all instances invoked by ESA, the functions of the Contracting Parties were all related to ongoing negotiations. With regard to the statement in the Joint Declaration, ESA seems to put significant emphasis on the following excerpt:

"[...] any distortion of competition is to be assessed by the Contracting Parties [...]"

The applicant submits that this is a case of clear 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, in which the quote reads as follows:

"Selv om EFTA-statene ikke overtar Fellesskapets regelverk om fiskeripolitikken, er det underforstått at når det vises til støtte gitt av statsmidler, skal en mulig konkurransevriddning vurderes i sammenheng med artikkel 92 og 93 i EØF-traktaten og i forhold til relevante bestemmelser i Fellesskapets regelverk om fiskeripolitikken og innholdet i felleserklæringen om artikkel 61 nr. 3 bokstav c) i avtalen."

Annex 5: Excerpt from the Norwegian translation of the Final Act

All in all therefore, when ESA seeks to establish that the Contracting Parties had reserved the function of reviewing the State aid provisions of Article 4(1) of Protocol 9 and the Joint Protocol thereto for themselves, this turns out to be a rather loosely founded and non-documented theory. The Authority cannot have examined available documentation on the history of the EEA negotiations. Both the text of Protocol 9 itself as well as numerous references in the Declarations and Agreed Minutes to the Final

Act, clearly show that Protocol 9, in the form it had when it was drafted and signed, was a snapshot of the status in negotiations that were still in progress. Further, that the Contracting Parties meant to continue their work beyond the signature of the Agreement until the entry into force of the Agreement on still unresolved issues.

There is moreover nothing in the context of the negotiations on the institutional provisions of the Agreement that support ESA's assumption. The Contracting Parties have no institutional place in the 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.

Admittedly, during the revision of the draft EEA Agreement subsequent to Opinion 1/91 from the European Court of Justice³, the EEA Joint Committee was given, in the context of ensuring the homogeneity of EEA law, certain added powers to oversee the work of the EFTA Court and the ESA as reflected in Articles 105 *et seq.* ad 109. Without, however, that these provisions have come to any active use during the lifetime of the Agreement. It is therefore also no reason to believe and no record to support the notion that the EEA Committee should take over these functions in the fisheries sector.

5 Conclusion

On these grounds, Marine Harvest ASA respectfully requests the EFTA 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.

Bergen, 20 September 2016



Torben Foss
Advocate



Kjell Vinnes Raknerud
Advocate

Advocate in charge: Torben Foss

³ ECLI:EU:C:1991:490

6 Schedule of annexes

Annex No.	Title	Mentioned on page
1	<i>EFTA Surveillance Authority's decision in case 79116 dated 27 July 2016</i>	1, 3, 4, 8, 10
2	<i>Formal complaint lodged 2 May 2016</i>	3
3	<i>Letter of acknowledgement dated 13 May 2016</i>	3
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