



E-4/97/99

REPORT FOR THE HEARING

in Case E-4-97

Admissibility

DIRECT ACTION brought under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Norwegian Bankers' Association for annulment of the decision of 9 July 1997 of the EFTA Surveillance Authority.

Norwegian Bankers' Association

and

EFTA Surveillance Authority

I. Facts and procedure

1. By a letter of 7 November 1995, *Den Norske Bankforening* (the Norwegian Bankers' Association, hereinafter variously "NBA" and "the Association") lodged a complaint with the EFTA Surveillance Authority asking the Authority to assess whether the framework conditions for *Husbanken* (The Norwegian State Housing Bank) were in conformity with the Agreement on the European Economic Area ("EEA"). NBA's complaint was based on Article 61 EEA on State aid contending that the arrangement distorted competition to the detriment of credit institutions other than *Husbanken* and that the monopoly of subsidized lending constituted an economic barrier to free trade in financial services and affected cross-border trade. NBA further contended that the arrangement went beyond what was required by the interests of the population groups which the subsidies targeted, and beyond the scope of necessity implicit in Article 59 EEA regarding public undertakings.

2. On 9 July 1997, the EFTA Surveillance Authority adopted the following decision: “The complaint initiated by letter of 7 November 1995 (Doc. No. 95-6439-A), concerning the framework conditions for the Norwegian State Housing Bank and their compatibility with the provisions of the EEA Agreement on State aid and competition, is closed without further action by the Authority. ...” This was followed by a decision on costs. NBA was informed of the decision by means of a copy.

3. By an application of 9 September 1997, received at the Court Registry on the same day, NBA brought an action under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“Surveillance and Court Agreement”) for annulment of the above-mentioned decision. The application is based on the grounds that the EFTA Surveillance Authority did not commence formal proceedings concerning State aid; that the EFTA Surveillance Authority infringed essential procedural requirements by not providing adequate reasons as required by Article 16 of the Surveillance and Court Agreement; and, finally, that the EFTA Surveillance Authority wrongfully interpreted and applied Article 59(2) EEA.

4. Pursuant to Article 36 of Protocol 5 to the Surveillance and Court Agreement (“Statute of the EFTA Court”) the Norwegian Government lodged an application to intervene in support of the EFTA Surveillance Authority. The Application for Intervention and Written Observations were received at the Court Registry on 24 November 1997. By a letter of 14 January 1998, the Court informed the Norwegian Government of its decision to allow the intervention. A Statement in Intervention was received at the Court Registry on 6 February 1998.

5. On 9 December 1997, the EFTA Surveillance Authority lodged at the Court Registry a request for a decision on admissibility pursuant to Article 87 of the Rules of Procedure of the EFTA Court. NBA lodged a statement to that request on 2 February 1998.

6. Pursuant to Article 20 of the Statute of the EFTA Court, the Commission of the European Communities submitted its written observations, received at the Court Registry on 19 December 1997.

7. On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87(4) of the Rules of Procedure, the Court decided that an oral hearing would be held on the request for a decision on admissibility, as a preliminary issue.

II. Form of order sought by the parties as regards admissibility of the Application

8. The claims of the EFTA Surveillance Authority in the request for a decision on the admissibility are that the Court should:

- dismiss the application as inadmissible;
- order NBA to pay the costs.

9. The Norwegian Government, as intervener, supports the EFTA Surveillance Authority's claims and asks the Court:

- principally, to dismiss the application as inadmissible.

10. The claims of NBA as regards admissibility are that the Court should:

- declare the application admissible;
- order the EFTA Surveillance Authority to bear the costs.

III. Legal background

The EEA Agreement

11. Article 59 EEA provides:

“1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.”

12. Article 61(1) and (2) EEA provides:

“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.”

The Surveillance and Court Agreement

13. Article 1 of Protocol 3 to the Surveillance and Court Agreement, on the functions and powers of the EFTA Surveillance Authority in the field of State aid reads as follows:

“1. The EFTA Surveillance Authority shall, in co-operation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.

2. If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

On application by an EFTA State, the EFTA States may, by common accord, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the functioning of the EEA Agreement, in derogation from the

provisions of Article 61 of the EEA Agreement, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the EFTA Surveillance Authority has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the EFTA States shall have the effect of suspending that procedure until the EFTA States, by common accord, have made their attitude known.

If, however, the EFTA States have not made their attitude known within three months of the said application being made, the EFTA Surveillance Authority shall give its decision on the case.

3. The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

IV. Submissions of the parties and the intervener regarding admissibility

1. Reviewability of the decision

14. The *EFTA Surveillance Authority* submits that the case concerns the application for annulment of a decision rejecting a complaint concerning an alleged failure by Norway to comply with Article 59 EEA, in conjunction with other rules of the Agreement, notably Article 61 EEA. The Authority has thus been called upon to take appropriate measures against Norway under Article 59(3) EEA.

15. The EFTA Surveillance Authority submits that considerations underlying the settled case law of the European Court of Justice (“ECJ”) regarding Article 169 EC, which has established that the Commission enjoys absolute discretion in deciding whether or not to initiate infringement procedures and that a refusal to do so is not subject to judicial review, apply with equal force to a rejection of a complaint requesting measures to be taken under Article 90(3) EC. This is further supported by the decision of the Court of First Instance (“CFI”) in Case T-32/93 *Ladbroke v Commission* [1994] ECR II-1015, and the opinion of Advocate General Cosmas in Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing Ltd.*, opinion of 13 May 1997.

16. These considerations are equally valid in the context of Article 59 EEA. Accordingly, the contested decision is not a measure subject to review under Article 36(2) of the Surveillance and Court Agreement.

17. Were the Authority's rejection of the complaint to be viewed as a decision under Protocol 3 to the Surveillance and Court Agreement, and not under Article 59(3) EEA, the EFTA Surveillance Authority submits that the application for annulment would be inadmissible under that scenario as well. The aid has to be considered existing aid within the meaning of Article 61(1) EEA, and this includes both the provisions on the funding of *Husbanken*, which pre-date the entry into force of the EEA Agreement, and the amendments introduced on 1 January 1996. The EFTA Surveillance Authority submits that it is not explicitly contested by the Association that the aid is to be regarded as existing aid.

18. The EFTA Surveillance Authority argues that where existing aid is found not to be compatible with the EEA Agreement, before the Authority proceeds with a formal investigation and decision on the matter, Article 1 of Protocol 3 obliges the EFTA Surveillance Authority to propose appropriate measures to the State concerned. The contested decision would therefore have implied a refusal to propose appropriate measures to Norway under Article 1 of the Protocol. The EFTA Surveillance Authority refers to a judgment of the CFI in Case T-330/94 *Salt Union v Commission* [1996] ECR II-1475, in the context of the corresponding provision of Community law, Article 93(1) EC, where the Court held that a refusal by the Commission to propose such measures is not an act which can be challenged under Article 173 EC.

19. The *Norwegian Government* supports the view of the EFTA Surveillance Authority to the effect that Article 59(3) EEA is the appropriate basis for the EFTA Surveillance Authority's decision. Stressing that Article 59 EEA constitutes a specialized regime for public undertakings, the Government finds that Article 59(3) EEA establishes a particular system of monitoring State obligations with regard to public undertakings and that this procedure is the only appropriate procedure, since Article 59(3) EEA is the only provision preparing for the full assessment by the EFTA Surveillance Authority of all relevant facts and circumstances. The Government further submits that, under Article 59(3) EEA, the EFTA Surveillance Authority enjoys broad discretion in deciding whether or not to initiate infringement proceedings. The Government refers to Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, in this respect, stressing, that no exceptional circumstances are present in the case at hand.

20. The Norwegian Government submits that neither the aim nor the means of the housing policy was altered in 1996, but rather the technical system for fixing the low interest rate was adjusted. Such a technical adjustment does not, in the view of the Government, bring the case within the scope of the notification procedure in Article 1(3) of the Protocol.

21. NBA, submits that the EFTA Surveillance Authority has misinterpreted the complaint, its own decision and the procedural context in interpreting the complaint as a request to take a measure under Article 59(3) EEA. In the view of NBA, the complaint concerned alleged illegal State aid in contravention of Article 61 EEA, to which the derogation in Article 59(2) EEA was not applicable.

22. The exemption in Article 59(2) EEA, which corresponds to Article 90(2) EC, is an exemption from the rules of the EEA Agreement and must be applied in connection with other rules in the Agreement. NBA argues that there is no specific “Article 59(2) procedure”, but the procedural requirements follow from the provisions to which Article 59(2) EEA is connected, in State aid cases Protocol 3 to the Surveillance and Court Agreement, and refers to Case T-106/95 *FFSA and others v Commission* [1997] ECR II-229. Further, the applicability of Article 61 EEA is explicitly stated in “Procedural and Substantive Rules in the Field of State aid” (OJ L 113/19, 4 May 1994) adopted by the Authority on 19 January 1994, paragraphs 20.2 and 20.6.

23. According to NBA, the aid in the present case is “new aid” within the meaning of Article 1(3) of Protocol 3. However, NBA submits that the difference between existing aid and new aid has no legal relevance when considering whether the decision is a reviewable measure. Regardless of an extra preparatory stage in the case of existing aid, i.e. the proposal of appropriate measures to a Member State, NBA submits that nothing in the wording of Article 1(1) compared to Article 1(3) and 1(2) suggests a different supervisory obligation for the EFTA Surveillance Authority. Nor is this supported by case law. In both instances the objective is to arrive at a final decision of the compatibility of the State aid in question.

24. The EFTA Surveillance Authority chose to take a decision at the first stage of the proceedings, with the effect of a final decision. NBA argues that this makes the contested decision a reviewable measure, first because the procedure under Article 1(2) of Protocol 3 was not opened and, secondly, because the decision is a final assessment of the legality of State aid to *Husbanken*.

25. Viewed as a failure to open formal proceedings, the reviewability of the decision follows from Case C-198/91 *Cook v Commission* [1993] ECR I-2487. The review by the Court is the more warranted in this case as incomplete facts and

insufficient answers from Norwegian authorities ought to have given rise to serious difficulties in determining whether the derogation under Article 59(2) EEA was applicable and, consequently, whether the aid in question was compatible with the EEA rules.

26. NBA distinguishes the case at hand from *Salt Union v Commission* (cited above) emphasizing that the explicit request in that case was to propose appropriate measures pursuant to Article 93(1) EC. NBA submits that the judgment should be given a limited application, closely linked to the specific complaint and action invoked. The case cannot, in the view of NBA, be seen as overruling *Cook v Commission* (cited above).

27. The decision is a final assessment of the case with definitive legal effects and is to be considered a reviewable measure. Reference is made to *FFSA and others v Commission* (cited above) and Case C-313/90 *CIRFS and others v Commission* [1993] ECR I-1125, in which a decision by the Commission not to commence the procedure under Article 93(2) EC was considered to be a final decision and not only a preparatory measure and therefore reviewable under Article 173 EC. The question of admissibility was not raised in Case T-471/93 *Tiercé Ladbroke v Commission* [1995] ECR II-2537.

28. Alternatively, NBA submits that, in the event that its complaint is interpreted as a request to the EFTA Surveillance Authority to take appropriate measures against Norway under Article 59(3) EEA, the decision is a measure subject to review under Article 36(2) of the Surveillance and Court Agreement.

29. The case at hand concerns framework conditions and contributions to a particular entity, *Husbanken*, by political decisions taken each year by the Norwegian Parliament, and not legislation of general application. NBA distinguishes *Ladbroke v Commission* (cited above) from the present case and contests the view of the EFTA Surveillance Authority that a rejection of a complaint requesting measures under Article 90(3) EC is to be viewed in the same light as a refusal to take action under Article 169 EC. NBA refers to *Commission and France v Ladbroke Racing Ltd.*, referred to by the EFTA Surveillance Authority, contesting the EFTA Surveillance Authority's interpretation of the Advocate General's opinion. NBA further refers to the opinion of Advocate General La Pergola in *Bundesverband der Bilanzbuchhalter v Commission* (cited above), where he distinguishes between Article 90(3) EC and Article 169 EC.

30. NBA points out that the legal situation is not settled. NBA further points out that the difference between Article 59(3) EEA and Article 90(2) EC is significant when it comes to proposing "appropriate measures" vis-à-vis "appropriate directives or decisions", as the power conferred on the Authority to

propose measures of general scope is very limited. NBA refers to joined cases C-48/90 and C-66/90, *Netherlands and others v Commission* [1992] ECR I-565, paragraphs 31, 32 and 43, in support of the view that the powers of the Commission under Article 90(3) EC are comparable with its powers under Article 93 EC. NBA concludes that the EFTA Surveillance Authority's principal argument for the decision not being reviewable is not valid, either on factual or legal grounds.

2. *Locus standi*

31. The *EFTA Surveillance Authority* submits that the Association is not directly and individually concerned by the decision within the meaning of Article 36(2) of the Surveillance and Court Agreement and does not meet the established criteria that the decision should affect the Association who is not an addressee of the decision by reason of certain attributes peculiar to him or by reason of circumstances in which he is differentiated from all others and thereby individually distinguished (Case C-25/62 *Plaumann v Commission* [1963] ECR 95; C-231/82 *Spijker v Commission* [1983] ECR 2559; C-309/89 *Codorniu v Council* [1994] ECR I 1853; T-2/93 *Air France v Commission* [1994] ECR II 323).

32. Even if an association may have *locus standi* to challenge a decision (i) where the association defends not only the interests of the industry sector concerned but also the individual interests of some or all of its members, which are directly and individually concerned (Joined cases T-447, 448 and 449/93 *AITEC and Others v Commission* [1995] ECR II- 1971) and (ii) where the Association has been so actively involved in the matter at issue that the challenged decision can be seen as also affecting the position of the association itself (Joined Cases 67, 68 and 70/85 *van der Kooy and Others v Commission* [1988] ECR 219; Case E-2/94 *Scottish Salmon Growers Association Ltd. v EFTA Surveillance Authority* [1994-1995] Report of the EFTA Court 59), none of these conditions apply in the present case. NBA's members can not be considered individually concerned by the decision and nothing shows that the Association has been engaged in any such actions with regard to the conditions complained of, i.e. that the Association is affected individually.

33. Where an association has brought a complaint before the Commission and has been active in the examination of the complaint, this is not sufficient to distinguish the association individually from others, where the decision concerned relates to national measures of a general nature (Case T-398/94 *Scheppvaart v Commission* [1996] ECR II 477).

34. If the decision is to be considered as a decision taken under Protocol 3 to the Surveillance and Court Agreement, the EFTA Surveillance Authority acknowledges that ECJ has recognized, in principle, a right for “parties concerned” within the meaning of Article 93(2) EC to challenge decisions approving aid without opening the formal investigation procedure (*Cook v Commission*, cited above; Case C-225/91 *Matra v Commission* [1993] ECR I 3203). “Parties concerned” are, according to the case law of ECJ, “persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations” (Case C-323/82 *Intermills v Commission* [1982] ECR 3809; *Matra v Commission*, cited above).

35. However, the EFTA Surveillance Authority argues that this does not change the conclusion already reached to the effect that NBA does not have *locus standi* in the present case. The scope of the rulings have been narrowed down by the Court of First Instance in *Scheppvaart BV v Commission* (cited above), in which the rulings were found to relate to approval of “individual aids” and could not in the circumstances be considered decisive with regard to a general aid scheme.

36. Finally, the facts of the present case warrant no legitimate interest by NBA or the association’s members in having the Court review the decision, as any change in the competitive situation of the members is not dependent on the abolition of State aid to *Husbanken*, but on the alternative arrangements for providing housing subsidies chosen by the Norwegian authorities.

37. The *Norwegian Government* supports the submission that the Association does not have *locus standi*. The Government refers to the case law of ECJ, and in particular to the rule that, under EC law, cases will be admissible only when a decision is addressed to an organisation or it is affected directly in its capacity as negotiator and not only its members (*CIRFS and others v Commission*, cited above). The Government distinguishes the *Scottish Salmon Growers* case (cited above) from the present case, pointing out the involvement of that association in economic activities.

38. *NBA* submits that the association is entitled to challenge the decision pursuant to Article 36(2) of the Surveillance and Court Agreement. If the decision is viewed as a failure to initiate formal investigation proceedings, *NBA* stresses that the ECJ has held that the corresponding Article 173(4) EC must not be interpreted strictly (*Plaumann v Commission*, cited above) and that “the parties concerned” within the meaning of Article 93(2) EC have the right to contest the decision (*Cook v Commission*, *Matra v Commission*, cf. also *Intermills v Commission*, all cited above). *NBA* points out that the members of the association are in direct competition with *Husbanken* on the market for first priority mortgage

loans to new dwellings, the definition of “party concerned” expressly refers to trade associations and the Court of First Instance has recognized an association as a “party concerned” (Case T-380/94 *AIUFFASS and AKT v Commission* [1996] ECR II 2169).

39. Seen as a decision involving final assessment of the legality of State aid to *Husbanken*, NBA submits that the Association is directly and individually concerned by the decision within the meaning of Article 36(2) of the Surveillance and Court Agreement. NBA states, that the ECJ has in several cases recognized the *locus standi* of an association to challenge a decision and refers to recent cases where an association’s standing to initiate court proceedings has not been contested (*Bundesverband der Bilanzbuchhalter v Commission, FFSA and others v Commission*, cited above).

40. As regards direct and individual concern of the Association, NBA submits that the Association must be regarded as directly concerned and refers to established case law on the point that a decision to find an aid compatible with the Treaty leaves intact all the effects of the contested aid, which the Association had sought abolished or amended; the decision is therefore of direct concern to the Association (*AITEC and others v Commission*, cited above, and Case C-169/84 *COFAZ v Commission* [1986] ECR 391).

41. NBA submits that the Association is individually concerned and fulfils both of the two alternative criteria established by the ECJ, for the standing of an association which is not the addressee of a measure, i.e. (i) “where the association has a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled” or (ii) “where the association, by bringing its action, has substituted itself for one of more of the members whom it represents, on condition that those members were themselves in a position of bring an admissible action”. (Joined Cases T-481/93 and 484/93 *Exporteurs in Lvende Varkens and others v Commission* [1995] ECR II 2941 and *AIUFFASS and AKT v Commission*, cited above).

42. As regards the first criterion, NBA refers to *van der Kooy and others v Commission, CIRFS and others v Commission*, as well as *AIUFFASS and AKT v Commission*, both cited above, and Case T-585/93 *Greenpeace and others v Commission* [1995] ECR II 2205 and a judgment of the EFTA Court in the *Scottish Salmon Growers* case (cited above). NBA stresses that the Association took active part in the administrative procedure culminating in the contested decision; that the Association has continually taken action towards Norwegian authorities on the subject of State aid to *Husbanken*; that the Association has been involved with questions concerning State banks; that the Norwegian Government and authorities often address themselves to the Association instead of the

individual banks; that the Association has negotiated, co-ordinated, managed or taken action on behalf of its members towards Norwegian authorities; that the Association has pursued the general question of changes in legislation to allow ordinary financial institutions to compete with the favourable terms that *Husbanken* offers and that the Association is a full member, and the only Norwegian member, of the Banking Federation of the European Union, and the European Mortgage Federation. NBA submits that the Association's position as interlocutor both of the EFTA Surveillance Authority and the Norwegian authorities is affected by the contested decision and the Association has a particular interest in having the decision reviewed.

43. As regards the second criterion, NBA submits that the member institutions of the Association are in direct competition with *Husbanken* on the market for first priority mortgage loans to new dwellings. Furthermore, examples and calculations show that the market shares and income potential of the members of the Association are affected by the State aid to *Husbanken* to the in that the members of the Association are directly concerned by the decision of the Authority to approve the aid. The Association therefore has standing as a representative of its members. NBA refers to *COFAZ v Commission*, cited above, *AITEC and others v Commission* cited above and Case T-266/94 *Skibsværftforeningen and others v Commission* [1996] ECR II 1399.

44. NBA stresses the importance of the State aid to *Husbanken* for its members by calculations and further states that a taking over of loan portfolios and customers from *Husbanken* would improve the diversification of their balance sheets.

45. NBA submits that *Scheppvaart v Commission*, referred to by the EFTA Surveillance Authority, is distinguishable from the present case on its merits. The present case does not concern the authorization of a general aid scheme but the approval of an individual aid granted to one single undertaking, i.e. *Husbanken*. Moreover, the members of NBA are in direct competition with *Husbanken*.

46. Further, the Association disagrees with the reasoning of the EFTA Surveillance Authority when it states that, according to settled case law, the defence of the common interests of members of an association is not sufficient to establish the admissibility of an action for annulment. NBA submits that all judgments referred to by the EFTA Surveillance Authority in this context concern actions for annulment of measures applicable to an undefined number of recipients within a certain sector. Finally, NBA disagrees with the submission of the EFTA Surveillance Authority to the effect that the Association does not have a legitimate interest in having the Court review the decision. NBA submits that if the action succeeds and the State aid granted to *Husbanken* is found to be illegal, the

Norwegian Government will have to abolish the aid and that this will change the position of the Association's members. Whether or not the Government will choose to abandon housing subsidies totally or maintain a system of housing subsidies, in a form which is not contrary to the EEA Agreement is, in NBA's submission, irrelevant in this context.

Thór Vilhjálmsson
Judge-Rapporteur