



## DECISION OF THE COURT

12 June 1998

*(State Aid - Action for annulment of a decision  
of the EFTA Surveillance Authority – Admissibility)*

In Case E-4/97

**Norwegian Bankers' Association**, represented by Counsel Mr Jonas W. Myhre,  
Hjort Law Office, Oslo, Norway,

*applicant,*

v

**EFTA Surveillance Authority**, represented by Mr Håkan Berglin, Director of the  
Legal and Executive Affairs Department, acting as Agent,

*defendant,*

supported by

**The Kingdom of Norway**, represented by the Office of the Attorney General  
(Civil Affairs), Mr Ingvald Falch, acting as Agent, assisted by Mr Morten Goller,  
acting as Co-agent,

*intervener,*

APPLICATION for a decision on the admissibility of an application 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,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson (Judge-Rapporteur) and Carl Baudenbacher, Judges,

Registrar: Asle Aarbakke, Legal Secretary

having regard to the written pleadings of the parties and the intervener, and

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 April 1998 on the question of admissibility,

gives the following

**Decision**

*Factual background and proceedings before the Court*

- 1 *Den Norske Stats Husbank* (The Norwegian State Housing Bank, hereinafter “*Husbanken*”) is a State institution governed by Act No. 3 of 1 March 1946 relating to the Norwegian State housing bank, as amended (*Lov om Den Norske Stats Husbank*). The role of *Husbanken* is, according to Section 1 of the Act, *inter alia* to provide loans or loan guarantees in return for security in developed property and to channel support from central and local government to housing constructions and other housing projects.
- 2 By a letter of 7 November 1995, *Den Norske Bankforening* (the Norwegian Bankers’ Association, hereinafter “the Association”), an interest organization representing 26 commercial banks and mortgage companies in Norway, lodged a complaint with the EFTA Surveillance Authority, asking that Authority to assess whether the framework conditions for *Husbanken* were in conformity with the Agreement on the European Economic Area (hereinafter “EEA”).
- 3 The Association’s complaint referred to Article 61 EEA on State aid as its legal basis, contending that the arrangement distorted competition to the detriment of credit institutions competing with *Husbanken*, and that the monopoly of subsidized lending constituted an economic barrier to free trade in financial services and affected cross-border trade. The Association 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.

4 On 9 July 1997, the EFTA Surveillance Authority adopted Decision No. 177/97 COL, which concluded as follows:

*“1. 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.*

*2. The Norwegian authorities, the complainant and the European Commission shall be informed by means of a copy of this decision.”*

5 By an application of 9 September 1997, the Association brought an action before the EFTA Court under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter “Surveillance and Court Agreement”) for annulment of that decision.

6 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.

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

8 On 9 December 1997, the EFTA Surveillance Authority lodged at the Court Registry a Request for a decision on the admissibility in accordance with Article 87 of the Rules of Procedure of the EFTA Court. The Association lodged a statement to that request on 2 February 1998.

9 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.

*Form of decision sought by the parties as regards admissibility of the application*

- 10 The EFTA Surveillance Authority requests the Court to dismiss the application as inadmissible and order the Association to pay the costs.
- 11 The Norwegian Government, as intervener, supports the EFTA Surveillance Authority's claims and asks the Court to dismiss the application as inadmissible.
- 12 The Association asks the Court to declare the application admissible and order the EFTA Surveillance Authority to bear the costs.
- 13 At this stage of the proceedings, the Court will rule on the admissibility of the application lodged by the Association. Consequently, the Court must rule on the reviewability of the decision made by the EFTA Surveillance Authority on 9 July 1997 as well as on the question of whether the Association has *locus standi* in the present case.

*Reviewability*

- 14 The *EFTA Surveillance Authority* submits that the case concerns an application for annulment of a decision rejecting a complaint about an alleged failure by Norway to comply with Article 59 EEA, read in conjunction with other provisions of the EEA Agreement, notably Article 61 EEA, through the framework conditions it has in place for *Husbanken*. The EFTA Surveillance Authority submits that it was called upon by the complainant to take appropriate measures against Norway under Article 59(3) EEA. Accordingly, the contested decision is not a measure subject to review under Article 36(2) of the Surveillance and Court Agreement, see, with respect to the corresponding provision in Article 173(4) EC, Case T-32/93 *Ladbroke v Commission* [1994] ECR II-1015.
- 15 At the oral hearing, the EFTA Surveillance Authority emphasized that, in determining admissibility, the nature of the complaint and the contested decision should be the decisive factors. The EFTA Surveillance Authority submits that the complaint concerned the very framework within which *Husbanken* operated, raising issues about essential elements of the policy pursued and the organizational structure for the implementation of the policy, rather than any measures taken by *Husbanken* acting on its own as a competitor on the market. Further, although the complainant alleged illegal State aid, nothing in the complaint suggested that aid was being given in excess of what was necessary for fulfilment of tasks entrusted to *Husbanken*, and the complainant noted that the complaint should be viewed in a broader context than that involving State aid.

- 16 The *Norwegian Government* supports the view of the EFTA Surveillance Authority to the effect that only Article 59(3) EEA provided the appropriate procedure for assessment of the complaint, as the initial complaint concerned the framework conditions of a public undertaking.
- 17 The *Association* argues that Protocol 3 to the Surveillance and Court Agreement sets out the procedural context for the present case. The Protocol is applicable to complaints involving public undertakings which may benefit from the exception under Article 59(2) EEA. The Association refers to Case C-387/92 *Banco Exterior de España* [1994] ECR I-877 and Case T-106/95 *FFSA and others v Commission* [1997] ECR II-229.
- 18 At the oral hearing, the Association emphasized that the background to the application was that the EFTA Surveillance Authority had reached a formal, reasoned decision, which established State aid in contravention of Article 61 EEA, but subject to the derogation in Article 59(2) EEA, and that the decision was taken at a preliminary stage, without a formal procedure being undertaken. The Association argues that the decision to close the case without further action is a reviewable measure, first, because the procedure under Article 1(2) of Protocol 3 was not carried out and, secondly, because the decision is a final assessment of the legality of the State aid provided to *Husbanken*.
- 19 The Association argues that, since the decision by the EFTA Surveillance Authority is to be 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 all 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.
- 20 The Association further contends that 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 (see paragraph 27), 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.
- 21 In answer to this, the EFTA Surveillance Authority submits that the application for annulment is inadmissible even if the decision is viewed as a decision under Protocol 3 to the Surveillance and Court Agreement. Where existing aid is found

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

- 22 At the oral hearing, the EFTA Surveillance Authority further stressed that different procedural rules apply to new and altered aid under Article 1(3), cf. Article 1(2) of Protocol 3, as compared with existing aid, such as in the present case, under Article 1(1), cf. Article 1(2) of Protocol 3, and that case law of the ECJ and CFI was of limited guidance, as every case referred to by the Association was distinguishable from the present case on its merits.
- 23 The *Court* must rule on the question of whether it is possible for a private organization to challenge before it a decision which concerns the framework conditions for *Husbanken*, a public institution which is at the centre of the public policy on housing in Norway.
- 24 It is the role of the EFTA Surveillance Authority to monitor State aid and react where appropriate in the way set out in the EEA and Surveillance and Court Agreements. The Court notes that both the Association’s complaint and the EFTA Surveillance Authority’s decision appear to concern State aid under Article 61 EEA. In the EFTA Surveillance Authority’s decision, Article 59(2) has been used to justify aid which would otherwise be contrary to Article 61, but that does not change the nature of the case. The Association has challenged the decision by presenting arguments that fall under Article 36(1) of the Surveillance and Court Agreement.
- 25 With respect to the procedures to be followed, the Court finds that the case must be viewed as a State aid case to be dealt with pursuant to Article 61 EEA and Protocol 3 to the Surveillance and Court Agreement. The EFTA Surveillance Authority’s decision was taken without Article 1(2) of Protocol 3 to the Surveillance and Court Agreement being applied. This means that no formal notice was given to the parties concerned to submit their comments, even though the file of the case shows that certain contacts had been made both with the Norwegian Government and the Association.

26 Even if the Court does not have to rule at this stage on whether that procedure was essential in the present case, it would seem to be so, taking into account the complicated nature of the case. The EFTA Surveillance Authority has exempted the framework conditions for *Husbanken* from the application of the State aid rules of the Agreement under Article 59(2) EEA. The decision to close the file amounts to a final assessment of the legality of State aid to *Husbanken*. The system of State aid control as provided for in the EEA Agreement requires that the Court can review a decision such as the one at hand. Those intended to benefit from the procedural guarantees in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement may secure compliance therewith only if they can challenge the decision taken by the EFTA Surveillance Authority before the Court. Accordingly, it is reviewable, see most recently Case C-367/95P *Commission and others v Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) and Brinks's France SARL*, Judgment of 2 April 1998 (not yet reported), at paragraph 47.

*Locus standi*

27 *The Association* refers to Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and others v Commission* [1995] ECR II-1971, and Case C-169/84, *COFAZ v Commission* [1986] ECR 391, to the effect that a decision to find an aid compatible with the Treaty leaves intact all the effects of the contested aid which the applicant sought to abolish or amend and is therefore of direct concern to the applicant. The Association further claims that it is individually concerned, as it meets both of two alternative criteria, i.e. has itself particular interest and represents members who could have brought an admissible action.

28 The *EFTA Surveillance Authority* has stressed that case law establishing the direct and individual concern of individuals or associations is limited to situations where there is a homogeneous and limited group of competitors, operating in a narrow and well-defined market (see Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and others v Commission*, cited above, and Case T-266/94, *Skibsværftforeningen and others v Commission* [1996] ECR II-1399, or where an association has a particular interest in the market sector (see Case E-2/94, *Scottish Salmon Growers v EFTA Surveillance Authority* [1994-1995] Report of the EFTA Court 59). The *EFTA Surveillance Authority* contends that the Association has no particular interest in the housing sector at which the State funds involved are targeted, and that the market is characterized by a great number of players and different categories of players.

29 At the oral hearing, the *Norwegian Government* emphasised that mortgage housing loans were also provided by a large number of Savings banks, which are

not members of the Association, and that these banks held a larger market share in this market than the members of the Association. The Norwegian Government estimated the market share of Husbanken in this market to be 14-15%.

- 30 The *Court* notes that, according to the case law of the Court of Justice of the European Communities and the Court of First Instance, “parties concerned” within the meaning of Article 93(2) EC are those persons, undertakings or associations whose interests might be affected by the grant of an aid, in particular competing undertakings and trade associations, see Case C-225/91 *Matra v Commission* [1993] ECR I-3202, at paragraph 18, Case C-328/82 *Intermills v Commission* [1984] ECR 3809, at paragraph 16 and Case C-198/91 *Cook v Commission* (cited above).
- 31 The cited judgments are a specific enunciation of a consistent application of Article 173 EC, whereby persons other than those to whom a decision is addressed may claim to be concerned within the meaning of that provision only if the decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons.
- 32 The Court further notes that the Association emphasizes the competitive disadvantage of its members with regard to first priority mortgage loans, a disadvantage which, according to the Association, is attributable directly to the subsidies channelled through *Husbanken*. The complaint to the EFTA Surveillance Authority, the investigation of which culminated in the disputed decision, also emphasized this issue.
- 33 It is not for the Court to make a definitive finding at the present stage on the competitive relationship between the banks and mortgage companies represented by the Association and *Husbanken*, nor on their market share in providing first priority loans and other mortgage loans on the Norwegian market. It is sufficient to note that the Court finds that the Association has shown that the decision of the EFTA Surveillance Authority may affect the legitimate interests of the members of the Association, by affecting their position on the market.
- 34 Further, the Court is of the opinion that even in the absence of provisions providing for a procedural system for complaints regarding State aid, an association’s involvement in the proceedings before the EFTA Surveillance Authority, as in the case at hand may, in certain circumstances, warrant a standing for that association to bring an action for annulment before the Court. This is particularly so where the association is, as a representative of its members, at the origin of a complaint to the EFTA Surveillance Authority, as is the case here, and where its views were heard during the procedure and information was gathered from the State in question regarding the complaint from the Association (see in particular Case C-169/84, *COFAZ v Commission*, cited above). This may equally

apply at the earlier stages of the procedure (see Case C-367/95 P, *Commission and others v Sytraval and Brinks's France SARL*, cited above) and in particular as, in the present case, where a decision effectively is a decision not to object to the State aid complained of.

- 35 The Court finally notes that in circumstances such as in the case at hand, any other conclusion would presumably preclude judicial review of the decision of the EFTA Surveillance Authority under Article 36 of the Surveillance and Court Agreement and would thus deprive the Court of its powers to exercise its functions of judicial control (see Case E-2/94, *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above).
- 36 The Court has decided to reserve its decision on costs until its final judgment.

On those grounds,

THE COURT,

before giving judgment on the substance of the case, hereby:

1. **Declares that the application is admissible;**
2. **Reserves the decision on costs.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Delivered in open court in Luxembourg on 12 June 1998.

Bjørn Haug  
President

Asle Aarbakke  
Registrar  
Legal Secretary