



REPORT FOR THE HEARING
in Case E-4/97
- revised ¹ -

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 in the case between

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 "the Applicant" 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, hereinafter "Husbanken") were in conformity with the Agreement on the European Economic Area ("EEA"). The complaint was based on Article 61 EEA on State aid and contended that the arrangement distorted competition to the detriment of credit institutions in competition with Husbanken and that the monopoly on subsidized lending constituted an economic barrier to free trade in financial services and affected cross-border trade. The

¹ Amendments in paragraphs 4, 28, 30 and 65.

Association further contended that the arrangement went beyond what was required by the interests of the population groups targeted by the subsidies 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 (hereinafter the “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. (...)”

3. In the decision, the EFTA Surveillance Authority rejected the submission of the Norwegian Government to the effect that privileges afforded to Husbanken as an instrument of the public housing policy were not governed by Articles 59 and 61 EEA. Regarding the assessment under Article 61 EEA, the contested decision states the following:

“...for a measure to constitute State aid in the meaning of Article 61(1) EEA it must

1. be granted through State resources;
2. distort or threaten to distort competition by favouring certain undertakings or the production of certain goods;
3. affect trade between Contracting Parties.

It is clear that the first condition is fulfilled in the present case, as Husbanken’s framework conditions are established by the State and its financial means are derived from State resources.

Apart from a very small equity, consisting of risk and loss funds, Husbanken’s core activity of providing loans for housing purposes is based on borrowings, which are obtained exclusively from the State(...) Husbanken, being a government agency financed by the State, enjoys the borrowing terms and favourable credit rating of the State. (...) Husbanken also in other ways clearly enjoys the financial backing of the State Treasury, for instance by way of budget appropriations, if needed, to cover the losses it incurs on loans as well as administrative expenses. It is therefore clear that as a State institution, Husbanken enjoys financial advantages of a kind not afforded to other providers of credit for housing purposes and which fulfil the condition referred to in point 2 above.(...) ...the Authority does not have reason to question the complainant’s contention that potential distortions of competition have not been removed.
(...)

It ... cannot be ruled out that the financial advantages enjoyed by Husbanken may, at least potentially, affect trade between Contracting Parties to the EEA Agreement, although in practice such effects are likely to be limited.”

4. As regards the derogation under Article 59(2) EEA, the decision is worded as follows:

“Article 59(2) in other words permits States parties to the EEA Agreement to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights or other privileges which may hinder the application of the rules of the Agreement on competition and State aid, in so far as restrictions on competition, or even the exclusion of all competition by other economic operators, are necessary to ensure the performance of the particular tasks assigned to the undertakings concerned.

(...)

In view of the above facts and considerations, and given that there is no legislation at the EEA level providing a uniform definition of the boundaries of a social housing policy and public housing finance services, the Authority has no grounds to dispute that Husbanken is entrusted with the operation of services of general economic interest.

(...)

Husbanken is not a credit institution in the meaning of the relevant EEA legislation. It is not authorised to accept deposits from the public and therefore does not compete with credit institutions in that area. It does not engage in other financial services, e.g. payment intermediation, outside the scope of its core activity to provide credit for housing purposes.

Given that the Norwegian authorities have entrusted Husbanken with the operation of loan schemes, whose interest rate terms are fixed by the Norwegian parliament, and these loans being considered to form an integral part the Government’s social housing policy, *inter alia* by virtue of their nation-wide and universal availability and on uniform terms, irrespective of the economic situation of the recipients, the funding by the State to service these loan schemes must be deemed to be necessary for the performance of these services of general economic interest. This funding is earmarked to allow Husbanken to annually meet the lending quotas, also determined by the Norwegian parliament, of its individual loan schemes, which as stated above are not applied to go beyond Husbanken’s core housing finance activity. The funding by the State Treasury is therefore genuinely needed to allow Husbanken to perform the particular tasks assigned to it and does not allow the undertaking to compete in lending activity outside its statutory functions.

(...)

In this context it must be acknowledged that in most developed countries, including most States parties to the EEA Agreement, governments, both at central and local level, intervene in housing and housing finance markets. This intervention takes different forms from one State to another, depending *inter alia* on certain realities in the housing markets, in particular the pattern of housing tenure, and the objectives of the housing policy of the governments concerned.
(...)

It shall furthermore be noted that the Authority is aware of no relevant case-law, according to which the EC Court of Justice has ruled on the compatibility with the State aid provisions of the EC Treaty of support granted through any of the numerous publicly supported housing finance institutions which exist in the EU Member States, or for that matter other types of institutions, which serve as instruments of public housing policy, nor is the Authority aware of any decision whereby the EC Commission has intervened to prohibit or limit the granting of such support.

As concerns assessment of whether restrictions or distortions of competition due to special measures in favour of public undertakings can be justified on the basis of the second paragraph of Article 59, the last sentence of that paragraph provides that “The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties”. This implies that the assessment of the derogation shall be done in an EEA context, i.e. it is subject to a proviso intended to safeguard the interests of other Contracting Parties. Whereas it clearly does not require that trade effects be non-existent, measures involving major trade effects are excluded. As has been concluded above the Authority considers that although it cannot be excluded that the measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited.

For the above reasons the Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to allow that undertaking to perform the services of general economic interest with which it has been entrusted.”

5. By an application of 9 September 1997, received at the Court Registry on the same day, the Association 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.

6. 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.

7. 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.

8. On 9 December 1997, the EFTA Surveillance Authority lodged at the Court Registry a request pursuant to Article 87 of the Rules of Procedure of the EFTA Court, asking for the application to be dismissed as inadmissible. After hearing oral argument from the parties on 30 April 1998 on the question of admissibility, the Court, in a decision of 12 June 1998, declared the application admissible and decided to reserve the decision on costs.

9. The Defence of the EFTA Surveillance Authority was received at the Court Registry on 23 July 1998, a Reply from the Association on 27 August 1998 and the Rejoinder from the EFTA Surveillance Authority on 2 October 1998. By a letter of 7 September 1998, the Court requested supplementary information on certain issues from the intervener, the Government of Norway, and asked the parties to give supplementary or rebuttal information regarding the information from the intervener, as the parties found necessary. The supplementary information from the Government of Norway was received at the Court Registry on 16 September 1998, and remarks to the supplementary information from the Association were received at the Court Registry on 1 October 1998.

II. Form of order sought by the parties

10. The Applicant claims that the EFTA Court should:
- annul the Decision of the EFTA Surveillance Authority of 9 July 1997 (Dec. No. 17/97), and
 - order the EFTA Surveillance Authority to bear the costs.

11. The EFTA Surveillance Authority contends that the EFTA Court should:
 - dismiss the application as unfounded, and
 - order the Applicant to pay the costs.
12. The Government of Norway, intervener in support of the EFTA Surveillance Authority, submits that the EFTA Court should:
 - dismiss the application.

III. Legal background

The EEA Agreement

13. 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.”

14. 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

15. 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.”

National legislation

16. The framework conditions for Husbanken are *inter alia* laid down in Act No. 3 of 1 March 1946 on the Norwegian State Housing Bank, as amended. The following provisions outline the object of Husbanken, its funding, its lending practices and the possibility of housing allowances:

“Chapter I. Objects and organisation

Section 1. The objects of the Norwegian State Housing Bank are:

- a) to provide mortgage loans or guarantees for loans on collateral security in developed properties,*
- b) to arrange funding from the State and local authorities for the building of housing and other related purposes,*
- c) to grant or guarantee building loans under Section 16.*

If special reasons dictate, the Bank may provide mortgage loans or guarantees for loans without collateral security in developed property subject to further regulations issued by the Ministry. The Bank can demand other types of security for such loans. The Ministry can lay down regulations determining to what extent Ch. IV shall take effect with respect to such loans and guarantees.

In special cases, the Housing Bank may also be assigned tasks other than those stated above. The Ministry can provide specific guidelines or regulations governing such operations.

Section 2. The Bank has primary capital of twenty million [Norwegian] kroner, which shall be contributed by the State.

(...)

Chapter II. The Bank’s funding

Section 10. The Bank can receive funding from the Treasury.

(...)

Chapter IV. The Bank's lending practices

*Section 13. The King can set limits for the Bank's lending growth and for the mortgage loans it grants. Special limits may be set for lending for special purposes and in certain parts of the country.
(...)*

Section 16. The Bank's mortgage loans or loans guaranteed by the Bank shall have a first mortgage on the developed property.

If conditions so dictate, the Bank may however give mortgage loans or guarantees for loans having priority after other loans or charges.

In special circumstances the Bank may also provide building loans for a sum no greater than the sum of the loans approved or guaranteed by the Bank, with the possible addition of loans from others with foregoing priority.

With respect to guarantees as stated in the first paragraph, the provisions under Sections 13, 13 a and 15 shall apply correspondingly.

*Further rules governing the mortgage loans and guarantee schemes are laid down in regulations under Section 26.
(...)*

Chapter V. Housing allowances

Section 23. According to guidelines issued by the Storting, housing allowances may be paid to persons living in certain categories of property if they are experiencing particular hardship in meeting their living expenses.

*The cost of housing allowances shall be met by the State and if required by the local authorities subject to guidelines issued by the Storting. (...)
(...)*

Chapter VI. Miscellaneous provisions

(...)

Section. 26 The Ministry shall issue further regulations governing the Bank's activities. The regulations can include provisions concerning the local authorities' treatment of matters pertaining to the Housing Bank.

17. Pursuant to Act 3 of 1 March 1946, Sections 1 and 26, general regulations for the Norwegian State Housing Bank (*Alminnelige forskrifter for Den Norske Stats Husbank*) have been adopted, as well as specific regulations relating to construction loans (*Forskrift om oppføringslån fra Den Norske Stats Husbank*) of 20 December 1995, loans for sheltered housing, nursing homes, etc. and other care facilities (*Forskrift om lån til omsorgsboliger, sykehjemsplasser og lokaler for omsorgstiltak fra Den Norske Stats Husbank*) of 29 January 1998, loans for day care centres (*Forskrift om barnahagelån fra Den Norske Stats Husbank*) of 20 December 1995, improvement loans (*Forskrift om utbedringslån fra Den Norske*

Stats Husbank) of 20 December 1995, first home loans (*Forskrift om etableringslån fra Den Norske Stats Husbank*) of 20 December 1995 and purchase loans (*Forskrift om kjøpslån fra den Norske Stats Husbank*) of 20 December 1995. Pursuant to the same provisions of the Act, regulations have been adopted relating to housing grants (*Forskrift om boligtilskudd fra Den Norske Stats Husbank*) of 20 December 1995, urban renewal grants (*Forskrift om tilskudd til byfornyelse fra Den Norske Stats Husbank*) of 20 December 1995, start-up grants for housing designed for 24-hour nursing and care services (sheltered housing) and nursing home places (*Forskrift om tilskudd til omsorgsboliger og sykehjemsplasser og tilskudd til kompensasjon for utgifter til renter og avdrag fra Den Norske Stats Husbank*) of 29 January 1998, grants to improve housing quality (*Forskrift om tilskudd til boligkvalitet fra Den Norske Stats Husbank*) of 20 December 1995 and grants for development and information (*Forskrift om tilskudd til utviklings- og informasjonsarbeid fra Den Norske Stats Husbank*) of 20 December 1995. Detailed guidelines are issued by Husbanken regarding each of the categories of loans and grants.

IV. Submissions of the Parties

18. The Applicant submits that the contested Decision should be annulled, partly because essential procedural requirements have not been fulfilled, the Authority has based its Decision on incorrect and/or incomplete facts, and the Authority has committed a manifest error in the assessment of those facts in interpreting the derogation in Article 59(2) EEA. The intervener, the Government of Norway, the EFTA Surveillance Authority and the Commission all submit, on the contrary, that such an error of assessment and procedural errors have not been substantiated.

Scope of review

19. The *EFTA Surveillance Authority* and the *Commission of the European Communities* submit that the scope of judicial review by the Court is limited with respect to a decision such as the one at hand. The Commission refers to Case C-225/91 *Matra v Commission* [1993] ECR I-3203 and Case C-56/93 *Belgium v Commission* [1996] ECR I-723, to the effect that the Court cannot substitute its own assessment for that of the Commission or, in the case at hand, the EFTA Surveillance Authority, and that the Court must confine itself to verifying whether the Commission, in the present case the EFTA Surveillance Authority, complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.

(See also Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, para. 25; Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; Case C-174/87 *Ricoh v Council* [1992] ECR I-1335, para. 68; and Case C-225/91 *Matra v Commission*, cited above, para. 25).

20. The EFTA Surveillance Authority emphasizes the margin of discretion, which is even wider under Article 59(2) EEA than under Article 61 EEA, regard being had to the degree of latitude allowed the Member States with regard to Article 90(2) EC, cf. Case T-32/93 *Ladbroke v Commission* [1994] ECR II-1015, para. 37. The EFTA Surveillance Authority further points out that an assessment of a fact that ultimately has not had any decisive effect on the outcome of the examination of a case should not entail the annulment of a decision, even if it is shown to have been incorrect (Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229, para. 199; and Case C-174/87 *Ricoh v Council* [1992] ECR I-1335, para. 74).

21. The *Applicant* does not contest that it has been established through case law that the Authority enjoys a wide discretion in assessing the compatibility of State aid with the EEA Agreement, in particular when it comes to assessing the aid in the context of Article 59(2) EEA. While conceding on the EFTA Surveillance Authority's submission about an assessment of a fact that ultimately has not had a decisive effect on the outcome, the Applicant maintains that errors of several elements of fact, each of which alone would not qualify as having the decisive effect on the outcome, may cumulatively have such an effect and may lead to annulment.

Opening of proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement

22. The *Applicant* submits that the EFTA Surveillance Authority has infringed a procedural requirement by not opening the formal proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement (hereinafter "the Protocol"). The Applicant bases this plea on the grounds that the EFTA Surveillance Authority found the aid in question to constitute State aid within the meaning of Article 61 EEA. Furthermore, the Applicant submits that the EFTA Surveillance Authority must be obliged to initiate such formal proceedings when it considers permitting the State aid under Article 59(2) EEA, as that Article provides for a limited derogation from the rules on State aid, calling for the opportunity of the parties to be heard before a decision is taken.

23. The complex question whether Husbanken was to be considered an entity entrusted with the services of general economic interest and the possible

application of the derogation in Article 59(2) EEA did, in the Applicant's view, necessitate the formal proceedings (Case C-179/90 *Merci Convenzionali Porto de Genova* [1991] ECR I-5889, para. 27; Case T-106/95 *FFSA and Others v Commission*, cited above). As examples of cases which give rise to difficulties of assessment, the Applicant refers to Commission Cases C-64/97 – possible aid to West Deutsche Landesbank-Girocentrale (West LB) (OJ C140, 5.5. 1998, p. 9) and Case C-88/97 Aid to the Crédit Mutuel (OJ C 146, 12.5.1998, p. 6), in particular the conclusion of the Commission in the latter case, in VII at page 16. The Applicant further refers to Case C-89/97 (NN 144/07) (OJ 1998 C 144, 9 May 1998).

24. The Applicant submits that it is for the Court to ascertain whether the factual and legal circumstances would or ought to have given rise to difficulties. The Applicant submits that the EFTA Surveillance Authority has misinterpreted the requirements on applying the derogation in Article 59(2) EEA, as there was no testing of the possible special characteristics of Husbanken's services as compared with the general economic interest of other economic activities. This misinterpretation, the Applicant submits, influenced the Authority's evaluation of whether or not to open Article 1(2) proceedings.

25. As an alternative argument, the Applicant maintains its view that the aid was "new aid", which should have been notified. This is so, according to the Applicant, due to changes in Husbanken's loan system introduced on 1 January 1996 (from which time interest rates were to follow the interest rate on government securities, with an added margin of 0.5%, instead of being determined by Husbanken's resolutions) followed by substantial changes made in the system of funding of Husbanken in 1997. The Applicant argues that the EFTA Surveillance Authority should have opened the formal proceedings to investigate the legality of the "new aid". The Applicant claims that Case C-44/93 *Namur-les Assurances du Crédit SA v OND* [1994] ECR I-3829 supports its submissions that the aid was "new aid".

26. The Applicant further notes that the EFTA Surveillance Authority does not comment on the aim of the aid, as of 1996, to put Husbanken in a preferable position vis-à-vis its competitors in the commercial market for non-means-tested, first-priority mortgage loans. Nor has the EFTA Surveillance Authority commented on the fact that, as of 1997, the maximum amounts allocated for ordinary loans and means-tested loans were combined, leaving it to Husbanken, in principle, to use the majority of the total means on the market for providing ordinary, non-means-tested, first-priority mortgage loans.

27. The Applicant maintains that the proceedings under the Protocol are the appropriate ones and not Article 59(3) EEA as argued by the EFTA Surveillance Authority.

28. The *EFTA Surveillance Authority* adheres to the view that the possibility of opening a formal investigation under Article 1(2) of the Protocol applies both with regard to new aid and existing aid; however, the conditions for opening the proceedings are different. Referring to the system established in Article 1(1) of the Protocol for the review of existing aid and to Case T-330/94 *Salt Union v Commission* [1996] ECR II-1475, the EFTA Surveillance Authority maintains that, after only a preliminary examination of existing aid and before addressing appropriate measures to the State, it is not within the powers of the EFTA Surveillance Authority to open proceedings under Article 1(2) of the Protocol. Moreover, if appropriate measures are proposed, it will depend on the attitude of the State concerned to the measures proposed whether the Authority will be in a position to open proceedings. For an illustration in practice to the matter, the EFTA Surveillance Authority refers to its own decision on the regionally differentiated social security contributions in Norway (Decision No. 165/98/COL of 2 July 1998) and a similar case before the Commission against Sweden.

29. The EFTA Surveillance Authority disagrees with the Applicant's submissions to the effect that the aid is "new aid", referring to it as common ground that the aid involved is not the benefits offered by Husbanken to its clients, but lies in the way in which Husbanken's activities are financed by the State treasury, notably by means of preferential borrowing terms for Husbanken's loans from the State. The principles for the financing arrangements were laid down by the Storting (parliament) in the context of the national and fiscal budgets for 1980 and 1981 and have not been changed since. Accordingly, the aid predates the EEA Agreement and constitutes existing aid within the meaning of Article 1(1) of the Protocol. Further, the amendments introduced on 1 January 1996 did not concern the principles for the financing arrangements for Husbanken, but rather the lending terms for loans offered by the bank to its clients. Admittedly, due to the way in which the financing of Husbanken is arranged, the total amount of aid will be affected indirectly by the amount of loans granted by the bank, which in turn may well be affected by the bank's lending terms. An amendment of the lending terms may indirectly affect the total amount of aid. However, such a potential effect on the aid paid out does not, according to the EFTA Surveillance Authority, amount to an alteration of the aid for the purposes of Article 1(3) of the Protocol, as long as the system remains the same (Case C-44/93 *Namur-Les Assurances du Crédit SA v OND*, cited above, para. 28.)

30. In its rejoinder, the EFTA Surveillance Authority states that modifications introduced in 1997 were not considered in the Decision. This was partly because

the fact-finding part of the examination was completed in October 1996, there were no indications at the time either from the Applicant or the Government that the amendments would constitute new or altered aid, and any possible changes would, in any event, be considered by the Authority in its review of existing aid. The EFTA Surveillance Authority submits that the contested Decision concerns the framework conditions for Husbanken, as last modified by the 1996 amendments of its lending terms. Consequently, the question whether the amendments introduced in the context of the national budget for 1997 constitute new or altered aid falls outside the scope of review to be made by the Court in the present case. The EFTA Surveillance Authority adds, “for the sake of order”, that the information submitted on the matter by the applicant and the Norwegian Government suffices to show that the modifications introduced in 1997 do not at all affect in substance the financial arrangements for Husbanken found to involve State aid, but only the way in which these arrangements are technically shown in the State budget.

31. The EFTA Surveillance Authority submits two further grounds in support of its view that there was no obligation on the part of the EFTA Surveillance Authority to open the formal proceedings. These grounds apply irrespectively of whether the aid was existing aid or new aid.

32. First, the obligation arises when the Authority considers the aid to be incompatible with the EEA Agreement or where the circumstances give rise to serious doubts as to the compatibility of the aid. The complexity of the case is thus not the decisive criteria for opening formal proceedings, as illustrated by Case T-106/95 *FFSA v Commission*, cited above.

33. The EFTA Surveillance Authority maintains that, at the end of the preliminary examination, there was no finding by the Authority that the aid was incompatible with the EEA Agreement. An obligation to open formal proceedings could only be established if it could be said that the Authority still should have been in serious doubt as to the compatibility of the aid at the end of the examination. The EFTA Surveillance Authority disagrees with the Applicant’s submissions to the effect that this was the case, as well as submissions to the effect that there were incomplete facts and insufficient and unclear information from the Norwegian authorities. The EFTA Surveillance Authority maintains that the examination carried out and the information available to the Authority at the end of that examination were adequate and sufficient to allow for the case to be decided upon without there being any need for further investigations.

34. The examination included contacts with the Applicant, the Government and an exchange of views with the Commission; there was ample and consistent documentation on the housing policy involved and the tasks entrusted to

Husbanken; detailed information regarding financing of Husbanken's activities allowing for reasonably safe conclusions on the purpose and nature of the aid, as well as on the question on the possibility of cross-subsidies. Further, the EFTA Surveillance Authority examined a variety of statistics, studies and reports on the situation in the EEA with regard to housing finance and cross-border operations regarding mortgage lending. The EFTA Surveillance Authority emphasizes that it was indeed relevant and necessary to take into account the view of the Norwegian authorities to the effect that Husbanken is an instrument for the implementation of social housing policy. This alone, however, would not have been sufficient to justify the conclusion. The EFTA Surveillance Authority submits that it is evident from the Decision itself that the Authority's finding was not based on this observation alone.

35. The EFTA Surveillance Authority observes that, in cases of this kind, there may be issues that give rise to such serious difficulties that formal investigation proceedings are called for, such as the possibility of cross-subsidization. Such difficulties were not present in the case at hand, as it was clear already on the basis of the legislative and administrative framework that the funds at issue were earmarked only to allow Husbanken to carry out the particular tasks assigned to it by the State, and that Husbanken was not engaged in any activities other than the execution of those tasks.

36. Secondly, the EFTA Surveillance Authority maintains that a formal obligation to open proceedings under Article 1(2) of the Protocol was also excluded on the ground that, if necessary, the case should have been examined within the framework of the proceedings laid down in Article 59(3) EEA, but not under the Protocol. To take the view that the EFTA Surveillance Authority was obliged to open proceedings under Article 1(2) of the Protocol and thus ruling out Article 59(3) EEA, even as a possible venue, would seriously erode the value of that provision as an instrument in ensuring compliance with the Agreement in the case of undertakings entrusted with services of general economic interest.

37. The intervener, the *Government of Norway*, refers to Case 84/82 *Germany v Commission* [1984] ECR 1451, para. 13. The Government of Norway states that the decisive factor is whether or not the EFTA Surveillance Authority was in doubt in determining the compatibility of the scheme with the EEA rules. The Government of Norway stresses that the parties were given an opportunity to submit comments in the preliminary procedure and that the EFTA Surveillance Authority has not expressed serious doubts as to whether the aid was compatible with the EEA Agreement. Consequently, the EFTA Surveillance Authority was under no obligation to initiate formal proceedings.

38. As regards the argument that the new principles for fixing the interest rates on Husbanken's loans, implemented as of 1 January 1996, involve new aid, the Government of Norway refers to the evaluation of the EFTA Surveillance Authority that these changes were likely to reduce the level of direct interest subsidization and thus the distortive effects on competition. The Norwegian Government argues that these changes did not call for the initiation of formal proceedings under Article 1(2) of the Protocol. In its supplementary information submitted to the Court, the Government of Norway has given a further account of the financing of Husbanken, stating *inter alia* that, in principle, no alteration in the funding of Husbanken's lending has been made since 1980 and that all alterations to borrowings after that date have been technical changes in the calculation of costs, with the objective of refining the principles laid down in 1980. The changes have been without real economic substance, except for the withdrawal of aid in 1996 (resulting from the change in Husbanken's lending).² The changes in 1997 illustrate the simplified system of borrowing in the budget. At that time Husbanken's borrowing rates were set equal to Husbanken's actual interest income, including the 0.5% margin.

39. The *Commission of the European Communities* submits that the Applicant has failed to demonstrate an infringement of an essential procedural requirement in not opening the formal proceedings. The Commission refers to Case T-277/94 *AITEC v Commission* [1996] ECR II-351, para. 66 and cases there referred to, to support the proposition that the Authority enjoys a wide margin of discretion and is not bound to, nor can be required to, open formal proceedings. This discretion is fettered only in the case of serious difficulties in determining the compatibility of an aid (Case C-198/91 *Cook v Commission* [1993] ECR I-2487, para. 29), a condition which the Applicant has not shown to be fulfilled in this case.

Reasoning of the Decision

40. The *Applicant* argues that the EFTA Surveillance Authority has failed to provide an adequate statement of reasons under Article 16 of the Surveillance and Court Agreement as regards its finding that the derogation under Article 59(2) EEA applies. Referring to Case E-2/94 *Scottish Salmon Growers* [1994-1995] EFTA Court Report 59, para. 26, the Applicant claims that the EFTA Surveillance Authority "must set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the authority to its Decision may be understood." The Applicant maintains this is not the case.

² The Norwegian Government uses the term "lending" exclusively to describe the relationship between Husbanken and its customers, and "borrowing" to describe the technical calculation used to illustrate the cost of Husbanken's lending in the national budget.

41. The Applicant states that, for analysing Article 59(2) EEA, it is necessary to evaluate two main elements, i.e. first the impact of the State aid rules on the entity's performance and, second, proportionality, i.e. whether the performance of the assigned tasks can be achieved by less restrictive means. The Applicant maintains that, from the reasoning of the Decision (pp. 17-20), it is not possible to understand whether such an analysis has been performed.

42. As regards the impact of the State aid rules on the performance of Husbanken's assigned tasks, the Applicant maintains that no grounds have been given, only a reference to the decision of the Norwegian authorities to entrust Husbanken with certain tasks. As regards proportionality, the Applicant submits that no evaluation seems to have been made, and in particular that alternative, less distortive means put forth by the Applicant were not evaluated. Rather, the EFTA Surveillance Authority discusses government support for new residential housing in comparison with other Scandinavian countries, a factor which, in the Applicant's view, is irrelevant and gives rise to the question whether the EFTA Surveillance Authority's reasoning is well founded.

43. As part of the proportionality analysis, the EFTA Surveillance Authority discusses possible restrictions or distortions of competition as a consequence of the State aid. The Applicant maintains that this reasoning is unsatisfactory. In particular, the Applicant submits that the EFTA Surveillance Authority provides no analysis of the relevant market, but refers to several markets which are not relevant, such as the credit market outside the housing finance business and market for other financial services, such as payment intermediation.

44. The Applicant refers to Case C-367/95 P *Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) et al.*, Judgment of 2 April 1998 (not yet published) paras. 51, 62 and 63, to the effect that the Commission recognizes its obligation to examine all the facts and points of law brought forward by the complainant, and that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, and may be affected *inter alia* by the interest which the addressees of the measure or other parties to whom it is of direct and individual concern may have in obtaining explanations. In Joined Cases T-371/94 and T-394/94 *British Airways et al. v Commission*, Judgment of 25 June 1998 (not yet published) para. 273, the Court of First Instance found that the Commission had not given sufficient grounds for its decision regarding a measure not constituting State aid, more specifically that a sufficiently comprehensive assessment of the markets at issue was not given in the assessment of the distortive effect of the aid in question.

45. The Applicant submits that it is not possible to ascertain by reading the Decision (pp. 19-20) why the development of trade is not affected to such an extent as would be contrary to the interests of the Contracting Parties and no grounds in the Decision address the dynamic element of the assessment of “the development of trade”. The doubt about whether the EFTA Surveillance Authority based itself on a correct interpretation of the scope of the First and Second Banking Directives carries over to the correct assessment of the negative effect on the development of EEA trade, a doubt which, the Applicant submits, is not erased because of insufficient grounds.

46. The Applicant submits that there is a close relationship between the insufficient statement of reasons and errors in law. An erroneous interpretation as to, e.g., the proportionality issue, the distortion of competition and the aid involved and the relevant market in which Husbanken operates, would seem, the Applicant submits, also to have been reflected in insufficient grounds for the Authority’s Decision.

47. The *EFTA Surveillance Authority* submits that concise reasoning on the principal issues fulfils the requirement of Article 16 of the Surveillance and Court Agreement. There is no need to state reasons separately with regard to each individual issue, as long as sufficient reasons can be deducted from the context of all the findings stated in support of the decision as a whole (see, e.g. Case 2/56 *Geitling v High Authority* [1957-1958] ECR 3, page 15). Nor is it necessary to address all issues raised by parties or complainants.

48. The EFTA Surveillance Authority submits that the reasons given were sufficient and that the Authority’s findings on all three principal questions, i.e. whether Husbanken was entrusted with services of general economic interest, the question of necessity (i.e. that the rules of the EEA Agreement apply inasmuch as they do not obstruct the performance of the particular tasks) and balancing of interests (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties) were correct. The EFTA Surveillance Authority refers to its Decision (pp. 16-20) in particular the following statement “...The Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to allow that undertaking to perform the services of general economic interest with which it has been entrusted...” (p. 20), and states that even if when read literally this could be seen as referring only to the question of necessity, it is clear from the context that this is not the case and that the conclusion is based on a discussion of circumstances such as the market situation and the effect on intra-EEA trade of the measures at issue.

49. With regard to the specific points raised by the Applicant with regard to lack of reasoning, the EFTA Surveillance Authority submits that the first of these issues, the impact of an application of the State aid rules on the assigned tasks of Husbanken, was indeed illustrated clearly enough. As regards the remaining three points, i.e. that the EFTA Surveillance Authority failed to evaluate correctly the proportionality and the distortion of competition of the aid involved and to define the relevant market, the EFTA Surveillance Authority argues that these amount to alleged errors in law rather than lack of reasoning. The same applies to several new points raised by the Applicant in the Reply. The EFTA Surveillance Authority submits that the claim of the Applicant that the EFTA Surveillance Authority failed to state reasons for the contested Decision is unfounded and should be dismissed.

50. The intervener, the *Government of Norway*, submits that the EFTA Surveillance Authority has adequately stated the reasons for its Decision in a manner pursuant to its obligations under Article 16 of the Surveillance and Court Agreement. In particular, the Government of Norway states that the reasoning regarding the assessment of proportionality in Article 59(2) EEA is adequately set out by the EFTA Surveillance Authority in its discussion about effects that withdrawal of funding by the State would have on Husbanken's ability to fulfil its tasks. As regards other issues raised by the Applicant, in particular regarding distortion of competition and analysis of the relevant market, the Government of Norway submits that the submissions of the Applicant concern the EFTA Surveillance Authority's material findings and do not regard the issue of inadequate reasoning as such.

51. The *Commission of the European Communities* submits that a statement of reasons has a two-fold purpose: to permit the Courts to exercise their judicial control and to permit interested parties to be informed of the justification for the measure (Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany v Commission* [1997] ECR 1997 I-645, para. 44; and Joined Cases C-71/95, C-155/95 and C-271/95 *Belgium v Commission* [1997] ECR I-687, para. 53). There is no requirement for exhaustive detail (Case C-22/94 *Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and the Attorney General* [1997] ECR I-1809, para. 39; Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507, para. 17; and Case C-285/94 *Italy v Commission* [1997] ECR I-3519, para. 48), but legal and factual considerations for the conclusion are required (Case T-77/95 *SFEI and others v Commission* [1997] ECR II-1, para. 90).

52. The Commission submits that the EFTA Surveillance Authority has provided reasons for its conclusion that the aid scheme is necessary for the service of general economic interest furnished by Husbanken. Further, the Commission

points out that the Applicant has not challenged the EFTA Surveillance Authority's statements on pages 16-17 of the Decision, on the nature of the services of general economic interest and thereby accepts the description as adequate. The Commission also submits that the Decision contains sufficient reasons why the aid scheme is considered to come within the derogation in Article 59(2) EEA. Part of the Applicant's submission regarding adequate reasoning is, in the view of the Commission, closely linked with the substantive ground that the EFTA Surveillance Authority has made a manifest error in applying the test of proportionality; this will be commented upon under the discussion on errors in law.

Error in law

53. The *Applicant* agrees with the finding of the EFTA Surveillance Authority that the financial advantages Husbanken enjoys as a State institution constitute State aid which cannot be justified under Article 61 EEA. However, the Applicant questions the finding that Husbanken is considered to be an undertaking entrusted with the operation of services of general economic interest, on the following grounds: "...Husbanken's activity in the relevant market ... is of such considerable scope and addressed to such a broad range of borrowers, that it is not correct to characterize its main lending activity as social housebuilding."

54. The Applicant emphasizes the main concern of the Association, i.e. that the housing policy can be implemented without providing Husbanken with the existing framework conditions which go beyond providing privileged financing for identified social groups and which drastically reduce the possibilities of ordinary credit institutions to compete on equal terms with Husbanken in the market of providing loans for private housing.

55. The Applicant refers to the Report of the Commission to the Council of Ministers: "Services of General Economic Interest in the Banking Sector", adopted 17 June 1998, to be presented at the ECOFIN Council in October 1998. The Applicant refers to the views expressed by the Commission as being in line with the argument presented by the Applicant: that intervention by Member States in the financial services sector risks causing significant distorting effects; that it can be questioned whether distribution of loans services itself can be regarded as a service of general economic interest; and that the State aid nature of the intervention can be eliminated if all institutions have the opportunity to compete on an equal basis for the service to be rendered.

56. In its description of Husbanken's activities, the Applicant has stressed that through the present financing scheme of Husbanken, applicable as of January

1996, the Government has attached great importance to Husbanken's ability to offer competitive interest rates compared to what is available in the private credit market (Report No. 34 (1994-1995) to the Storting).

57. The Applicant claims that Husbanken's share of in the market for financing of new houses was just over 50% in the early 1980s; 80-90% in the period 1990-1993; 70-80% in 1994 and 1995 and the proposed quota for 1996 corresponds to almost 45% of the estimated housing starts. The Applicant claims that statistics up to July 1997 show Husbanken regaining market share, to about 50%, after a drop down to 40 % following a fall in interest rates.

58. With regard to the contested Decision and alleged error in assessment of the derogation in Article 59(2) EEA, the Applicant discusses three issues:

59. First, the Applicant argues that Husbanken cannot be considered an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 59(2) EEA. It follows from case law that there is to be a strict definition of those undertakings that can take advantage of the derogation under Article 90(2) EC and Article 59(2) EEA, see Case 127/73 *BRT v SABAM and NV FONIOR* [1974] ECR 313, and the relevant test includes whether the services in question show "special characteristics" as compared with the general economic interest of other economic activities (Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 27). The Applicant submits that nothing in the contested Decision indicates that the Authority has applied this test to the present case. The Applicant further refers to Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, para. 8, implicitly rejecting the view that nationalized banks might be regarded as undertakings entrusted with services of general economic interest, and Case 226/87 *Commission v Greece* [1988] ECR 3611.

60. Second, the Applicant claims that the EFTA Surveillance Authority has wrongfully interpreted Article 59(2) EEA by accepting the framework conditions for Husbanken, primarily by referring to the fact that the Norwegian authorities have entrusted Husbanken with the loan schemes in question. The Applicant submits that it is up to the government in question to prove that the achievement of the performance of the particular assigned tasks cannot be achieved with due application of the provisions on State aid. The Applicant argues that in the Decision there are no traces of the burden of proof on part of the Norwegian government. The EFTA Surveillance Authority accepts without further scrutiny the policy statements of the Norwegian government. This represents, in the Applicant's view, a manifest error in the assessment on part of the Authority.

61. The Applicant submits that the only truly public service obligation performed by Husbanken is the providing of means-tested loans and grants to people in a weak financial position. The only purpose of the State aid as regards the non-means-tested loans is to put Husbanken permanently in a more advantageous position in the commercial market of offering first-priority mortgage loans. In the Applicant's view, the Decision does not distinguish the broad housing policy issues from the issue relevant for the application of Article 59(2) EEA. Further, no necessity test has been performed in the Decision according to what has been stated in Case T-106/95 *FFSA and Others v Commission*, cited above, para. 178. The Applicant concludes that a manifest error in the assessment of the requirement of necessity has been demonstrated.

62. Third, the Applicant claims that the EFTA Surveillance Authority has underestimated the distortion of competition in the relevant market, as shown by the following issues. The Applicant argues that all these issues attribute to the conclusion that the EFTA Surveillance Authority committed a manifest error of assessment:

- by applying a wrong definition of the relevant market. The Applicant maintains its position that Husbanken has a dominant position in the market for non-means-tested, first-priority mortgage loans and that this fact is an important element in deciding the distortion of competition. The Applicant submits that, with a proper analysis of the relative strength given to Husbanken in the relevant market as compared to its competitors, this would have led to even stronger conclusions with respect to effect under Article 61 EEA on trade, and also for the finding of effect on trade contrary to Article 59(2) EEA. The Applicant maintains that examination of the relevant market is appropriate under Article 59(2) EEA (Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809, para. 24; Cases T-371/94 and T-394/94 *British Airways et al. v Commission*, cited above, para. 273.)
- by using an incorrect interpretation of the First and Second Banking Directives when finding that Husbanken is excluded from the scope of the Directives.³ The Applicant stresses that lending and mortgage credit are expressly mentioned in the list of activities subject to mutual recognition according to the Second Banking Directive, cf. item 2 in the Annex. While conceding the fact that Husbanken has no longer the right to receive deposits from the public following an amendment in 1992, the Applicant maintains that credit institutions and mortgage credit institutions falling within the definition of a “credit institution” in Article 1 of the First Banking Directive, such as all the

³ Directive 77/780/EEC and Directive 89/646.

mortgage credit institutions listed according to Article 3, item 7, of the First Banking Directive, will be covered by the Banking Directives. The Applicant maintains that, as a consequence of the EFTA Surveillance Authority's misconception that mortgage credit institutions do not fall within the scope of the Directives, the Authority has also underestimated the scope and effect of the actual and/or potential competition on the relevant market and effects on trade between the Contracting Parties.

- by making erroneous use of statistics as a relevant factor. The Applicant claims that reference to statistics on subsidies to housing construction as a percentage of GNP is of no legal importance.
- by applying case law incorrectly. The Applicant argues that some of the cases referred to by the EFTA Surveillance Authority are either not relevant (Commission Decisions Nos. 193/95 and 44/96), distinguishable (Case NN/44/96, *Crédit Foncier de France*) or not cited (Case C-484/93 *Svenson and Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955).

63. As regards the effect on trade between the Contracting Parties, the Applicant submits that the EFTA Surveillance Authority is wrong in interpreting this condition only as involving major trade effects. The Applicant maintains that at least the potential cross-border activity is greatly underestimated by the EFTA Surveillance Authority and emphasizes the difficulties foreign banks have in penetrating the market and the possible isolation of markets.

64. The Applicant submits that the Commission's Report to the Council, referred to above, should serve as a basis for assessing the balancing of interests in the EEA (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties). The Applicant submits that mortgage financing is a part of the liberalized financial markets in the EEA but the Authority's Decision does not make reference to a possible limited liberalization in the market for mortgage loans. The EFTA Surveillance Authority has failed to consider the increasing cross-border element illustrated by the establishment of EEA banks and financial institutions in Norway and providing services, including provision of mortgage loans. This process will be facilitated by the introduction of the "Euro" on 1 January 1999. The Applicant maintains that the intervention by the Norwegian Government by offering Husbanken State subsidies and favourable terms for competition risks causing significant distorting effects. As the services can just as well be provided by other operators, there is no overriding interest in favour of applying the derogation under Article 59(2) EEA. The Applicant maintains that the Authority has committed a manifest error of assessment on this point as well.

65. Lastly, the Applicant argues that the EFTA Surveillance Authority, erroneously, did not find that the social housing policy could be achieved through less distortive means (Decision pp. 18 - 19). The Applicant stresses that there is no need for the preferential funding treatment of Husbanken, an element that the EFTA Surveillance Authority has failed to question. The main alternative, in the Applicant's submission, is a system where the borrower has a free choice of finance options from competing bids from different financial institutions, through which the authorities might provide a loan or a direct subsidy. Other alternatives are the so-called Model 3 and 4 in the Report from the Commission on State banks, NOU 1995:11, The State Banks under amended Framework conditions. This element also demonstrates that the Authority has committed a manifest error of assessment.

66. As regards Article 59 EEA, the *EFTA Surveillance Authority* stresses that Member States remain free, in principle and where no Community policy is established, to designate which services they consider to be of general economic interest and to organize these services as they see fit, subject to the conditions of necessity (i.e. that the rules of the EEA Agreement apply in so far as they do not obstruct the performance of the particular tasks) and balancing of interests (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties) (Case C-159/94 *Commission v France* [1997] ECR I-5815, paras. 55-56 and Case T-105/96 *FFSA and Others v Commission*, cited above, para. 192, and the EC Commission's Notice on Services of General Interest in Europe (OJ 1996 C 281, p. 3)).

67. Even if the freedom to define the general interest service is not without limitation (see Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 27 (dock services) compared with Case T-105/96 *FFSA and Others v Commission*, cited above, para. 106, and Case C-159/94 *Commission v France*, cited above, paras. 60-68), the EFTA Surveillance Authority submits that it may be concluded that an undertaking entrusted by the State with the performance of economic activities which the State considers to be in the interest of the general public is an undertaking "entrusted with the operation of services of general economic interest" within the meaning of Article 59(2) EEA, provided only that the activities show special characteristics related to the public interest involved, distinguishing them from economic activities in general. Characteristics of the loans operated by Husbanken were clearly sufficient to distinguish them from loans generally offered on the market, notably the obligation to keep the loans available on equal and preferential terms and the monitoring tasks linked to the operation of the loans.

68. As to the necessity test, the relevant question regarding whether or not an undertaking entrusted with the operation of services of general economic interest

escapes the rules of the EEA Agreement is whether these rules would obstruct the performance of the tasks assigned to the undertaking. The survival of the undertaking need not be threatened by the application of the rules; it is sufficient that it would not be possible to carry out the assigned tasks under economically acceptable conditions (see Case C-159/94 *Commission v France*, cited above, paras. 95-96, and paras. 49, 54-59) or that the undertaking is able to perform its public service obligations under conditions of economic equilibrium (Case T-106/95 *FFSA and others v Commission*, cited above, para. 178).

69. The Applicant does not question Husbanken's need for the aid involved in order for it to be able to carry out its tasks, but rather the organization of the services which, the EFTA Surveillance Authority maintains, is not relevant for the determination of the issue under consideration.

70. The EFTA Surveillance Authority maintains that it follows from the margin of discretion afforded to the State in defining and organizing its general interest services that the condition that measures must not affect trade to such an extent as would be contrary to the interests of the Contracting Parties cannot be taken to imply any obligation generally to organize such services so as necessarily to minimize the effects on trade. Thus, the EFTA Surveillance Authority submits that it is not necessary to establish positively that the measure at issue is the only one available or the least restrictive one, but only that it is not disproportionate (Case C-159/94 *Commission v France*, cited above, para. 101).

71. Furthermore, the concept of "effect on trade" in Article 59(2) EEA is different from that in Article 61(1) EEA and calls for a different kind of test. Under Article 59(2) EEA, the relevant test is whether the measure at issue affects "the development of trade" in a way "contrary to the interests of the Contracting Parties". Not all measures having a negative effect on trade can automatically be considered as being contrary to the interests of the Contracting Parties, given that the EEA Agreement covers fields such as environment, social policy and consumer protection (see Case C-159/94 *Commission v France*, cited above, paras. 113 and 115).

72. The EFTA Surveillance Authority concludes that the balancing of interests required under the second sentence of Article 59(2) EEA implies that any effect on trade must be assessed in the light of relevant interests of the Contracting Parties and the state of development of intra-EEA trade in the sector concerned and that a reasonable balance must be struck between the various interests involved. As regards the Applicant's reference to the Commission's Report to the Council, the EFTA Surveillance Authority points out that the Report contains only very general observations relating mainly to the financial services sector as a whole and no

specific information regarding mortgage loans or government intervention in house financing.

73. The EFTA Surveillance Authority submits that its finding that the aid involved had limited effects on trade and was not contrary to the interests of the Contracting Parties is well founded. In view of the legitimate policy interests of the Contracting Parties and the factual appraisal, the Authority would not have been justified to rule out, as being contrary to the interests of the Contracting Parties, measures of the kind involved. The EFTA Surveillance Authority points out, in particular, as relevant for the assessment, that:

- Husbanken did not engage in other activities and consequently there was no room for cross-subsidies;
- housing finance markets in most EEA States are characterized by government intervention (central and local);
- there is no precedent ruling out the compatibility of the State aid of any of the numerous publicly supported housing finance institutions in the EU;
- there is lack of harmonization in EEA, resulting in obstacles to cross-border operations with regard to mortgage credits; and
- loans for housing finance are predominantly of local character.

74. The EFTA Surveillance Authority maintains that the Authority found the conditions referred to above to be fulfilled in the case at hand and disputes the submissions of the Applicant regarding manifest errors in law. The EFTA Surveillance Authority primarily points out that the Applicant has accepted the policy objectives involved and that the tasks of Husbanken have been entrusted to it in pursuance of these objectives. The EFTA Surveillance Authority stresses that, in the Decision, the Authority found that Husbanken is an undertaking entrusted with services of general economic interest, as the tasks were entrusted to it by the State, the entrusted tasks were carried out in pursuance of the government's housing policy and, even with regard to the non-means-tested loans complained of in particular, the terms and conditions of the loans involved public policy objectives which imposed certain obligations on Husbanken. The EFTA Surveillance Authority maintains that these facts fully justify its finding on this point.

75. The EFTA Surveillance Authority disagrees with the Applicant's submissions that Article 59(2) EEA was not applied strictly, that the EFTA Surveillance Authority underestimated the distortion of competition, that the EFTA Surveillance Authority misinterpreted the First and Second Banking Directives, that the EFTA Surveillance Authority erred by referring to statistics on subsidies in certain States to housing construction as a percentage of GNP and that the EFTA Surveillance Authority erred in its application of case law, *inter alia*

with reference to the EFTA Surveillance Authority's margin of discretion and that either the Applicant has not substantiated the errors, and/or that such weight was given to the respective points, that they can be considered to have affected the outcome.

76. As regards the Applicant's claim that the EFTA Surveillance Authority erred by not finding that the policy objectives could have been achieved by less distortive means, the EFTA Surveillance Authority stresses the freedom of States to define the policies and organize the general interest services, leaving the Authority no power to take a position on the organization and scale of the service or the expediency of political choices made (See Case T-106/95 *FFSA and Others v Commission*, cited above). The EFTA Surveillance Authority submits that the Applicant's claim on this point is manifestly unfounded, and that the circumstances do not lend themselves to the conclusion that there was an error on the part of the Authority.

77. The intervener, the *Government of Norway*, maintains that Husbanken is not an "undertaking" within the meaning of Article 61 EEA, but rather a part of the State itself, the organization of which is a prerogative of the government. The Government of Norway further argues that only the loans granted by Husbanken to private consumers might be subject to an assessment under Article 61 EEA, but that the criteria set out in Article 61(1) EEA are not met and that, consequently, there was no infringement of Article 59(1) EEA taken in conjunction with Article 61 EEA. However, given the pleas of the parties, the Government of Norway bases its submissions on the assumption that Husbanken has been granted State aid incompatible with Article 61 EEA.

78. As regards the application of Article 59(2) EEA, the Government of Norway argues that the nature and structure of the service in question – to provide credit for housing purposes – is not dissimilar to those services accepted by the Court of Justice of the European Communities ("ECJ") as being of "general economic interest".⁴ The housing sector must be regarded as exhibiting special characteristics as compared with the general economic interests of other economic activities (Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 14) and of direct benefit for the public (*Merci Convenzionali Porto di Genova*, Opinion of the Advocate General, para. 27). This is in conformity with

⁴ The Government refers to the following cases, where the concept "general economic interest" is clarified: Case 10/71 *Ministère Public Luxembourg v Müller* [1971] ECR 723; Case 155/73 *Sacchi* [1974] ECR 409; Case 41/83 *Italy v Commission* [1985] ECR 873; Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case 96/82 *IAZ v Commission* [1983] ECR 3369; Case 66/86, *Ahmed Saeed Flugreisen and others v Zentrale Zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803; Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-393/92 *Almelo* [1994] ECR I-1477; Cases C-157/94, C-158/94, C-159/94 and C-160/94 *Commission v the Netherlands/ Italy / France/ Spain*, judgments of 23 October 1997; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889.

the purpose of Article 59(2) EEA as expressed in *inter alia* Case C-159/94 *Commission v France*, cited above, (paras. 55-56), that the States are permitted to make allowance for objectives related to their domestic policy.

79. The Government of Norway further argues that the tasks of general economic interest have appropriately been conferred on Husbanken, as defined by the ECJ, i.e. by act of the public authority, including administrative acts or a grant of a concession governed by public law (Case C-393/92 *Almelo* [1994] ECR I-1477, paras. 65-66.)

80. The Government of Norway submits that, as the aim is legitimate, the Court is restricted to monitoring the means selected by the State, in particular whether the means are appropriate and the least restrictive available (see Case C-159/94 *Commission v France*, cited above, paras. 53-59 and 95-96). Article 90(2) EC and Article 59(2) EEA are applicable if the derogation is necessary in order to fulfil the tasks on acceptable financial terms. The Government of Norway submits that Husbanken will not generally be able to offer terms and interest rates to the population better than those terms and rates private banks are able to offer if Husbanken is forced to operate on terms equal to those on which private banks operate. Husbanken would also be forced to raise the prices in unprofitable parts of the market in order to compete in the profitable parts. Another consequence, the Government of Norway argues, would be that requirements concerning quality, standard and costs would suffer. The restriction imposed on the competition by granting Husbanken State aid is thus genuinely needed in order to ensure the performance of the particular tasks assigned to Husbanken.

81. The Government of Norway further maintains that the objectives of the housing policy cannot be achieved to the same degree at the same cost through less distortive means. The Government of Norway submits that it is for the Applicant to establish that such alternative ways are possible and maintains that the possibilities brought up by the Applicant before the Court⁵ entail that the public housing policy objectives established by the Storting (Parliament) and the Government of Norway will largely be altered to be less ambitious than current objectives and the particular tasks assigned to Husbanken obstructed.

82. The Government of Norway contests the legal relevance of the Applicant's submissions regarding "the relevant market". The only relevance the Government of Norway finds concerns the assumed effects on inter-State trade. In this context, the Government of Norway submits that the relevant market is the whole market for mortgage-backed loans.

⁵ So-called model 3 and model 4, as described in NOU (Norwegian Official Report) 1995:11, The State Banks under amended Framework Conditions.

83. In the supplementary information submitted to the Court, the Government of Norway emphasizes that analysis of the relevant market may be a relevant factor under Article 61 EEA as part of the assessment of whether or not Husbanken distorts competition. However, the Applicant does not contest the finding of the Authority that Husbanken is the recipient of aid and, accordingly, the Court is not invited to decide upon the application of Article 61 EEA and the legal relevance of this analysis to the case at hand is therefore not shown.

84. The Government of Norway submits, however, additional information and analysis on the concept of the relevant market and submits that, from the point of view of interchangeability on the lending market, it is appropriate to distinguish between mortgage-backed loans and other loans. It is also possibly appropriate to distinguish between mortgage-backed personal loans and mortgage-backed business loans. It follows, in the submission of the Government of Norway, that the relevant market should be held to be loans to private persons backed by mortgages in private dwellings.

85. Husbanken's total share of the market as thus defined has decreased from 26% in December 1993 to just over 14% in December 1997. The Government of Norway submits that a market share of between 14% and 17% in 1996 and 1997 constitutes a small part of the total market and can hardly cause major distortions in the relevant market as claimed by the Association.

86. As to the condition in Article 59(2) EEA, that the derogation is precluded if the development of trade would be affected "to such an extent as would be contrary to the interests of the Contracting Parties", the Government of Norway submits that the relevant question is whether credit investments by foreign credit institutions will be considerably higher in Norway if Husbanken is deprived of the State aid. Referring to the assessment of the EFTA Surveillance Authority in its Decision, that this financial service is predominantly of a local character and normally does not involve any direct cross-border transactions, the Government of Norway estimates that the most likely scenario is that branches of foreign credit institutions will cover a similar share of Husbanken's "vacant" portfolio as in the credit market for households in general, which in 1995 was under 19% of the total credit supply in Norway. The Government of Norway concludes that foreign credit institutions are only marginally affected. Furthermore, as the State interest involved is considerable, the effect on intra-State trade must be correspondingly substantial before the derogation under Article 59(2) EEA is precluded.

87. The *Commission of the European Communities* submits that the Applicant has not clearly established that the EFTA Surveillance Authority has committed a manifest error in adopting its Decision. The Commission recalls the wide margin

of discretion the EFTA Surveillance Authority has in applying Articles 59 and 61 EEA, as the Commission has in applying Articles 90 and 92 EC (Case C-301/87 *France v Commission* [1990] ECR I-307, para. 49; Case T-106/95 *FFSA and Others v Commission*, cited above, para. 100) and the correspondingly limited role of the Court in reviewing decisions such as the one in the present case (Case C-56/93 *Belgium v Commission*, cited above, para. 11).

88. The Commission recalls that the ECJ has upheld a broad definition of what constitutes aid (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para. 13). When incompatible State aid is granted to an undertaking entrusted with the operation of a service of general economic interest, Article 90(2) EC and Article 59(2) EEA provide for a derogation which must, as a derogating rule, be interpreted restrictively (Case T-106/95 *FFSA and Others v Commission*, cited above, paras. 172 and 173).

89. There is no general, Community-wide definition of a service “of general economic interest”.⁶ The Member States thus remain, in principle, competent to designate which services they considered to be such, subject to scrutiny by the Community institutions (Case C-179/90 *Merzi Convenzionali Porto di Genova*, cited above, para. 26). The methodology applied in defining the concept is that of an analysis on a case-by-case basis.

90. As an additional safeguard, it must be established that the performance of the service does not affect in a disproportionate manner the rules of competition and the preservation of the unity of the common market. The test is of a negative nature: it examines whether the measure adopted is not disproportionate, but it is not required that the measure adopted is the least restrictive possible (Case 40/72 *Schroeder v Germany* [1973] ECR 125, para. 14). A reasonable relationship between the aim and the means employed is satisfactory (Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 29; Case C-202/88 *France v Commission* [1991] ECR I-1223, paras. 11 and 12; and Case C-159/94 *Commission v France*, cited above, paras. 55 and 56).

91. The Commission submits that it is legitimate to take into account not just the segment of the banking sector engaged in housing loans but also other lending activities in assessing whether the aid creates a disproportionate restriction on the provision of credit services. If housing loans form but a relatively small proportion of the total lending business, any restrictions resulting from the aid granted to Husbanken will be so much the less for the other undertakings active on the market.

⁶ Commission Communication on “Services of General Interest in Europe” does not provide one, see OJ 1996 C 281, p. 3.

92. As regards the case at hand, the Commission notes that the Applicant does not challenge the relevance of the broad description of the tasks of Husbanken which the EFTA Surveillance Authority considers to fall within the ambit of the definition of services of general economic interest. In particular, the Applicant has not sought to question that the rules involve certain social policy objectives which impose certain monitoring obligations on Husbanken and criteria for the selection of the recipients of the loans. The Commission states that it doubts whether it would itself have accepted such a broad view of the service of general economic interest provided by Husbanken. However, the Commission does not suggest that the EFTA Surveillance Authority has committed an error of a manifest kind.

93. Such a doubt would have compelled the Commission to examine the proportionate nature of the restrictive and distortive effects in a rigorous light. The Commission is, however, not in a position to examine or state with clarity which effect might be disproportionate to the aim of the measure in the case at hand.

94. The Applicant's approach, to argue disproportional measures, rather than challenge the specific tasks allocated to Husbanken, render it, in the view of the Commission, more difficult to establish that, in light of the broadly defined social tasks entrusted to Husbanken, the nature of the aid granted is more than commensurate with the policy pursued. The Commission finds that the Applicant has not demonstrated that the social aims assigned to Husbanken have not been achieved by means of the aid granted; in particular the Applicant does not challenge that borrowers in lower socio-economic groups benefit from the system and, as regards loans granted without means-testing, the Commission points out that the Applicant has not called into question that borrowers in less favourable economic circumstances fall into the category of those who would tend to borrow for dwellings of 120 square meters or less.

95. The Commission submits that, even if it were successfully shown that the scheme in question was not an optimally efficient one, it would not lead to the conclusion that the EFTA Surveillance Authority had made a manifest error in stating that the distortive effects are not disproportionate to the goals assigned. The choice of the means belongs exclusively to national authorities.

96. Lastly, the Commission considers that the Applicant has failed to demonstrate that the aid granted to Husbanken has a deleterious effect on the financial position of the unaided banking sector.

Thór Vilhjálmsson
Judge-Rapporteur

