



## ORDER OF THE COURT

27 June 1997

*(Action for failure to act – Admissibility)*

In Case E-7/96

**Paul Inge Hansen**, residing in Tiller (Norway), represented by Sigurd Knudtson of the Norwegian Bar (preceded by Jan E. Strand of the Norwegian Bar), with no address for service in Luxembourg,

applicant,

v

**the EFTA Surveillance Authority**, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, with no address for service in Luxembourg,

defendant,

APPLICATION for a decision requiring the EFTA Surveillance Authority to take a decision, for compensation and for "preliminary authorisation",

### THE COURT

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

Registrar: Per Christiansen,

makes the following

## ORDER

### I. Factual background - complaint to the EFTA Surveillance Authority

- 1 On 1 January 1996 the applicant lodged a complaint with the EFTA Surveillance Authority requesting:
  - "1. Easing/abolishment of the labour market monopoly [in Norway].
  2. Easing of the Social Security monopoly [in Norway].
  3. Easing of the Norwegian Industry and Regional Development Fund and the Ministry of Industry's monopoly on establishment grants, granting of loans to occupationally handicapped who have a realisable business project."
- 2 The applicant is a founder of the Rebecca Foundation. He describes the aims of the Foundation as promotion of employment for disabled people, *inter alia* through Community efforts, such as the Helios and Horizon programmes. For this purpose the foundation requires public approval by Norwegian authorities which, according to the applicant, has been denied.
- 3 In the complaint, the applicant requested the EFTA Surveillance Authority to bring a case before the EFTA Court in order to abolish the employment exchange monopoly in Norway.
- 4 The applicant referred to Articles 85 and 86 of the EC Treaty ("EC") in support of his claims, cf. Article 89 regarding procedure, and the parallel Articles 53 and 54 EEA, cf. Articles 55, 56 and 57 EEA regarding procedure. The applicant also referred to a judgment of the Court of Justice of the European Communities ("the ECJ") in case C-41/90 *Höfner and Elser* [1991] ECR I-1979.
- 5 In a letter of 22 February 1996, the EFTA Surveillance Authority notified the applicant that his complaint "alleging, *inter alia*, abuse of the monopoly of the Government Employment Service within the field of vocational rehabilitation and employment of disabled people" had been registered and was being examined by the Authority's services. The applicant would be kept informed of the examination of the complaint and its result, and, if necessary, he would be approached for further information.
- 6 In a second letter to the EFTA Surveillance Authority of 8 August 1996, the applicant referred to Article 37 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("the Surveillance and Court Agreement") and stated that a case would be brought

before the EFTA Court if the Authority did not decide on the request before it within two months. In a letter of 26 August 1996, the EFTA Surveillance Authority answered the applicant's letter, informing him that the Authority did strive to decide cases as expediently as possible and that this case would be processed and decided according to its merits. However, it was not clear if this could be managed within two months. The EFTA Surveillance Authority also informed the applicant that an application for failure to act can only lead to conviction in cases where the Surveillance Authority has violated an obligation to make a decision.

## II. The application to the Court

- 7 By an application dated 5 December 1996, registered at the Court on 10 December 1996, the applicant requested the Court *inter alia* to order the EFTA Surveillance Authority to make certain decisions. The first part of this section of the document submitted by the applicant reads as follows:

"1. EFTA's Surveillance Authority is obliged to make the following decision:

### I

- a. The employment exchange in Norway as it functions today contravenes the EEA [A]greement.
- b. The Norwegian Government is obliged to make it possible for physically disabled and occupationally handicapped - if they so wish - to join the labour market as genuine job seekers on the same lines as able-bodied unemployed.
- c. The Norwegian Government is ordered to reduce the employment exchange monopoly.
- d. The Norwegian Government is ordered to make it possible for the Rebecca Foundation to participate in EU's programmes for physically disabled and occupationally handicapped.
- e. The Norwegian Government is obliged to give the Rebecca Foundation the necessary approval
  - x. to run a business activity
  - y. to run private recruitment of personnel for people in Norway who fall under, or may fall under the provisions of the National Insurance Act:
    - i. 3 - illness
    - ii. 5 - rehabilitation
    - iii. 8 - disability
    - iv. 11 - occupational injuryor who are a part of the physically disabled or occupationally handicapped group.

- f. The Norwegian Government is obliged to ensure that the Rebecca Foundation may be established and run its activities under the same framework conditions and with the same means as the Norwegian Government.
  - g. The Norwegian Government is obliged to ensure that the necessary changes in the law are made so that the Norwegian law agrees with the provisions in the EEA [A]greement."
- 8 The application also states that to ensure implementation of the foregoing, the Norwegian Government should be ordered to allow certain activities, to provide the Rebecca Foundation with adequate funds, to pay compensation to the foundation as well as costs, etc. The application lists subsidiary statements and requests that the Norwegian Government be ordered to give the Foundation preliminary permission to operate.
- 9 The application includes a summary of the applicant's account of the difficulties he and the Rebecca Foundation are said to have encountered in their dealings with Norwegian authorities in his attempts to set up business activities, especially an employment agency.
- 10 The applicant further asserts that the EFTA Surveillance Authority has not dealt with his complaint in due time and that his application to the Court is based on Article 37 of the Surveillance and Court Agreement, which reads as follows:

"Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established.

The action shall be admissible only if the EFTA Surveillance Authority has first been called upon to act. If, within two months of being so called upon, the EFTA Surveillance Authority has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the EFTA Court that the EFTA Surveillance Authority has failed to address to that person any decision".

### **III. Further procedure**

- 11 The EFTA Court invited the EFTA Surveillance Authority to lodge a defence in the case. On 17 January 1997, the EFTA Surveillance Authority raised a plea of inadmissibility and asked the Court to rule on the question of admissibility as a preliminary issue pursuant to Article 87 of the Rules of Procedure.

- 12 The European Commission submitted written observations dated 18 February 1997. The observations state that, in principle, the application should be dismissed without an oral procedure being opened.

*New requests made by the applicant*

- 13 In a document sent to the Court on 9 April 1997, the applicant opposed the plea of inadmissibility made by the EFTA Surveillance Authority. In the same document the applicant amended the form of order sought to read as follows:

"1. Principally

The Authority is imposed to make a decision relating to the applicant's complaint within due time as stipulated by the Court.

2. Alternatively,

The Authority is imposed to issue a position relating to the applicant's complaint within due time as stipulated by the Court.

3. Another alternative,

The Authority's failure to act on the applicant's complaint is infringement of provisions of the Surveillance and Court Agreement and provisions of the EEA Agreement."

- 14 The document includes a statement of facts and a statement to the effect that, in the applicant's opinion, the EFTA Surveillance Authority is obliged to make a decision concerning his application to it, at least in connection with that part of the complaint where the applicant has a legitimate interest, as more specifically set out. Article 37 of the Surveillance and Court Agreement is referred to and it is contended that the EFTA Surveillance Authority, in dealing with the complaint, has not acted in accordance with general principles of administrative law.

#### **IV. Findings of the Court**

- 15 The Court notes that it follows from the scheme of Article 37 of the Surveillance and Court Agreement that an application for failure to act must be preceded by a formal notice calling upon the Surveillance Authority to act, and that the subject-matter of that notice must be set out in such a manner as to make it clear what decision the EFTA Surveillance Authority should have taken under EEA law. This view is in conformity with judgments of the ECJ, *e.g.*, in Case 25/85 *Nuovo*

*Campsider v Commission* [1986] ECR 1531 and Joined Cases 81 and 119/85 *Usinor v Commission* [1986] ECR 1777. Neither the fact that those judgments are concerned with Article 35 ECSC, and not Article 175 EC upon which Article 31 of the Surveillance and Court Agreement is modelled, nor the fact that the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow that reasoning when interpreting the main part of that Agreement, prevents the reasoning which has led the ECJ to its interpretations from being of guidance for the EFTA Court in similar matters.

- 16 The Court further notes that whenever an undertaking is suspected of violating Articles 53 or 54 EEA, the EFTA Surveillance Authority may institute proceedings against such an undertaking in accordance with Protocol 4 to the Surveillance and Court Agreement. If the undertaking in question is one covered by Article 59(1) EEA, the EFTA Surveillance Authority may also, additionally or alternatively, take action against the EFTA State concerned, either under Article 59(3) EEA or under Article 31 of the Surveillance and Court Agreement. Those remedies available to the EFTA Surveillance Authority are governed by different procedural rules, granting *inter alia* different procedural rights to natural and legal persons initiating a procedure.
- 17 In the present case it is unclear, both from the complaint of 1 January 1996 and from the letter of 8 August 1996 to the EFTA Surveillance Authority, whether the applicant intended his application to the EFTA Surveillance Authority to initiate an infringement procedure by the EFTA Surveillance Authority against Norway, under Article 59 EEA or Article 31 of the Surveillance and Court Agreement, or whether he intended to commence a procedure under Protocol 4 to the Surveillance and Court Agreement against the Government Employment Service. While several of the claims contained in the application would seem to indicate the former, the only provisions explicitly relied on are Articles 53 and 54 EEA.
- 18 Moreover, the lack of clarity attached to the applicant's communications to the EFTA Surveillance Authority does in fact seem to have misled the latter regarding the legal basis for the claim. Both the EFTA Surveillance Authority's letter of 26 August 1996, in reply to the applicant's letter of 8 August 1996, and the submissions of the Surveillance Authority before this Court are based on the assumption that the applicant intended to initiate an infringement procedure against Norway under Article 31 of the Surveillance and Court Agreement. It follows from the applicant's pleadings of 9 April 1997 that this was in fact not the intention.
- 19 On this background, the Court finds that the applicant's letter of 8 August 1996 to the EFTA Surveillance Authority does not satisfy the requirements for setting in motion the two-month time-limit prescribed in Article 37 of the Surveillance and

Court Agreement and, consequently, that the application for failure to act must be dismissed as inadmissible.

## **V. Costs**

- 20 Under Article 66(3) of the Rules of Procedure, where each party succeeds on some heads and fails on others, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. With reference to the findings of the Court and further bearing in mind the competence of the EFTA Surveillance Authority to investigate a complaint regarding infringements of Articles 53 or 54 EEA, and a certain duty of vigilance in procedural matters, the Court orders each party to bear their own costs.

On those grounds

## THE COURT

hereby orders:

- 1. The application is dismissed as inadmissible.**
- 2. Each party shall bear their own costs.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Luxembourg, 27 June 1997.

Per Christiansen  
Registrar

Bjørn Haug  
President