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Judgment in Joined Cases E-5/04 - E-704 *Fesil and Finnfjord and others v EFTA Surveillance Authority*

Exemptions from environmental taxes as State aid – Recovery order based on non-compliance of an EFTA State with an “agreement” concluded with the EFTA Surveillance Authority

In a judgment delivered today, the EFTA Court found that the EFTA Surveillance Authority did not infringe EEA law when deciding that the exemptions from electricity tax granted to the mining and manufacturing industries in Norway constitute State aid incompatible with the functioning of the EEA Agreement. Neither did the EFTA Surveillance Authority err in law when it ordered the recovery of a “significant proportion” of the tax benefit received by the undertakings concerned.

The Court thereby upheld a decision issued by the EFTA Surveillance Authority on 30 June 2004. It concerned the Norwegian electricity tax legislation in place during the budget years 2001, 2002 and 2003. This legislation provided an exemption from the general taxation for electricity used for certain energy intensive industries, namely the mining and manufacturing sectors. In its decision, the EFTA Surveillance Authority had taken the view that this tax relief constituted State aid incompatible with the EEA Agreement and ordered the Kingdom of Norway to demand recovery from the benefiting undertakings. The Kingdom of Norway, the Association of the Norwegian Manufacturing Industry and a number of private operators filed applications contesting this decision with the EFTA Court.

The Court confirmed that relief of expenses in the form of tax exemptions constitutes State aid, which, in the case at hand, fulfilled the criteria of selectivity inherent in Article 61(1) EEA by benefiting certain economic sectors. This selective advantage was not justified by the inherent logic of the Norwegian tax scheme. Its overall objective of environmental protection is not fulfilled by exempting two significant energy consuming sectors. Moreover, other sectors such as services or construction did not get the same advantages. The Court further held that the aid granted is liable to

affect trade between the EEA States (i.e. the Community Member States and the three EFTA States party to the EEA Agreement) and to distort competition, both preconditions under Article 61(1) EEA for State aid to be considered incompatible with the EEA Agreement.

As to the recovery, the essential question was whether there was a legal basis for such an order. In the contested decision, the EFTA Surveillance Authority had referred to its guidelines “on the application of the EEA State aid provisions to aid for environmental protection” issued in May 2001. Based on these guidelines, it had proposed the Kingdom of Norway to bring its existing environmental aid schemes into line therewith before 1 January 2002. The Norwegian Government signified its agreement, but did not alter its electricity tax legislation within the time-limit agreed. The EFTA Surveillance Authority was of the opinion that in such a situation, a recovery order could be based on this agreement and referred in that respect to the case law of the Court of Justice of the European Communities, namely Case C-313/90 CIRFS. This was disputed by the applicants who pointed out *inter alia* that the agreement did not specify which legislation was affected, and maintained that the guidelines were too general and vague. Therefore, the agreement could not entail severe consequences such as recovery.

The Court held that the issuance of general guidelines constitutes one element of the obligation of regular, periodic cooperation between the EFTA Surveillance Authority and the EFTA/EEA State in the field of State aid. While the EFTA Surveillance Authority does not necessarily have to carry out an individual assessment of specific aid schemes, it is under an obligation to cooperate sincerely with the national administration. In the case at hand there existed only two other relevant aid schemes in Norway, and there had been extensive exchanges of view between the EFTA Surveillance Authority and the Norwegian authorities before and after the drafting of the guidelines. In such circumstances, the agreement entered into between the Kingdom of Norway and the EFTA Surveillance Authority was held to constitute a legal basis for a recovery order in case of non-compliance, provided that the principle of protection of legitimate expectations of the beneficiaries of the aid is not infringed. In the case at hand, however, the EFTA Surveillance Authority had only ordered recovery from the date when it published a note in the EU Official Journal.

The full text of the judgment may be found on the Internet at: www.eftacourt.lu.

This press release is not an official document. Please note that the Court may not comment on the case.