ESA | EFTA Surveillance Authority

Case handler: Gjermund Mathisen
Tel: +32 2 286 1860
gma@eftasurv.int

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Ministry of Trade, Industry and Fisheries
Department of Competition Policy
Attn.: Director Monica Wroldsen
PO Box 8090 Dep
NO-0032 Oslo
Norway

Reply to request for information:
ESA's application of the new procedural regulation

Dear Ms Wroldsen,

Thank you for your letter of 30 October 2019, and for the opportunity to express ESA's views on these important issues.

The new procedural regulation is part of a more comprehensive package of EU/EEA rules in the field of state aid, dating back to 2014–2015. The package has been fully implemented on the EU side, but only partly in the EFTA pillar. The aim is to reform the enforcement of the state aid rules, in particular by leaving more cases to be handled at the national level. By way of example, wide-ranging exemptions have been made from the obligation to notify new state aid measures to ESA. Norway is already making good use of these exemptions, and some 90% of new state aid measures in Norway are no longer notified to ESA in advance.[1] The final piece of legislation from this simplification package, the one regulation that has yet to be incorporated into the EEA Agreement, is the new procedural regulation.

The most significant aspect of the new procedural regulation in practical terms is that it would allow ESA to reject complaints from parties that cannot demonstrate the required legal interest. The new regulation would result in fewer ESA cases in the field of state aid.

ESA typically receives around a dozen state aid complaints a year, and is legally bound to pursue these cases. We have reviewed our complaint cases back to when the rules of the new procedural regulation were introduced in the EU, in 2014, and we have found that approximately 40% could have been rejected under the new rules. Moreover, we have found that the cases that could have been rejected are not exclusively minor cases. The cases are a mix of smaller cases and some bigger

[1] See ESA's state aid scoreboard 2018: http://www.eftasurv.int/media/uncategorized/State-aid-scoreboard-2018-March-.pdf p. 16 for further details.

ones, including some requiring considerable resources to be spent – not only on the part of ESA, but also on the part of the Norwegian authorities. That said, the smaller cases are also time consuming. Indeed, the fact that ESA is obliged to handle a significant number of smaller cases, where the complainant lacks a justified legal interest, effectively hinders ESA in fully realising the objective of 'big on big, small on small', which we pursue in the same manner as the Commission. It hinders us in focussing, in a timely manner, on the bigger and most important state aid cases, and may result in what is sometimes perceived as 'micromanagement' of smaller cases that would be better left to national authorities. From this point of view, the incorporation of the new procedural regulation into the EEA Agreement would certainly be a positive contribution to better targeted enforcement. It would help us leave more cases to be handled at the national or local level, and it would help us focus our limited resources on the cases that may have a significant impact on the internal market in the EEA.

The new procedural regulation also provides for so-called 'market information tools'. That is, most importantly, the power to ask *companies* – not just the national authorities – for information in a state aid case. Moreover, if a company supplies incorrect or misleading information it would be possible to fine the company in order to make it correct the information. It is important that ESA have the same powers as the Commission in this respect. Such powers might be needed in the future – in Norwegian, Icelandic or Liechtenstein cases. Moreover, it is a prerequisite for the continued good functioning of the EEA Agreement that the EFTA institutions have powers equivalent to those of the EU institutions.

That said, it appears unlikely that the market information tools would be used very frequently. We have looked back at our state aid cases over the past 25 years to see if there are cases where we would have wanted to use these tools had they been available. We found no such case.[2] We have also looked to the field of competition enforcement, where we have – even stronger – market information tools, and where we regularly ask companies for information directly. In this context, we checked whether we have had to fine any company for non-compliance with an information request. This has never been the case.

Moreover, there are stringent requirements in the new procedural regulation for the use of these tools. They are designed for technically complex cases, and subject to strict safeguards. To begin with, they can only be used in formal investigations, which have been rare. Over the past ten years, ESA has initiated an average of 1.6 formal investigations per year. In addition, the formal investigation must have been identified as 'ineffective', and it is difficult to see any recent formal investigation into any Norwegian measure that would have met that threshold. Furthermore, for any request for information directed at a beneficiary of a Norwegian aid measure, the Norwegian authorities would have to agree to the request in advance. What this all entails in practice, is that ESA would seek to ask the national authorities first; only where they could not provide the information needed, would requests to companies be considered.

Finally, in application of the 'homogeneity principle', ESA would naturally follow the practice and policy of the Commission in the use of these tools. Under the

[2] Indeed, ESA would have relied on Article 6 of the Surveillance and Court Agreement in order to request information directly from companies, had it been deemed necessary in any case. This has not happened.

homogeneity principle, the rules of the EEA Agreement are generally to be the same as in the EU, the rules are to be interpreted the same, they are to be applied the same, and they are to be enforced in the same manner. Against this background, we have checked the Commission's use of the market information tools since 2014: First, these tools have only been used in a limited number of technically complex cases. Where they have been used has been in tax rulings cases, which are complex by nature and involve large, multinational companies (Starbucks, FIAT, Amazon, IKEA, Nike). Second, since the introduction of the rules in 2014, no fines have been imposed.

Yours sincerely,

Bente Angell-Hansen
President
EFTA Surveillance Authority