

Case handler: Line Hoven  
Tel: +32 2 286 1884  
lho@eftasurv.int

Brussels, 12 December 2017  
Case No: 80860  
Document No: 886540

EFTA SURVEILLANCE  
AUTHORITY

The Ministry of Culture  
P.O Box 8030  
Dep 0030  
Oslo, Norway

**Subject: Case No 80860 – Bokavtalen**

- *Request for information*
- *Meeting request*

## 1 Introduction

This letter is a formal request of information made in accordance with Article 6 of the Surveillance and Court Agreement.

The EFTA Surveillance Authority (“the Authority”) has noted that the Fixed Book Price Agreement (*bokavtalen*; “the Book Agreement”) between the Norwegian Publishers Association and the Norwegian Booksellers Association claims an exemption from Section 10 of the Norwegian Competition Act pursuant to *forskrift om unntak fra konkurranseloven § 10 for samarbeid ved omsetning av bøker* (“the Exemption Regulation”).<sup>1</sup>

The Exemption Regulation does not exempt the Book Agreement from application of Article 53 of the EEA Agreement (“Article 53 EEA”).<sup>2</sup>

## 2 Timeline

On 2 March 2014, the second and – in substance – final draft of a legal opinion on the compatibility of the Book Agreement with Article 53 EEA was forwarded to the Ministry.<sup>3</sup> The Book Agreement was signed by the parties on 17 March 2014. In a press release published by the Ministry of Culture on 5 May 2014, the Minister of Culture stated that the Government endorsed the contents of the Book Agreement.<sup>4</sup> Later that year, on 19 December 2014, and with effect from 1 January 2015 until 31 December 2016, the Norwegian authorities granted an exemption from Section 10 of the Norwegian Competition Act for the sales of books in Norway.

---

<sup>1</sup> *Forskrift om unntak fra konkurranseloven § 10 for samarbeid ved omsetning av bøker*, FOR-2014-12-19-1716, (“the Exemption Regulation”).

<sup>2</sup> Article 53 EEA is also Norwegian law, pursuant to *EØS-loven*, LOV-1992-11-27-109. Article 53 EEA is enforced in Norway not only by the Authority, but also by the Norwegian Competition Authority.

<sup>3</sup> Utredning av forholdet mellom reguleringen av bokavtalen og EØS-konkurranseretten, for Kulturdepartementet og Nærings- og fiskeridepartementet, by Ronny Gjendemsjø (University of Bergen): <https://www.regjeringen.no/contentassets/ca5daf3f5837490da8fe18b5885bd226/vedlegg2.pdf>.

<sup>4</sup> “Regjeringa har slutta seg til innhaldet i den nye bokavtalen som Bokhandlerforeningen og Forleggerforeningen har forhandla fram.” See Press Release from the Ministry of Culture on 5 May 2014, available at <https://www.regjeringen.no/no/aktuelt/Regjeringa-seier-ja-til-ny-bokavtale/id758341/>.

Both the Book Agreement and the Exemption Regulation were amended in 2016, in that their duration was extended. The new end date for both the Book Agreement and the Exemption Regulation is now 31 December 2018.

By a letter dated 29 June 2017, the Authority requested information from the Ministry of Trade, Industry and Fisheries, and received a reply on 31 August 2017. However, there is a need for further information. This request for information is addressed to the Ministry of Culture, given the involvement of the Ministry of Culture already at the outset, as reflected in the press release of 5 May 2014, and given that the Ministry of Culture is the line Ministry for this sector of the economy. A copy of the request is sent to the Ministry of Trade, Industry and Fisheries, for information.

### **3 The Exemption Regulation, price fixing and EEA competition law**

The Book Agreement is based on the “principle of a fixed book price”; and, for a period of time, “[b]ooks are sold at a fixed book price” determined by the publisher.<sup>5</sup> *Prima facie*, this would appear to constitute price fixing, and a restriction of competition by object.

An agreement to fix prices is in breach of Article 53(1) of the EEA Agreement provided that it “may effect trade between Contracting Parties”. This ‘effect on trade’ criterion is the only substantive difference between Article 53(1) EEA and Section 10, first paragraph, of the Norwegian Competition Act.

The compatibility of the Book Agreement with Article 53 EEA was assessed in early 2014 – on request from the Ministry of Culture and the Ministry of Trade, Industry and Fisheries – in a legal opinion written by Mr Ronny Gjendemsjø at the University of Bergen.<sup>6</sup> Mr Gjendemsjø concluded that it cannot be ruled out that the Book Agreement may be in breach of Article 53 EEA. In order to minimise the risk of breaching EEA Competition law, he opined that the agreement “must exclude cross border sales” (our translation, see below). In addition, Mr Gjendemsjø recommended considering to “exclude certain types of books from the scope of the agreement” (our translation, see below). However, the Book Agreement appears to make no such exclusions.

With a view to the present request for information, the Authority notes that the Exemption Regulation seems designed to fit the Book Agreement as signed on 17 March 2014, and that Mr Gjendemsjø’s legal opinion seems to have had little impact on how the Exemption Regulation was drafted.<sup>7</sup>

### **4 Questions to the Ministry of Culture**

In light of the above, the Norwegian authorities are invited to reply to the following questions:

1. For the sake of good order, please confirm that the Book Agreement referred to in the press release from 5 May 2014 is the Book Agreement applicable from 1 January 2015 to 31 December 2018 (after its prolongation in 2016).

---

<sup>5</sup> The Book Agreement § 1.0 *Formål* and § 2.1 *Den faste bokprisen*. Our translation.

<sup>6</sup> Utredning av forholdet mellom reguleringen av bokavtalen og EØS-konkurranseretten, for Kulturdepartementet og Nærings- og fiskeridepartementet, by Ronny Gjendemsjø (University of Bergen): <https://www.regjeringen.no/contentassets/ca5daf3f5837490da8fe18b5885bd226/vedlegg2.pdf>

<sup>7</sup> On the latter point, see also the Norwegian Booksellers Association’s Annual Report 2014, at page 8: [http://www.bokhandlerforeningen.no/sites/bohafor/files/user/vedlegg/arsberetning\\_2014.pdf](http://www.bokhandlerforeningen.no/sites/bohafor/files/user/vedlegg/arsberetning_2014.pdf).

2. The Authority assumes that the Exemption Regulation is based on an assessment that the Book Agreement would be in breach of Section 10 of the Norwegian Competition Act (constituting a restriction under the first paragraph and not being justified under the third paragraph) – otherwise, there would seem to be no need for the Exemption Regulation. Further, the Authority assumes that the Exemption Regulation is based on an assessment that the Book Agreement has no ‘effect on trade’ so that it is, for that reason, not in breach of Article 53 EEA – otherwise, the Exemption Regulation would seem devoid of purpose. Please confirm.
3. Please elaborate (and provide documentation and references as necessary) on how the legal opinion from Mr Gjendemsjø, requested by the Ministry, was taken into account in:
  - 3.1. The Ministry’s assessment of the Book Agreement, leading up to the Government’s endorsement of the contents of the agreement.
  - 3.2. The subsequent drafting and adoption of the Exemption Regulation.
  - 3.3. The prolongation of the Exemption Regulation in 2016.
4. In particular, when replying to questions 3.1 to 3.3, please elaborate on the authorities’ assessment of Mr Gjendemsjø’s recommendations:
  - 4.1. To exclude cross-border sales. (See page 37 of the legal opinion: “*For det første må bokavtalen avgrenses mot grenseoverskridende handel med bøker.*”)
  - 4.2. To consider excluding ebooks, textbooks, and other books with no, or only little text or speech. (See page 37 of the legal opinion: “*Ønskes det sikkerhet om at avtalen ikke omfattes av forbudet i EØS-avtalen artikkel 53, bør det også vurderes å avgrense avtalens anvendelse på visse bokgrupper. Disse bokgruppene er ebøker, fagbøker og bøker og andre produkter uten, eller med minimalt med, tekst eller tale.*”)
5. Also when replying to questions 3.1 to 3.3, please elaborate – additionally – on the authorities’ assessment of audiobooks, and the ‘effect on trade’ of sales of such books.
6. In his legal opinion from early 2014, Mr Gjendemsjø concludes that the Book Agreement in the future will fall foul of Article 53 of the EEA Agreement due to increased cross-border sales of ebooks. (See pages 36–37 of the legal opinion: “*Videre må det legges til grunn at bokavtalen i fremtiden vil omfattes av forbudet i EØS-avtalens artikkel 53 på grunn av økt eboksalg over landegrensene.*”) Does the Ministry share this view? Please elaborate, including on the time perspective.

The Norwegian authorities are hereby invited to reply **by Friday 19 January 2018**. Please clearly indicate in your reply whether there are any business secrets contained in the information provided, and annex a non-confidential version if necessary.

## 5 Meeting request

We would like to organise a meeting with the Ministry of Culture here in Brussels, alternatively by videoconference, in order to discuss the case. We would see it as beneficial if the meeting could be held before the deadline to reply to the request for information, and would suggest a date in the week beginning 8 January, for example **Wednesday 10 January 2018** at 11.00.

Please reply to this meeting request as soon as possible, by contacting Ms Line Hoven using the contact details provided at the top of this letter. Please also contact Ms Hoven should you have any other questions to the present letter.

Yours faithfully,

Gjermund Mathisen  
Director of Competition and State Aid

*This document has been electronically signed by Gjermund Mathisen.*

Cc:  
Ministry of Trade, Industry and Fisheries  
P.O. box 8090  
Dep N-0032  
Oslo, Norway