

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 July 2012

closing complaint cases against Norway in the field of free movement of capital
regarding impersonal residence requirements

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Facts and procedure

1. On 23 August 2009 and 29 September 2010, two complaints were lodged with the EFTA Surveillance Authority (“the Authority”) concerning residence requirements imposed in the municipalities of Nøtterøy and Tjøme, respectively.
2. By letters of 24 February 2010 and 5 October 2010, the Authority invited the complainants to provide further information regarding the complaints. The Authority received the requested information by letters of 28 February 2010 and 31 October 2010.
3. In addition to the two complaints the Authority has, in the years 2003-2010, received four other complaints against Norway concerning residence requirements for the acquisition of real estate in Norway. The two complaints have been handled together with those complaints.
4. While handling the above complaint cases, Norway has provided the Authority with information by letters of 15 April 2005, 30 September 2005, 8 November 2010, 17 March 2011 and 3 February 2012. Furthermore, Norway has, on a regular basis, provided the Authority with statistical information from the KOSTRA monitoring system on concession cases.
5. The above cases were discussed at the package meetings in Oslo on 9-10 November 2005 and 10-11 November 2011.

2 Assessment

2.1 National law

6. According to Section 2 of the Act on Concession for the Acquisition of Real Estate (*lov 28. november 2003 nr. 98 om konsesjon for erverv av fast eiendom* (“the Concession Act”)), the acquisition of real estate in Norway is subject to prior authorisation unless otherwise provided.
7. However, several exemptions are to be found from this principle in Sections 4 and 5 of the Concession Act. In practice, the categories of properties that may be subject to prior authorisation according to the Norwegian Concession Act are:
 - Certain categories of agricultural and forestry land;
 - Properties in certain municipalities (or parts of municipalities) where it has been considered desirable to ensure whole year residence.
8. The present two complaints (cases no. 67812 and 68836) concern the second category of properties, namely properties in municipalities where whole year residence is considered desirable by the Norwegian authorities.
9. According to Section 7 of the Concession Act the freedom from the prior authorisation requirement may be lifted for certain properties, when regarded necessary in order to prevent properties, that should be used for whole year residence, from being used for recreational purposes.
10. Such a decision may be taken by the Directorate of Agriculture (*Landbruksdepartementet*) by means of a regulation. The scope of each regulation is limited to a municipality or specified areas of that municipality.
11. According to Section 7(1) of the Concession Act, a regulation lifting the authorisation freedom must be limited to properties:
 - a) containing buildings which are or have been used for all year living;
 - b) containing buildings not yet used for all year living, but situated in areas which under the planning legislation are designated for (all year) housing purposes;
 - c) not yet built on, which, under the planning legislation, are designated for (all year) housing purposes (the property itself is designated for all year residence).
12. It follows that a regulation requiring prior authorisation may only cover certain areas of the municipality specified by the regulation. It may also be limited to one or two of the above mentioned property-categories, *e.g.* properties already used for all year living and properties designated for it by the planning legislation.
13. As regards Nøtterøy and Tjøme, such regulations have been adopted requiring prior authorisation for the acquisition of real estate that has been used as whole year residence.¹

¹ FOR 1998-08-20 nr. 831: Forskrift om konsesjonsplikt for bebygde eiendom, Nøtterøy kommune, Vestfold and FOR 2004-03-12 nr. 526: Forskrift etter konsesjonsloven om nedsatt konsesjonsgrense, Tjøme kommune, Vestfold.

14. Section 7(6) of the Concession Act sets out that the Directorate of Agriculture can only adopt such regulations when it is considered necessary in order to prevent that properties which should be used for all year living are used for recreational purposes.
15. Potential acquirers will, however, not have to apply for a prior authorisation if he/she commits himself/herself to use the property as a year-round residence for himself/herself or others during the period he/she owns the property. In other words, if the owner makes sure that someone resides on the property, *e.g.* by renting it out, no authorisation is needed *cf.* Section 7(3) of the Concession Act. The residence requirement at issue in the cases is, therefore, not a personal, but an impersonal one.
16. If an acquirer wants to be exempted from the residence requirement altogether, a prior authorisation is needed. Applications for authorisation will be assessed under Section 10 of the Concession Act.
17. According to Section 10 of the Concession Act, authorisation shall be granted in all situations where rejection is not considered necessary in order to prevent use of the property for recreational purposes. Section 10 provides a non-exhaustive list of elements that is relevant for the assessment:
 - a) the location of the property;
 - b) the character and standard of the buildings on the property;
 - c) how much time has passed since the property was used for all year living;
 - d) for how long time it was used for all year living;
 - e) is it foreseeable that someone would acquire the property for all year living.
18. Section 10(2) of the Concession Act sets out that authorisation shall be granted if the competent authorities find it sufficiently reasoned that the property can only be sold for all year living, to a price which is considerably lower than the price level for similar properties in the area.
19. Decisions on whether to grant an authorisation can be appealed to a higher administrative level and contested before the national courts.

2.2 EEA law

20. Article 40 EEA on the free movement of capital provides that there shall be no restrictions between the EEA States on the movement of capital belonging to persons resident in EU Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.
21. Investments in real estate on the territory of an EEA State by non-residents are such capital movements.² Specifically, the right to acquire, use or dispose of immovable property on the territory of another EEA State generates capital movements when it is exercised.³

²See *e.g.* Case C-370/05 *Festersen*, [2007] ECR I-1135, paragraph 22.

³See *e.g.* Joined Cases C-515/99, C-519/99, C-524/99, C-526/99 and C-540/99 *Reisch and others* [2002] ECR I-2157, paragraph 29.

22. *2.2.1 Restriction on the free movement of capital*

23. The measures prohibited by Article 40 EEA as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in an EEA State.⁴ Indeed, all measures that prohibit or are liable to impede or render less attractive the exercise of the fundamental freedoms must be regarded as constituting restrictions to those freedoms.⁵
24. Even though the Norwegian rules on residence requirements in Nøtterøy and Tjøme do not discriminate between Norwegian nationals and nationals of other EEA States, the fact remains that a duty to seek prior authorisation so restricts the free movement of capital.⁶
25. In light of this, the Authority considers the residence requirements for the acquisition of properties in Nøtterøy and Tjøme to restrict the free movement of capital as provided for in Article 40 EEA.

2.2.2. Public interest objective

26. A measure that restricts the free movement of capital may, nevertheless, be permitted provided that it pursues an objective in the public interest, that it is applied in a non-discriminatory way and that it respects the principle of proportionality, that is to say that it is appropriate for ensuring that the aim pursued is achieved and does not go beyond what is necessary for that purpose.⁷
27. The objective of lifting the freedom from prior authorisation procedure for certain municipalities is, according to Section 7 of the Concession Act, to prevent properties that should be used for whole year residence from being used for recreational purposes.
28. By letter of 17 March 2011, the Norwegian Government explained that the all year living requirement does pursue the aim to restore and uphold viable municipalities where people live throughout the year.
29. The promotion of a permanent population and economic activities outside the tourist sector may justify restriction to the free movement of capital.⁸
30. Accordingly, the Authority considers the objective of the Norwegian rules to be a public interest objective that is capable, in principle, of justifying restrictions to the free movement of capital.

2.2.3 Proportionality

⁴ See e.g. Cases C-370/05 *Festersen*, cited above, paragraph 23 and C-515/03 *Van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 55.

⁵ See e.g. Cases C-55/94 *Gebhard* [1995] ECR I4165, paragraph 37 and C-442/02 *CaixaBank France* [2004] ECR I8961, paragraph 11.

⁶ See Case C-370/05 *Festersen*, cited above, paragraph 25.

⁷ Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 40; *Reisch and Others*, cited above, paragraph 33; and Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 34

⁸ See Cases C-302/97 *Konle*, cited above, paragraph 40; *Reisch and others*, cited above, paragraph 34.

31. As regards the condition of proportionality, it is necessary to assess whether the residence requirement constitutes an appropriate and necessary measure for the attainment of the objective of ensuring whole year residence in certain municipalities.
32. The Court of Justice of the European Union already held that a requirement to personally reside on a given plot of land constitutes a measure that goes beyond what is necessary to attain the objective to avoid the acquisition of real estate for purely speculative reasons. First, such a measure was particularly restrictive since it does not only restrict the free movement of capital but also the acquirer's right to choose his place of residence freely. Second, there was nothing that indicated that other measures less restrictive could not have been adopted in order to attain the objective pursued.⁹
33. However, as regards residence requirements for acquirers of properties in municipalities that apply prior authorisation rules for the acquisition of real estates in Norway, the acquirer is not required to live on the property himself/herself since he/she is only obliged to ensure that someone lives on the property. The acquirer can, therefore, *e.g.* rent the property out. Such an impersonal requirement is less restrictive than a personal residence requirement.
34. The aim of the residence requirement is to maintain stable settlement in certain areas and avoid the situation where properties used for whole year living turn into recreational properties. The Authority does not see how that legitimate aim could be reached by an equally efficient but less restrictive measure than the imposition of some kind of impersonal residence requirement aimed at ensuring that the concerned plots of land are inhabited on permanent basis.
35. Therefore, the Authority considers that the imposition of an impersonal residence requirement is a proportionate measure to reach the aim of ensuring whole year residence in certain municipalities in Norway. Consequently, the Authority takes the view that the application of an impersonal residence requirement in Nøtterøy and Tjøme are not in breach of Article 40 EEA.

2.2.4 Retroactivity

36. By two letters of 20 April 2012, the complainants were informed by the Authority of its intention to close the case. One of the complainant submitted observations by letters of 8 and 12 May 2012, indicating that the Authority fails to take into consideration that Norway applies the impersonal residence retroactively, *i.e.* that residence requirements are imposed on properties that have already been acquired.
37. Article 40 EEA on the free movement of capital applies to investment restrictions and, as explained above, the imposition of an impersonal residence requirement is a restriction to Article 40 EEA.
38. The Authority acknowledges that the application of restrictions under national law on owners of properties in a retroactive manner may be burdensome. However, the Authority does not consider that a retroactive application of impersonal residence requirements such as the ones in Nøtterøy and Tjøme would, as such, add anything

⁹ See C-370/05 *Festersen*, cited above, paragraphs 33-37, 41-42 and 50.

to the restrictive effect of those measures under Article 40 EEA. While retroactive application of these measures might raise questions under national constitutional law, the EEA Agreement shall in no way prejudice the rules governing the EEA States' system of property ownership (Article 125 EEA).

3 Conclusion

39. For those reasons, there are no grounds for pursuing these cases further.

HAS ADOPTED THIS DECISION:

Cases no. 67812 and 68836 arising from complaints against Norway for alleged breach by that State of Article 40 of the EEA Agreement, are hereby closed.

Done at Brussels, 11 July 2012

For the EFTA Surveillance Authority

Oda Helen Sletnes
President



Signed version

Sabine Monauni-Tömördy
College Member