

Case No: 82222
Document No: 1392956
Decision No: 139/23/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 October 2023

closing a complaint case concerning the regulation in Norway of sub-threshold
alternative investment fund managers

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 Introduction

On 7 June 2018, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway concerning the interpretation of the Act on the Management of Alternative Investment Funds (“the AIF Act”),¹ implementing the Alternative Investment Fund Managers Directive 2011/61/EU (“the AIFMD”),² by the Norwegian Financial Supervisory Authority (*Finanstilsynet*).

According to the complaint, Finanstilsynet is preventing 1) foreign EEA Alternative Investment Fund (“AIF”) managers registered under Article 3 AIFMD (sub-threshold AIFMs³) from managing AIFs in Norway or from marketing foreign EEA AIF to Norwegian professional investors, and 2) Norwegian AIF managers from marketing Norwegian feeder funds to Norwegian professional investors, in cases where the master fund is managed by a foreign EEA sub-threshold AIFM.

The complainant considers that the abovementioned practices of Finanstilsynet are in breach of, respectively, Article 36 EEA and Articles 31 and 36 AIFMD.

Article 5(1)(a) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) confers on the Authority a mandate to ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement. To this end, Article 5(2) SCA empowers the Authority to adopt a range of measures.

¹ Lov om forvaltning av alternative investeringsfond, LOV-2014-06-20-28.

² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73).

³ “AIFMs” means legal persons whose regular business is managing one or more AIFs: see Article 4(1)(b) of the AIFMD.

According to settled case-law of the EFTA Court, the Authority enjoys wide discretion in deciding whether and how to pursue proceedings against an EFTA State. The Authority alone is competent to decide whether it is appropriate to bring proceedings under Article 31 SCA for failure to fulfil the obligations under the EEA Agreement.⁴

Furthermore, any infringement proceedings brought by the Authority under Article 31 SCA should be concentrated so as to ensure the greatest impact for the functioning of the EEA Agreement, bearing in mind the resources of the Authority and having regard to alternative enforcement mechanisms available at national level.⁵

2 The Authority's action concerning the complaint

On 22 August 2018 (Doc No 927482) the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("the Directorate") requested information from the Norwegian Government on the sub-threshold AIFMs regime in Norway.

The Norwegian Government replied by a letter dated 19 October 2018 (Doc No 935369).

On 25 January 2022 (Doc No 1251910), the Directorate sent a supplementary request for information letter to Norway.

The Norwegian Government replied by a letter dated 7 March 2022 (Doc No 1274095).

3 The Authority's assessment

On account of the Authority's limited resources and increased workload, and in an effort to pursue EEA law matters of principle in a timely manner, the Authority needs to exercise a strict prioritisation of the issues it examines. Such prioritisation aims to ensure clarity for complainants in line with the principle of good administration, and to increase the Authority's efficiency and effectiveness in discharging its duties under the EEA Agreement and SCA.

After examination of the case, the Authority is of the view that it is not possible to allocate the resources required to pursue an infringement procedure. In the light of the above, this case cannot be prioritised.

By letter of 27 June 2023 (Doc No 1371955), the Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or to present any new information by 15 August 2023.

⁴ See, for example, Order of the EFTA Court of 23 October 2013 in Case E-2/13, *Bentzen Transport v EFTA Surveillance Authority*, EFTA Ct. Rep [2013] p. 802, point 40, and further, the Order of the EFTA Court in Case E-13/10 *Aleris Ungplan AS v ESA* [2011] EFTA Ct. Rep. 3.

⁵ As the European Commission has stated: "*Certain categories of cases can often be satisfactorily dealt with by other, more appropriate mechanisms at EU and national level. This applies in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice, of a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law. In such cases, if there is effective legal protection available, the Commission will, as a general rule, direct complainants in this context to the national level.*" See "*EU law: Better results through better application*" (2017/C 18/02) paragraph 3, sub para 9. The same principles are applicable *mutatis mutandis* to the EEA legal order.

The complainant did not reply to that letter.

It is emphasised that the Authority's view as set out in the present Decision is a decision made upon policy grounds alone. It does not constitute any indication that the Authority considers that either national law or administrative practice are in compliance with EEA law.

Moreover, the present Decision in no way restricts the Authority's future actions concerning the legal, administrative and/or factual issues arising in or from the case closed.

4 Conclusion

In the context outlined above, the Authority concludes, in the exercise of its discretion pursuant to Article 31 SCA, not to pursue the case further.

HAS ADOPTED THIS DECISION:

The complaint case against Norway concerning the regulation in Norway of sub-threshold alternative investment fund managers, is hereby closed.

For the EFTA Surveillance Authority

Arne Røksund
President

Stefan Barriga
Responsible College Member

Árni Páll Árnason
College Member

Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.