

Case No: 84262
Document No: 1397402
Decision No: 010/24/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 7 February 2024

closing an own initiative case arising from an alleged failure by Norway to comply with Directives 2014/24/EU and 2014/25/EU and Articles 31 and 36 of the EEA Agreement by maintaining in force national legislation in the form of Section 19-3 of Regulation No. 974 of 12 August 2016 on Public Procurement and Section 7-8 of Regulation No. 975 of 12 August 2016 on Procurement in the Utility Sectors

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 14 October 2019, the EFTA Surveillance Authority (“the Authority”) opened a case against Norway regarding restrictions on subcontracting in the field of public procurement. The case was opened in light of the ruling of the Court of Justice of the European Union in Case C-63/18, *Vitali*.¹

The case concerns Section 19-3 of Regulation of 12 August 2016 No. 974 on Public Procurement² and Section 7-8 of Regulation of 12 August 2016 No. 975 on Procurement in the Utility Sectors.³

Section 19-3 of Regulation No. 974 (“Limitation of the number of links in the supply chain”) provides:

- 1) *The client shall require that suppliers may have a maximum of two links in the supply chain below them when the supplier is to carry out construction work or cleaning services covered by CPV code 90910000 (cleaning).*
- 2) *The client may accept several links in the supply chain if necessary to ensure adequate competition. The maximum number of links the client may accept must be stated in the procurement documents. After the contract is*

¹ Judgment of the Court of Justice of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787.

² Forskrift om offentlige anskaffelser (anskaffelsesforskriften), FOR-2016-08-12-974, available at <https://lovdata.no/dokument/SF/forskrift/2016-08-12-974>.

³ Forskrift om innkjøpsregler i forsyningssektorene (forsyningsforskriften), FOR-2016-08-12-975, available at <https://lovdata.no/dokument/SF/forskrift/2016-08-12-975>.

*signed, the client may accept more links if, due to unforeseen circumstances, it is necessary in order for the contract to be completed.*⁴

Section 7-8 of Regulation No. 975 (“Limitation of the number of links in the supply chain”) provides:

- 1) *Clients referred to in Section 1-2, first paragraph, subparagraphs a to d, shall require that suppliers may have a maximum of two links in the supply chain below them when the supplier is to carry out construction work or cleaning services covered by CPV code 90910000 (cleaning) in contracts with an estimated value equal to or exceeding NOK 4.1m excluding VAT.*
- 2) *The client may accept several links in the supply chain if necessary to ensure adequate competition. The maximum number of links the client may accept must be stated in the procurement documents. After the contract is signed, the client may accept more links if, due to unforeseen circumstances, it is necessary in order for the contract to be completed.*⁵

For the purposes of this decision, these provisions will be referred to as “Sections 19-3 and 7-8.” The Authority notes that a materially similar provision concerning construction contracts with values under the EEA threshold for works contracts is also included at Section 8-13 of Regulation No. 974.⁶

The Norwegian Government has explained that the objectives of Sections 19-3 and 7-8 are to detect and combat work related crime and has noted that the presence of one or more of the following elements is characteristic of work related crime: crime related to taxes and government fees, gross violations of accounting and bookkeeping practices (incorrect and deficient accounting and use of fictitious/incorrect documentation), corruption, bankruptcy crime, money laundering, currency smuggling, social security fraud, providing incorrect or false information and documentation to public authorities (false identity and recording of incorrect data in public registers), gross violations of rules on health, security and environment, exploitation of labour in violation of statutes or agreements and use of illegal workers.⁷

2 Key correspondence

On 10 June 2020, the Authority issued a letter of formal notice to Norway,⁸ concluding that Sections 19-3 and 7-8 did not comply with EEA law.

On 28 October 2020, the Norwegian Government responded to the letter of formal notice.⁹

Dialogue and correspondence have continued between the Authority and the Norwegian Government since the Norwegian Government’s response to the letter of formal notice.¹⁰

⁴ The Authority’s translation.

⁵ The Authority’s translation.

⁶ Note that this was not referred to in the letter of formal notice (see section 2 below),

⁷ Letter of 28 October 2020, Document No 1160402, pages 4 and 6.

⁸ Decision No 052/20/COL; Document No 1112240.

⁹ Document No 1160402.

¹⁰ See, in particular, Document Nos 1170531, 1180861, 1290327, 1325668 (page 54) and 1358912, in addition to the correspondence referred to in section 3 below.

3 Summary of the issue

In its letter of formal notice, the Authority concluded that Sections 19-3 and 7-8 did not comply with Directive 2014/24/EU,¹¹ Directive 2014/25/EU¹² or Articles 31 and 36 of the EEA Agreement. The Authority based its conclusion primarily on there being limited possibility for assessment on a case-by-case basis by the contracting authority, such a position meaning the relevant provisions went beyond what was necessary to meet their objective and therefore failed to comply with the principle of proportionality.

The Authority did not dispute the legitimacy of the aim of the provisions and recognised that Directives 2014/24/EU and 2014/25/EU include provisions that provide for scope for measures to be taken which may affect subcontracting, particularly:

- a) Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU, which oblige States to take measures to ensure contractors comply with obligations of, inter alia, social and labour law;
- b) Article 71(6) of Directive 2014/24/EU and Article 88(6) of Directive 2014/25/EU, which provide that measures may be taken in the context of subcontracting with the aim of avoiding breaches of the obligations referred to in Article 18(2)/36(2); and
- c) Recital 41 of Directive 2014/24/EU and Recital 56 of Directive 2014/25/EU, which refer to the ability of States to take measures necessary to protect, inter alia, public policy, public morality and public security.¹³

However, in the context of the Norwegian legislation, the Authority also noted that it was not clear why it should not have been possible for a contracting authority to assess the nature of a specific contract and conclude that the risk of work related crime in that instance did not require additional measures to be taken.¹⁴ Furthermore, the Authority expressed the view that if a contracting authority had other means of control at its disposal to combat work related crime, it should have been able to use such means.¹⁵

In its response to the letter of formal notice,¹⁶ the Norwegian Government disputed the Authority's conclusions and argued that Sections 19-3 and 7-8 did not deter competition and, in the alternative, that they were permissible pursuant to the articles and recitals of Directives 2014/24/EU and 2014/25/EU referred to above. The Norwegian Government also referred to the possibility for a contracting authority to accept more links in the supply chain if necessary to ensure adequate competition ("the competition exemption").¹⁷

The competition exemption has been a focus of subsequent dialogue with the Norwegian Government

On 24 April 2023, the Norwegian Government wrote to the Authority and stated that it saw the need to clarify the interpretation of Sections 19-3 and 7-8, in particular, the competition

¹¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, act referred to at point 2 of Annex XVI to the EEA Agreement.

¹² Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, act referred to at point 4 of Annex XVI to the EEA Agreement.

¹³ Page 7 of the letter.

¹⁴ Page 9 of the letter.

¹⁵ Page 9 of the letter.

¹⁶ Letter of 28 October 2020.

¹⁷ See, in particular, page 9 of the letter.

exemption.¹⁸ The letter included comments to the effect that the competition exemption should be interpreted to entail more flexibility than was understood earlier in the case.¹⁹ The letter also referred to the competition exemption balancing obligations relating to social and labour law and the other basic principles in the procurement regulations regarding, inter alia, competition, proportionality and equal treatment of suppliers.

On 19 October 2023, the Norwegian Government supplied a copy of guidance intended to be published by the Norwegian Agency for Public and Financial Management (DFØ) concerning Sections 19-3 and 8-13 of Regulation No. 974.²⁰ On 6 November 2023, the Ministry of Trade, Industry and Fisheries confirmed that that guidance had been published on DFØ's website.²¹

4 The Authority's position

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 EEA 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.

According to settled case-law of the EFTA Court, the Authority enjoys wide discretion in deciding whether and how to pursue proceedings against an EEA 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.²²

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.²³

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 stakeholders 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.

¹⁸ Document No 1368668.

¹⁹ See, in particular, the Authority's letter of formal notice and the Norwegian Government's letter of 15 February 2021 (Document No 1180861).

²⁰ Document No 1406700.

²¹ Document No 1410899. See <https://anskaffelser.no/berekraftige-anskaffingar/arbeidslivskriminalitet/begrensning-i-antall-ledd-i-leverandorkjeden>

²² 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.

²³ 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.

As regards the present case, it should be reiterated that any legislation in breach of the EEA Agreement is sufficient to justify the Authority taking action. That being said, the Authority has not received any complaints regarding Sections 19-3 and 7-8 (or Section 8-13 of Regulation No. 974). It can also be noted that the Norwegian Government has adopted updated guidance on the competition exemption, as set out in Part 3 above. Recalling the Authority's discretion referred to above, the Authority is of the view that it is not appropriate to allocate further resources to the present case.

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.

The Authority may, in particular, monitor whether the changes made to the guidance impact how the competition exemption is applied in individual instances, and/or assess any relevant changes made in the framework of the Norwegian Government's review of the national procurement regulations.²⁴ The Authority welcomes any input from interested parties on these or other matters relating to Norwegian rules regarding subcontracting in contracts subject to EEA public procurement law.

5 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 own initiative case arising from an alleged failure by Norway to comply Directives 2014/24/EU and 2014/25/EU and Articles 31 and 36 of the EEA Agreement by maintaining in force national legislation in the form of Section 19-3 of Regulation No. 974 of 12 August 2016 on Public Procurement and Section 7-8 of Regulation No. 975 of 12 August 2016 on Procurement in the Utility Sectors, is hereby closed.

For the EFTA Surveillance Authority

For Arne Røksund
President

Stefan Barriga
College Member

Árni Páll Árnason
Responsible College Member

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

This document has been electronically authenticated by Stefan Barriga, Melpo-Menie Josephides.

²⁴ <https://www.regjeringen.no/no/aktuelt/forslag-til-ny-anskaffelseslov-skal-gjore-offentlige-innkjop-enklere-og-mer-barekraftige/id3013883/>