

Case No: 80996
Document No: 1469257
Decision No: 114/24/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 10 July 2024

to bring a matter against Norway before the EFTA Court in accordance with Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

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(2) thereof,

Whereas:

By a letter dated 28 August 2017 (Doc No 867116), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that, following the judgment of the EFTA Court in Case E-08/16 *Netfonds Holdings*,¹ the Authority had opened an own initiative case to examine whether Norwegian rules and administrative practices concerning the authorisation of banks and insurance companies complied with Articles 31, 36 and 40 of the Agreement on the European Economic Area (“EEA” or “the EEA Agreement”).

In the judgment in *Netfonds Holdings*, the EFTA Court interpreted Articles 31, 36 and 40 EEA in the context of the Norwegian rules and administrative practices applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks and insurance companies, as described by the referring court. It concluded that those rules and practices constituted restrictions falling predominantly within the scope of Article 31 EEA, which either did not seem to be suitable to achieve the identified legitimate objective or, if suitable, seemed to go beyond what was necessary in order to attain that objective.

Moreover, on 12 July 2018, the Authority received a complaint (Doc No 923939-923947) concerning a rejection by the Norwegian Ministry of Finance of an application to establish a bank, based on a general evaluation of the planned ownership structure of the prospective bank, in which the complainants, two independent cooperative building associations, intended to establish an ownership percentage of 25 percent each, representing a qualifying holding of the bank. According to the complainants, Norwegian rules and administrative practices concerning the authorisation of financial undertakings are in breach of the EEA Agreement.

¹ Judgment of 16 May 2017 of the EFTA Court in Case E-08/16 *Netfonds Holdings ASA, Netfonds Bank AS, and Netfonds Livsforsikring AS and the Norwegian Government* [2017] EFTA Ct. Rep. 163.

In the abovementioned letter of 28 August 2017, the Norwegian Government was invited to inform the Authority of how it intended to comply with the EFTA Court's judgment in *Netfonds Holdings*.

The Norwegian Government replied by letter dated 28 September 2017 (ref. 17/3573, Doc No 875727), where it stated that in the judgment in *Netfonds Holdings*, the EFTA Court had answered the questions referred to it by Oslo District Court (*Oslo tingrett*). However, it had not made any decisions on whether the Norwegian legislation was in line with the EEA Agreement, and that the Norwegian Government would not be able to provide further comments on the matter before the national court's case was concluded.

The case was discussed at the package meeting which took place in Oslo on 26-27 October 2017² where the Norwegian Government was repeatedly invited to provide a reply to the question referred to in the request for information, *i. e.* how the Government intended to comply with the EFTA Court's judgment in *Netfonds Holdings*. By letter dated 15 December 2017 (ref. 17/3573, Doc No 889073), the Norwegian Government replied to the Authority's letter following up on the meeting and put forward its view that the Norwegian legislation was compliant with EEA law and that the EFTA Court had not concluded otherwise, without further explaining the Government's line of argumentation.

Based on the information provided by the Norwegian Government and on the information, which could be drawn from the judgment in *Netfonds Holdings*, the Internal Market Affairs Directorate of the Authority ("the Directorate") assessed the case and preliminarily concluded that the Norwegian legislation breached Article 31 EEA. Therefore, on 20 February 2018 (Doc No 892186), it sent a Pre-Article 31 letter to the Norwegian Government.

Norway replied by letter of 20 March 2018 (ref. 17/3573, Doc No 903700). In that letter, it provided an explanation of the Norwegian rules and administrative practices at stake, as well as comments concerning their suitability and necessity with regard to the aims pursued.

The Norwegian Government was informed about the abovementioned complaint by letter of 18 July 2018 (Doc No 924555). A request for information was sent to the Norwegian Government on 1 August 2018 (Doc No 925890). On 1 October 2018 (ref. 18/2969, Doc No 932303), Norway replied to the Authority's request for information mainly referring to its reply of 20 March 2018 to the Pre-Article 31 letter.

The issue was discussed at the package meeting in Oslo on 25-26 October 2018³ where the representatives of the Norwegian Government informed the Authority that a working group was being established to assess the criteria of Section 6-3 of the Financial Undertakings Act (see Case No 77973). It was proposed that this working group would also look into the financial undertakings' ownership regime. The report of the working group was expected in spring 2019.

After having assessed the Norwegian provisions and practices at issue, on 10 April 2019, the Authority issued a letter of formal notice to Norway. In this letter, it held the view that by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act, Norway has failed to fulfil its obligations arising from Articles 31 and 40 of the EEA Agreement.

Norway replied to the letter of formal notice on 11 June 2019 (ref. 17/3573, Doc No 1074428). In its reply, the Norwegian Government, among other things, informed the Authority that on 26 April 2019, an expert working group delivered a report on the suitability

² See the follow-up letter to the package meeting, Doc No 878916.

³ See the follow-up letter to the package meeting, Doc No 1039214.

assessment of large owners in financial undertakings⁴. The report discussed *inter alia* the ownership control regime and suggested amendments to the Norwegian legislation. According to the Norwegian Government, the issues raised in the letter of formal notice were closely connected with the national proceedings where the Government was a party and with the rules assessed in the experts' report, which was being considered by the Ministry of Finance. In light of this situation, the Government considered that it was not in a position to elaborate in detail on the issues raised in the letter of formal notice and only commented on certain aspects of the letter.

The case was discussed at the package meeting in Oslo on 24 and 25 October 2019⁵, where the representatives of the Norwegian Government informed the Authority that the national proceedings pending at the Court of Appeal had been postponed until June 2020. The Government was also still looking into how to follow up the experts' report of 26 April 2019.

On 11 March 2020, the Authority delivered a Reasoned Opinion to Norway (Doc No 1092776). There, the Authority maintained its conclusions presented in the letter of formal notice of 10 April 2019 (Doc No 924240), that Norway has infringed Articles 31 and 40 of the EEA Agreement by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act⁶.

By letter dated 11 June 2020 (Doc No 1137825), Norway replied to the RDO, essentially disagreeing with the Authority, and setting out detailed arguments to this effect, in a document of 49 pages. Also, on 3 March 2021, the Norwegian Borgarting Court of Appeal delivered a judgment, in which it concluded that the Norwegian rule and practice were proportionate and thus compatible with EEA law.⁷

Norway's reply to the Reasoned Opinion does not contest that the Norwegian rules and administrative practice at issue in the present case represent a restriction upon the freedom of establishment per Article 31 EEA. What is contested by Norway is the justifiability of the restriction in question. Norway's reply to the RDO defends the proportionality of the contested measures, but it expands significantly upon the arguments already advanced by Norway in its argumentation before the EFTA Court in *Netfonds* and those upheld by the Borgarting Court of Appeal.

Norway claims that the Authority has made 'an error in law' in assessing the suitability, consistency, necessity and proportionality of the measures in question in terms of two objectives pursued by Norway (namely the reduction of risk-incentives inherent in financial institutions with concentrated ownership structures, and the reduction of risk of misuse of ownership power). Rather, there are four further objectives (contributing to a sound capital situation for the financial institutions; promoting regulatory compliance; facilitating supervision and the enforcement of regulations; and increasing investor confidence with respect to the Norwegian financial market). This list of six objectives, in addition to the fact that Norway has chosen (as it may) a high level of protection in this area is used to defend the measure.

The Authority is of the view that the arguments put forward by Norway do not justify its failure to fulfil its obligations under Articles 31 and 40 of the EEA Agreement. Consequently, the Authority maintains its conclusion and considers that the matter should be brought before the EFTA Court.

⁴ Accessible at: <https://www.regjeringen.no/no/aktuelt/utredning-om-utforming-av-eierkontrollreglene/id2643416/>.

⁵ See the follow-up letter to the package meeting, Doc No 1096584.

⁶ *Lov om finansforetak og finanskonsern (finansforetaksloven) av 10. april 2015 No 17.*

⁷ LB-2018-141762.

HAS ADOPTED THIS DECISION:

1. Proceedings should be commenced before the EFTA Court to seek a declaration that, by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act, Norway has failed to fulfil its obligations under Articles 31 and/or 40 of the EEA Agreement.
2. The Director of Legal and Executive Affairs is instructed to seize the EFTA Court, liaising with the Internal Market Affairs Directorate and subject to control by the responsible College Member, and to represent the EFTA Surveillance Authority before the EFTA Court in these proceedings.

For the EFTA Surveillance Authority

For 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 Arni Pall Arnason, Melpo-Menie Josephides.