

Case No: 78022
Document No: 1397012
Decision No: 134/23/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 27 September 2023

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

concerning Norway's breach of

Articles 14, 26, 57 and 60 of Directive 2009/138/EC,
Articles 8, 16, and 24 of Directive 2013/36/EU,
Articles 9 and 20 of Directive 2003/41/EC,
Article 5 of Directive (EU) 2015/2366,
Article 3 of Directive 2009/110/EC and
Article 31 of the EEA Agreement

by maintaining in force an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States

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 letter dated 15 October 2015,¹ the EFTA Surveillance Authority (hereinafter "the Authority") informed Norway that it had opened an own initiative case concerning an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States, prescribed by Section 4-1 of the Norwegian Financial Institutions Act (hereinafter "the FIA").² In the letter, the Authority requested Norway to provide certain information in order to facilitate the Authority's examination of the matter.

By letter of 8 February 2016,³ Norway provided the requested information. It claimed essentially that the authorisation requirement in Section 4-1 the FIA ensured financial stability and was compliant with Article 31 of the EEA Agreement, as well as the relevant secondary legislation in force at the time.

Following further correspondence in the case,⁴ and after having examined the information provided by Norway, on 11 December 2019, the Authority issued a Letter of Formal

¹ Doc No 775977.

² *Lov om finansforetak og finanskonsern (finansforetaksloven)* of 10 April 2015, No 17.

³ Ref. 16/39 4 JCW, Doc No 792371.

⁴ See, in this regard, the Authority's pre-Article 31 letter of 22 June 2018 (Doc No 906322), Norway's reply of 21 September 2018 (Doc No 930846, Ref. 16/39), the Authority's additional

Notice to Norway,⁵ finding that by maintaining in force an authorisation requirement, such as that established in Section 4-1 of the FIA, Norway was in breach of Directives 2009/138/EC, 2013/36/EU, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC and of Article 31 of the EEA Agreement.

Norway replied to the Letter of Formal Notice by a letter of 2 March 2020.⁶ In its reply, Norway maintained its view that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway.

Following further correspondence in the case,⁷ and having examined the additional information and argumentation advanced by Norway, on 8 July 2020, the Authority sent a Reasoned Opinion to Norway, in which it maintained the view expressed in the Letter of Formal Notice.⁸

On 9 December 2020, Norway replied to the Reasoned Opinion⁹ and reiterated its view that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. The reply further noted that the relevant EEA legal framework supports the notion that competent authorities should have sufficient supervisory powers in cases in which an entity under its supervision plans to establish a group with subsidiaries in other EEA States. Annexed to the Reply to the Reasoned Opinion was a text and translation of the proposed amendments to Section 4-1 of the FIA.¹⁰

On 7 July 2022, Norway informed the Authority that, as of 1 June 2022, the relevant provisions of Section 4-1 of the FIA had been amended.¹¹ Moreover, Norway stated that the form that these amendments took ultimately largely reflected the proposed amendments previously discussed with ESA.

On 5 October 2022, having examined the revised legislation, as well as the correspondence received, and having discussed the amendments with Norway in the interim, the Authority issued a Supplementary Letter of Formal Notice to Norway.¹² In this letter, the Authority stated that the amendments of the relevant legislation had merely replaced an authorisation requirement *simpliciter* with a *de facto* authorisation requirement, and that by maintaining in force an authorisation requirement such as that established by Section 4-1 first paragraph of the FIA (as amended), Norway is in breach of Directives 2009/138/EC, 2013/36/EU, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC and of Article 31 of the EEA Agreement.

Following further correspondence and discussion,¹³ on 2 December 2022, Norway replied to the Authority's Supplementary Letter of Formal Notice.¹⁴ There, Norway disagreed with the Authority's assessment that the amendments to the relevant legislation had resulted

request for information of 23 November 2018 (Doc no 1039260), and Norway's reply of 3 January 2019 (Doc No 1045358, Ref. 16/39).

⁵ Doc No 900171.

⁶ Ref. 16/39, Doc No 1117887.

⁷ See, in this regard, the Authority's letter of 24 March 2020, requesting information concerning the Norwegian working group (Doc No 1122927), and the reply from Norway of 13 May 2020 (Doc No 1132730, Ref. 16/39).

⁸ Doc No 1120918.

⁹ Ref. 16/39, Doc No 1168066.

¹⁰ Doc No 1168068.

¹¹ Doc No 1301145.

¹² Doc No 1308892.

¹³ The case was discussed at the Package Meeting in Oslo on 27-28 October 2022. The Authority thereafter sent a follow-up letter to Norway on 15 December 2022, noting that the Authority would assess Norway's reply to the Supplementary Letter of formal Notice and determine the next steps to be taken in the case (Doc No 1325668).

¹⁴ Ref. 16/39, Doc No 1334134.

in the creation of a *de facto* authorisation scheme, arguing that the notification requirement, and the safety measures attached thereto – which are only applicable in the cases of special risk, or if the acquisition or establishment would impede supervision of the group – contribute to the legitimate goal of safeguarding financial stability in Norway.

On 19 April 2023, the Authority sent a Supplementary Reasoned Opinion¹⁵ where it maintained its conclusions in the Supplementary Letter of Formal Notice.

On 20 June 2023, Norway replied to the Supplementary Reasoned Opinion,¹⁶ maintaining its view set out in the Reply to the Letter of Formal Notice, namely that the notification requirement and the Norwegian financial supervisory authority's ability to intervene in cases of special risk, is justified by an overriding reason in the public interest, specifically to ensure financial stability. Moreover, Norway maintained its understanding that the relevant directives neither prohibit nor exclude competence for the home State supervisory authority to set conditions for an establishment or acquisition of a subsidiary in an EEA State as part of its supervision of national financial undertakings. The Norwegian Government's letter additionally requested further time to reply to the Supplementary Reasoned Opinion, with a view to bringing forward further legislative amendments in this area.

On 25 July 2023, the Authority issued a letter, replying that Norway's request for an extension could not be granted.¹⁷

Since this date, Norway has engaged with the Authority via email correspondence,¹⁸ setting out tentative proposals for potential future reforms of the FIA. Notwithstanding the foregoing, the Authority notes that the most recent formal correspondence received, the Reply to the Supplementary Reasoned Opinion,¹⁹ maintains the position that the present scheme of Section 4-1 of the FIA is compatible both with Article 31 EEA and with Directives 2009/138/EC, 2013/36/EU, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC (together, "the relevant Directives").

The Authority is of the view that the arguments put forward by Norway cannot justify its failure to fulfil its EEA obligations under Article 31 EEA and the relevant Directives. Subsequently, the Authority maintains its conclusion and therefore considers that the matter should be brought before the EFTA Court.

HAS ADOPTED THIS DECISION:

1. Proceedings should be commenced before the EFTA Court to seek a declaration that Norway, by maintaining in force an authorisation requirement in Section 4-1 of the Norwegian Financial Institutions Act to set up subsidiaries or acquiring of Norwegian financial institutions in other EEA States, Norway has breached:
 - Articles 14, 26, 57 and 60 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast);
 - Articles 8, 16 and 24 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;
 - Articles 9 and 20 of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision;

¹⁵ Doc No 1336699.

¹⁶ Doc No 1380394.

¹⁷ Doc No 1390206.

¹⁸ See, in particular, Doc No 1393046.

¹⁹ Doc No 1380394.

- Article 5 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market;
 - Article 3 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, and
 - Article 31 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 competent College Member, and to represent the EFTA Surveillance Authority before the EFTA Court in these proceedings.

For the EFTA Surveillance Authority

Arne Røksund
President

Stefan Barriga
Responsible College Member

Árni Páll Árnason
College Member

Melpo-Menie Joséphidès
Countersigning as Director,
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This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.