

Case No: 78022
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Decision No: 073/20/COL

REASONED OPINION

delivered in accordance with Article 31 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 8, 16, 22 and 24 of Directive 2013/36/EU, Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC, Article 3 of Directive 2009/110/EC and/or 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

1 Introduction

1. By letter dated 15 October 2015 (Doc No 775977), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had opened an own initiative case concerning an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States.

2. In this reasoned opinion, the Authority maintains its conclusions presented in the letter of formal notice of 11 December 2019 (Doc No 900171), that an authorisation requirement, such as the one established in Section 4-1 first paragraph of the Norwegian Financial Institutions Act (“the FIA”)¹, is in breach of Directives 2013/36/EU², 2009/138/EC³, 2003/41/EC⁴, 2007/64/EC⁵ and 2009/110/EC⁶ and/or constitutes an unjustified restriction on the freedom of establishment, in breach of Article 31 of the Agreement on the European Economic Area (“the EEA Agreement”).

2 Correspondence

3. By the abovementioned letter of 15 October 2015, the Authority asked the Norwegian Government to provide certain information for the purpose of the Authority’s examination of the matter. By letter of 8 February 2016 (ref. 16/39-4 JCW, Doc No 792371), the Norwegian Government provided the requested information. It claimed essentially that the authorisation requirement in Section 4-1 first paragraph of the FIA ensures financial stability and complies with Article 31 of the EEA Agreement.

4. The case was discussed at the package meeting in Oslo on 27-28 October

¹ *Lov om finansforetak og finanskonsern (finansforetaksloven) av 10. april 2015 No 17.*

² 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* (OJ L 176, 27.6.2013, p. 338), incorporated at point 14 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 (OJ L 321, 12.12.2019, p. 170).

³ 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)* (OJ L 335, 17.12.2009, p. 1, and EEA Supplement No 76, 17.12.2015, p. 987), incorporated at point 1 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 (OJ L 262, 6.10.2011, p. 45).

⁴ 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* (OJ L 235, 23.9.2003, p. 10, and EEA Supplement No 39, 16.7.2009, p. 439), incorporated at point 30cb of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 88/2006 (OJ L 289, 19.10.2006, p. 26). The directive has been replaced by Directive (EU) 2016/2341, which has not yet been incorporated into the EEA Agreement.

⁵ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *on payment services in the internal market* (OJ L 319, 5.12.2007, p. 1, and EEA Supplement No 10, 20.2.2006, p. 26), incorporated at point 16e of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 114/2008 (OJ L 339, 18.12.2008, p. 103). The directive has been replaced by Directive (EU) 2015/2366, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 (not yet in force in the EEA EFTA States).

⁶ 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* (OJ L 267, 10.10.2009, p. 7, and EEA Supplement No 49, 27.8.2015, p. 332), incorporated at point 15 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 120/2010 (OJ L 58, 3.3.2011, p. 77).

2016⁷ where the Norwegian Government reiterated that the authorisation requirement can be justified by the need to ensure financial stability and that the restriction is proportionate with regard to the aim sought.

5. Based on the information provided by the Norwegian Government, the Internal Market Affairs Directorate of the Authority (“the Directorate”) assessed the relevant aspects of the case and came to the preliminary view that the Norwegian legislation was in breach of Article 31 EEA. Therefore, on 22 June 2018 (Doc No 906322), it sent to Norway a Pre-Article 31 letter.

6. The Government replied by letter of 21 September 2018 (ref. 16/39, Doc No 930846). In this letter, it maintained its view that Section 4-1 first paragraph of the FIA is both suitable and necessary in order to achieve the aim of financial stability.

7. The issue was discussed at the package meeting in Oslo on 25-26 October 2018⁸ where the Norwegian Government provided arguments as to the suitability and necessity of the national measure. The Authority stated that it would continue to examine and assess the case and was likely to revert with requests for further information.

8. On 23 November 2018 (Doc No 1039260), the Authority sent an additional request for information to Norway. The Government replied by letter of 3 January 2019 (ref. 16/39, Doc No 1045358).

9. At the package meeting in Oslo on of 24 and 25 October 2019⁹, the representatives of the Norwegian Government informed the Authority that they did not have any additional information as concerns proportionality of the national measure.

10. After having assessed the Norwegian provisions and other information provided by Norway, on 11 December 2019, the Authority issued a letter of formal notice to Norway. In this letter, it held the view that by maintaining in force an authorisation requirement, such as the one established in Section 4-1 first paragraph of the FIA, Norway is in breach of Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, 2007/64/EC and 2009/110/EC and/or of Article 31 EEA.

11. Following the extension of the deadline, Norway replied to the letter of formal notice by letter of 2 March 2020 (ref. 16/39, Doc No 1117887). In its reply, Norway maintained its view that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. However, the Norwegian Government noted that it would ask a forthcoming working group to assess, whether it is possible to achieve the same high level of protection of financial stability through other measures than the prior authorisation scheme.

12. By letter of 24 March 2020 (Doc No 1122927), the Authority requested from Norway further details on the working group, such as the time line on the commencement and the finalisation of its work related to the prior authorisation scheme addressed in the letter of formal notice. In addition, the Government was invited to inform the Authority about the time line on the implementation of the working group’s potential proposals.

13. After the extension of the time-limit, on 13 May 2020, the Norwegian

⁷ See the follow-up letter to the package meeting, Doc No 824382.

⁸ See the follow-up letter to the package meeting, Doc No 1039214.

⁹ See the follow-up letter to the package meeting, Doc No 1096584.

Government replied to this request (ref. 16/39, Doc No 1132730) by essentially referring to the information provided in their letter of 2 March 2020. It added, however, that part one of the working group's report, which is due on 1 October 2020, will include the issue concerning the prior authorisation scheme, which is the subject matter of the letter of formal notice.

3 Relevant national and EEA law

14. For the account of the relevant national and EEA law the Authority refers to, correspondingly, **Part 3** and **Part 4** of the letter of formal notice.

4 The Authority's Assessment

15. Section 4-1 first paragraph of the FIA establishes a prior authorisation scheme for Norwegian financial institutions that intend to either establish or acquire financial institutions as subsidiaries in other EEA States.

16. Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, 2007/64/EC and 2009/110/EC contain rules concerning authorisation for the taking up and pursuit of the business of, respectively, credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions. Therefore, those directives are applicable where a Norwegian financial institution seeks to establish or acquire a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State.

17. The Authority refers to its assessment in **Part 5.2** of the letter of formal notice to conclude that by requiring Norwegian financial institutions to obtain an authorisation from the competent Norwegian authority before establishing or acquiring a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State, Norway is in breach of the authorisation procedures applicable to the establishment/acquisition of credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions, as provided, correspondingly, in Articles 8, 16, 22 and 24 of Directive 2013/36/EU, Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC and Article 3 of Directive 2009/110/EC.

18. There is no harmonised EEA legal framework applicable to the taking up and pursuit of the business of other financial institutions than credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions or electronic money institutions. Therefore, Article 31 EEA is applicable where a Norwegian financial institution seeks to establish/acquire in another EEA State as a subsidiary a financial institution, other than a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution.

19. The Authority refers to its assessment in **Part 5.3** of the letter of formal

notice to conclude that by requiring Norwegian financial institutions to obtain an authorisation from the competent Norwegian authority before establishing or acquiring a financial institution other than a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution, as a subsidiary in another EEA State Norway is in breach of Article 31 EEA.

20. In the alternative, if it were established that the above-mentioned EEA secondary legislation does not apply to the requirement of authorisation by the Norwegian competent authority for the establishment/acquisition of subsidiaries of financial institutions in other EEA States, the Authority refers to its assessment in **Part 5.3** of the letter of formal notice to conclude that this requirement does not comply with Article 31 EEA. In particular, the Norwegian rules at issue constitute a restriction on the freedom of establishment under Article 31 EEA. For the reasons explained in the above-mentioned part of the letter of formal notice, the Norwegian measure does not comply with the principle of legal certainty and, as such, cannot be considered as justified. In any case, the authorisation requirement is not suitable with regard to the aims sought and/or goes beyond what is necessary to ensure the aims indicated by the Norwegian Government.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force an authorisation requirement, such as the one in Section 4-1 first paragraph of the Financial Institutions Act, Norway fails to fulfil its obligations arising from Articles 8, 16, 22 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 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 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*, Article 5 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *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.

Alternatively, the Authority must conclude that, by maintaining in force an authorisation requirement, such as the one in Section 4-1 first paragraph of the Financial Institutions Act, which constitutes an unjustified restriction on the freedom of establishment, Norway has failed to fulfil its obligation arising from Article 31 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *three months* of its receipt.

Done at Brussels, 8 July 2020

For the EFTA Surveillance Authority

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This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.