



## JUDGMENT OF THE COURT

25 November 2005

*(Failure of a Contracting Party to fulfil its obligations – life assurance services – freedom to provide services and right of establishment – Article 33 of Directive 2002/83/EC – justification of restriction based on general good – proportionality)*

In Case E-1/05,

**EFTA Surveillance Authority**, represented by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Officer, in the Department of Legal & Executive Affairs, acting as Agents, 35 Rue Belliard, Brussels, Belgium,

*Applicant,*

v

**The Kingdom of Norway**, represented by Christian F. Galtung, Advocate, Attorney General for Civil Affairs, and Guro Hansson Bull, Legal Adviser, Department for Legal Affairs, Ministry of Foreign Affairs, acting as Agents, 7 juni plass 1, Oslo, Norway,

*Defendant,*

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations pursuant to Article 33 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, referred to at point 11 of Annex IX to the EEA Agreement, as adapted to the EEA Agreement by Protocol 1 thereto.

THE COURT,

composed of: Carl Baudenbacher, President, Per Tresselt and Thorgeir Örlygsson (Judge-Rapporteur), Judges,

Registrar: Henning Harborg,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman, Legal Adviser, and Georges Zavvos, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agent Per Andreas Bjørgan, the Defendant, represented by its Agent Christian F. Galtung, and the Commission of the European Communities, represented by its Agent Georges Zavvos, at the hearing on 11 October 2005.

gives the following

## Judgment

### I Facts and pre-litigation procedure

- 1 By an application lodged at the Court on 11 January 2005, the EFTA Surveillance Authority (hereinafter ESA or the Applicant) brought an action under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice seeking a declaration that the Kingdom of Norway has failed to fulfil its obligations pursuant to Article 33 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, referred to at point 11 of Annex IX to the EEA Agreement, as adapted to the EEA Agreement by Protocol 1 thereto (hereinafter Directive 2002/83/EC), by maintaining in force the requirement of an upfront payment of contract completion costs in Section 3(2) of the Norwegian Regulation of 21 November 1989 No 1167 on the Allocation of Costs, Losses, Income, Funds etc between Insurance Undertakings in a Concern and between Branches and Contracts of Insurance Undertakings (*forskrift om fordeling av kostnader, tap, inntekter, fond mv mellom forsikringsselskaper i konsernforhold og mellom bransjer og kontrakter i et forsikringsselskap* (hereinafter Regulation 1989 No 1167) and Section 10 of the Norwegian Regulation of 22 September 1995 No 827 on Insurance Services and the Establishment of a Branch of an Insurance Undertaking with Headquarters in another EEA State (*forskrift om forsikringstjenesteytelser og etablering av filial av forsikringsselskap med hovedsete i annen stat i Det europeiske økonomiske samarbeidsområde m.m.* (hereinafter Regulation 1995 No 827).
- 2 The contested requirement was introduced in relation to insurance legislation enacted by the Norwegian Parliament (Storting) in 1988. According to undisputed information provided by the Norwegian Government, one of its main objectives was to enable policy holders to terminate and effectively transfer their life assurance contracts from one insurer to another, or, where appropriate, to other forms of savings. At that time, life assurance providers could charge costs that accrued when life assurance contracts were entered into (so called contract completion costs), normally around NOK 7000, as a cost element of the premium, spreading repayment over the term of the contract. This meant that if a

life assurance contract was terminated or transferred, a “completion costs debt” was deducted from the accrued funds, the amount depending on how long the contract had run. This was seen by the Norwegian authorities as a hindrance to the transfer of life assurance contracts. Thus, the contested requirement in Section 3(2) of Regulation 1989 No 1167 was introduced. However, the assurance providers continued to spread costs over the contract term using a narrow definition of what constituted completion costs. Regulation 1989 No 1167 was therefore amended in 1994 in order to clarify the obligations for the assurance providers. Contract completion costs are now normally around NOK 450 – 600.

- 3 By a letter dated 14 December 2000, ESA informed the Government of Norway that it had opened an own-initiative case to consider whether Section 3(2) of Regulation 1989 No 1167 complied with provisions in, at the applicable times, Directive 79/267/EEC and Directive 92/96/EEC.
- 4 By a letter dated 20 July 2001, the Norwegian Ministry of Finance submitted that the provision in Section 3(2) of Regulation 1989 No 1167 was in compliance with the requirements of the relevant Directives.
- 5 After an additional exchange of correspondence, ESA on 2 April 2003 issued a letter of formal notice to the Government of Norway. There it was submitted, that ESA considered the requirement of upfront payment of contract completion costs in Norwegian law to be contrary to Article 28 of Directive 92/96/EEC, and that the restriction could not be justified by the general good.
- 6 By a letter to ESA dated 13 June 2003, the Government of Norway maintained its position. It argued that even if a restriction did exist, it was justified by reference to the need to ensure effective competition and consumer protection, and that the measure was both necessary and proportionate.
- 7 On 17 July 2003, ESA issued a reasoned opinion maintaining the position expressed in the letter of formal notice, and demanded that Norway take the necessary measures to comply with the reasoned opinion within three months.
- 8 In its answer, by a letter dated 21 November 2003, the Government of Norway confirmed its view that the contested requirement complied with the EEA Agreement. It maintained that the requirement did not constitute a restriction, and even if it did, it was justified on the basis of legitimate interests to further the general good, namely consumer interests and effective competition.

## **II Legal background**

### *EEA law*

- 9 Article 31 EEA reads:

*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*

*2. Annexes VIII to XI contain specific provisions on the right of establishment.*

10 Article 36 EEA reads:

*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

*2. Annexes IX to XI contain specific provisions on the freedom to provide services.*

11 Directive 2002/83/EC (OJ 2002 L 345, p. 1) is referred to in point 1 of Chapter XIX of Annex II to the EEA Agreement. The Directive repealed Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (OJ 1992 L 360, p. 1), at that time referred to in point 12a of Annex IX to the EEA Agreement (hereinafter, “Directive 92/96/EEC”). Directive 2002/83/EC was incorporated into the EEA Agreement by Joint Committee Decision 60/2004, which entered into force on 27 April 2004.

12 Article 28 of Directive 92/96/EEC reads:

*The Member State of the commitment shall not prevent a policy-holder from concluding a contract with an assurance undertaking authorized under the conditions of Article 6 of Directive 79/267/EEC, as long as that does not conflict with legal provisions protecting the general good in the Member State of the commitment.*

13 Article 33 of Directive 2002/83/EC reads:

*The Member State of the commitment shall not prevent a policy holder from concluding a contract with an assurance undertaking authorised under the conditions of Article 4 as long as that does not conflict with legal provisions protecting the general good in the Member State of the commitment.*

- 14 According to Article 36 of Directive 2002/83/EC, which corresponds to Article 31 of Directive 92/96/EEC, at least the information listed in Annex III(A) to the Directive shall be communicated to the policy holder before the life assurance contract is concluded. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.
- 15 Annex III(A) to Directive 2002/83/EC, which corresponds to Annex II(A) of Directive 92/96/EEC, refers, *inter alia*, to the following information, which is to be communicated in a clear and accurate manner, in writing, to the policy holder before the contract is concluded:

...

(a)4 *Definition of each benefit and each option*

(a)5 *Term of the contract*

(a)6 *Means of terminating the contract*

(a)7 *Means of payment of premiums and duration of payments*

(a)8 *Means of calculation and distribution of bonuses*

(a)9 *Indication of surrender and paid-up values and the extent to which they are guaranteed*

(a)10 *Information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate*

...

(a)13 *Arrangements for application of the cooling-off period*

#### *National law*

- 16 Section 3(2)-3(5) of Regulation 1989 No 1167 reads:

*Costs which are accrued when a life assurance contract is entered into (contract completion costs) are not to be included in the cost element when setting the premium tariff (basis for calculation). Such costs are to be charged and paid by the policy holder separately and no later than upon the payment of the first premium.*

*Only costs that accrue as a direct consequence of the entering into of the life insurance contract shall be considered to be contract completion costs. ...*

*Costs other than contract completion costs shall be included in the cost element of the premium tariff. The policy holder shall pay such costs annually for the duration of the insurance contract, either as part of an annual premium or as a specified supplement to the annual premium.*

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*If the life insurance contract ends as a consequence of moving or repurchase, the undertaking may only deduct unpaid costs for which the policy holder is charged until and including the year in which the contract ends.*

- 17 It follows from Section 10 of Norwegian Regulation 1995 No 827 that Section 3 of Regulation 1989 No 1167 is applicable to undertakings authorised in other EEA States that provide services in Norway.

### **III Arguments of the parties**

- 18 The application is based on the plea that the Defendant has failed to fulfil its obligations under Article 33 of Directive 2002/83/EC by maintaining in force the requirement in Section 3(2) of Regulation 1989 No 1167 and Section 10 of Regulation 1995 No 827 that contract completion costs be charged and paid by the policy holder separately, and no later than upon the payment of the first premium.
- 19 The Applicant maintains that the aforementioned requirement restricts the freedom to provide life assurance services since it prevents policy holders in Norway from entering into contracts with life assurance providers that distribute the payment of contract completion costs over a period of time, thereby limiting consumer choice. Furthermore, it potentially limits the provision of different assurance services since undertakings authorized in other Contracting Parties may be hindered from marketing their products in Norway.
- 20 As regards the question of whether the contested requirement can be justified on the basis of the concept of the general good as laid down in Article 33 of Directive 2002/83/EC, the Applicant does not contest that the general aim behind the Norwegian insurance legislation, to facilitate consumer's effective rights to terminate and transfer life assurance contracts, serves the general good, i.e. consumer protection. The Applicant, however, maintains that the aim behind the contested requirement to facilitate competition can not serve as justification, and refers in that respect to case law of the Court of Justice of the European Communities, *inter alia* Case C-422/01 *Skandia v Sweden* [2003] ECR I-6817, paragraph 58. The Applicant points out that the marketplace is the EEA and not the national market, and that Directive 2002/83/EC is aimed at creating competition in the EEA by ensuring the greatest possible choice of life assurance products for consumers.
- 21 Even if the contested requirement were to be considered to serve the general good, the Applicant submits that the requirement of an upfront payment is neither suitable nor necessary to achieve the aims of the contested requirement. On the contrary, the requirement may harm competition and consumer interests by limiting the number of available life assurance products in Norway. The Applicant also argues that the contested requirement does not affect the "tie-in effect" that the Defendant maintains was caused by high contract completion cost debt. Furthermore, the Applicant asserts that there is no proof of a link between

the contested requirement of an upfront payment of contract completion costs, and any reduction of such costs that has occurred.

- 22 In any event, the Applicant maintains that the stated aim of the contested requirement can be adequately achieved by less restrictive means, i.e. by requiring insurance undertakings to calculate the amount of contract completion costs and present information thereon, as well as on the conditions for their payment, before a contract is concluded, and refers in that regard to Article 36 of Directive 2002/83/EC and recital 52 of its preamble, and to case law of the Court of Justice of the European Communities, *inter alia* Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR-649.
- 23 The Commission of the European Communities supported in general the Applicant's arguments and referred in that regard especially to Case C-442/02 *Caixa-Bank France v Ministère de l'Economie, des Finances et de l'Industrie* [2004] ECR I-8961.
- 24 The Defendant does not contest that the disputed requirement may amount to a restriction incompatible with Article 33 of Directive 2002/83/EC, given the very broad interpretation of this concept by the Court, and the Court of Justice of the European Communities. However, the Defendant claims that the application is unfounded as the disputed requirement, which is non-discriminatory, is justified on the basis of the general good.
- 25 The Defendant submits that the disputed requirement is a necessary and important part of the regulation of the life insurance market in Norway, as one of its main objectives is to enable consumers to transfer their life assurance contracts from one assurance provider to another with the least possible cost. The Defendant also points out that consumer protection is generally accepted as a legitimate public interest by the Court of Justice of the European Communities.
- 26 The Defendant claims that the contested requirement is suitable to ensure this objective. It has created a sharp focus on the price demanded by assurance providers for the conclusion of a contract, making it impossible to obscure the price, with the result of 80-90% price decrease.
- 27 With respect to proportionality, the Defendant emphasizes that the provision in question forms part of contract law relating to the conclusion of life assurance contracts, which varies between different EEA States. The Defendant refers to recital 44 of the preamble to Directive 2002/83/EC, and asserts that every assurance provider offering services to Norwegian consumers in Norway will have to adjust his contract to Norwegian contract law requirements. The contested requirement is one of many contractual obligations, and only calls for small adjustments to the conditions of life assurance contracts.
- 28 The Defendant pointed out that Norway has chosen a high level of consumer protection, which is not for the Court to review. In this respect, the Defendant referred to Cases C-124/97 *Läärä v the Finnish State* [1999] ECR I-6067,

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paragraph 36, C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, and 205/84 *Commission v Germany* [1986] ECR 3755.

- 29 Concerning the question of whether the same level of protection can be achieved by less restrictive means, the Defendant argues that a mere information requirement, as proposed by the Applicant, is not sufficient. In addition to such requirement, already in place in Norwegian legislation, the contested requirement is needed both in order to increase the level of consumer awareness and to reduce the level of contract completion costs charged to policy holders.

#### **IV Findings of the Court**

- 30 The dispute before the Court essentially concerns the question of whether the requirement in regulation 1989 No 1167, that costs which accrue when life assurance contracts are entered into have to be charged and paid no later than the date when the first premium payment is due, is in conformity with Article 33 of Directive 2002/83/EC.
- 31 The application is based on the plea that the contested requirement constitutes an unjustified restriction within the meaning of Article 33 of Directive 2002/83/EC. The Defendant does not contest that the rule at issue may amount to a restriction, but maintains that it is justified on grounds of the general good.
- 32 The Court notes that the reasoned opinion issued by the Applicant in the pre-litigation procedure was based on Article 28 of Directive 92/96/EEC. That Directive was subsequently repealed by Directive 2002/83/EC. Article 33 of Directive 2002/83/EC replaced Article 28 of Directive 92/96, and is identical in substance. In those circumstances, the Applicant is correct in basing its application on Article 33 of Directive 2002/83/EC (see, for comparison, Case C-363/00 *Commission v Italy*, [2003] ECR I-5767, paragraphs 21-24).
- 33 Directive 2002/83/EC aims at completing the internal market in direct life assurance, to make it easier for assurance undertakings with head offices in the EEA to cover commitments situated within the EEA, and to make it possible for policy holders to have recourse not only to assurers established in their own country, but also to assurers which have their head office in the EEA and are established in other Contracting Parties.
- 34 Directive 2002/83/EC does not directly address the issue of contract completion costs. However, according to its Article 33, and as explained in recital 46 of its preamble, it is for the Contracting Party of commitment to ensure that there is nothing to prevent the marketing within its territory of all the assurance products offered for sale in the EEA by insurance undertakings authorized in other Contracting Parties, as long as they do not conflict with the legal provisions protecting the general good in force in the State of commitment. Article 33 is an expression of the provisions of the EC Treaty on the freedom to provide services



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and the right of establishment and corresponding provisions of the EEA Agreement.

- 35 Directive 2002/83/EC is built on the principles of mutual recognition and home State supervision. The approach adopted consists, as set out in recital 7 of its preamble, in harmonising national law to an extent necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the EEA and apply the principle of supervision by the home State.
- 36 The contested requirement applies equally, irrespective of the nationality or the residency of the parties to an assurance contract. However, as maintained by the Applicant, it prevents consumers in Norway from concluding assurance contracts with assurance providers authorised in other Contracting Parties that do not charge contract completion costs in the contested manner. Likewise, assurance providers authorised in other Contracting Parties are prevented from offering such contracts in Norway, irrespective of whether the service is provided over borders or through, *inter alia*, an agency or branch in Norway. The contested requirement therefore constitutes a restriction within the meaning of Article 33 of Directive 2002/83/EC. This has been acknowledged by the Defendant in the course of the proceedings.
- 37 Next, it needs to be examined whether the restriction can be justified on the basis of grounds serving the general good in accordance with Article 33 of Directive 2002/83/EC. In order to be so justified, the national rule at hand must be suitable for securing the objective it pursues and must not exceed what is necessary in order to achieve it, so as to accord with the principle of proportionality (see Case E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Court Report 143, paragraph 35).
- 38 According to undisputed factual description provided by the Defendant, one of the main objectives of the Norwegian insurance legislation enacted in 1988 was to enable policy holders to terminate and effectively transfer their life assurance contracts from one insurer to another. It is clear from the documents of the case, that the contested requirement was introduced in order to further this objective of consumer protection through increased consumer awareness, in order to lower the price of concluding life assurance contracts and thereby eliminate the so called “tie-in effect” caused by contract completion cost debt. This must be regarded as a legitimate aim falling under the concept of general good as laid down in Article 33 of Directive 2002/83/EC (see, for comparison, *inter alia* Case C-442/02 *Caixa-Bank*, paragraph 21).
- 39 In the Court’s view, the contested requirement may effectively make consumers aware of the costs involved in concluding a life assurance contract, and that could in principle affect the price offered by assurance providers. In this respect, the contested requirement may be considered as suitable for achieving the prescribed objective.

- 40 Next it needs to be examined whether the contested requirement is necessary in order to achieve the objective pursued.
- 41 In that regard, the Court notes that it is the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, to be taken into consideration when interpreting Directive 2002/83/EC (see, for comparison Case C-210/96 *Gut Springenheide* and *Tuski* [1998] ECR I-4657, paragraph 31). Life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer. Moreover, such contracts may involve considerable financial commitments for consumers over a long period of time. This underlines the importance of clear information to consumers when entering into life assurance contracts.
- 42 The Court further notes that Directive 2002/83/EC aims at protecting consumers through choice based on information. This approach is reflected in recital 52 of the preamble to the Directive, which states that if consumers are to profit fully from wider and more varied choice of contracts, they must be provided with whatever information is necessary to enable them to choose the contract best suited to their needs. In this respect, it has to be borne in mind that according to Article 36 of Directive 2002/83/EC, the EEA State of commitment may require undertakings to furnish information, if it is necessary for a proper understanding by the policy holder, of the essential elements of the commitment.
- 43 Considering the aforementioned, it has to be assessed whether less restrictive means than the contested requirement exist, to ensure that consumers can be provided with necessary information about the essential elements of the commitment in order to enable them to make an informed choice.
- 44 In this regard, the Court notes that the contested requirement excludes certain life assurance contracts from the Norwegian market, and thereby limits the possibility of consumers to choose the contract best suited to their needs. Moreover, in view of the complexity and value of life assurance contracts in general, the Court holds that contract clauses, whereby the completion costs are distributed over a longer period, do not necessarily have to be particularly complicated and, in general, only entail a minor part of the financial obligations involved.
- 45 Bearing this in mind, and considering that consumers can be provided with the necessary information in order to enable them to make an informed choice by less restrictive means, i.e. by requesting life assurance providers to supply more specific information under the terms of Article 36 of Directive 2002/83/EC, the Court finds that the contested requirement is disproportionate to the objective pursued.
- 46 The Court therefore holds, that by maintaining in force Section 3(2) of Regulation 1989 No 1167, read with Section 10 of Regulation 1995 No 827, the Defendant is restricting the freedom to provide life assurance services in a manner that is incompatible with Article 33 of Directive 2002/83/EC.

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## V Costs

- 47 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Applicant has asked that the Defendant be ordered to pay the costs. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force Section 3(2) of the Norwegian Regulation of 21 November 1989 No 1167 on the Allocation of Costs, Losses, Income, Funds etc between Insurance Undertakings in a Concern and between Branches and Contracts of Insurance Undertakings, read with Section 10 of the Norwegian Regulation of 22 September 1995 No 827 on Insurance Services and the Establishment of a Branch of an Insurance Undertaking with Headquarters in another EEA State, the Kingdom of Norway has failed to fulfil its obligations pursuant to Article 33 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, referred to at point 11 of Annex IX to the EEA Agreement, as adapted to the EEA Agreement by Protocol 1 thereto.**
2. **Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 25 November 2005.

Henning Harborg  
Registrar

Carl Baudenbacher  
President