

REPORT FOR THE HEARING
in Case E-1/05

Application to the Court 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 in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway

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 up front 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”)).

I. Introduction

1. The case at hand concerns a requirement of Norwegian law for the costs accrued when a life assurance contract is entered into (hereinafter, “completion costs”) to be charged and paid up-front, at the latest upon the date of payment of the first premium. The EFTA Surveillance Authority claims that this requirement

constitutes an unjustifiable restriction of the provision of life assurance services in breach of Article 33 of Directive 2002/83/EC.

2. It is not disputed before the Court that the requirement of up-front payment of completion costs in Section 3(2) of Regulation 1989 No 1167 constitutes a restriction of the free provision of life assurance services within the meaning of Article 33 of Directive 2002/83/EC. However, it is disputed between the parties whether the restriction can be justified on the basis of the general good under Article 33 of Directive 2002/83/EC. While it is not disputed that consumer protection can be grounds for justification, the EFTA Surveillance Authority is of the opinion that increased competition within Norway can not constitute such grounds. Moreover, the EFTA Surveillance Authority considers the requirement in Regulation 1989 No 1167 to be neither a suitable nor necessary means of achieving its objective. The Government of Norway, on the contrary, considers the requirement to be both suitable and proportionate.

3. According to undisputed facts described by the Government of Norway, the contested requirement was introduced in relation to a new insurance legislation, which the Storting enacted in 1988. The main objective of the legislation 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 completion costs as a cost element of the premium spreading their repayment over the term of the contract. This meant that if a life assurance contract was terminated or transferred a “completion costs debt”, the amount depending on how long the contract had run, was deducted from the accrued funds. The contract completion costs were normally around NOK 7000. This was seen by the Norwegian authorities as a serious hindrance to the statutory right of transfer of life assurance contracts. Thus, the contested requirement of up-front payment of completion costs was introduced in Regulation 1989 No 1167. However, life assurance providers continued to deduct similar amounts upon termination and transfer of life assurance contracts until the Regulation was amended in 1994 and a definition of completion costs and a prohibition against charging repurchase deductions upon the termination or transfer of life assurance contracts was added to the Regulation. Completion costs are now normally around NOK 450 – 600.

II. Legal background

EEA law

4. 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.

5. 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.

6. Directive 2002/83/EC (OJ 2002 L 345, p. 1) 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.

7. Article 28 of Directive 92/96/EEC read:

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.

8. 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.

9. 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.

10. 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

11. Section 3(2)-3(5) 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 (hereinafter, "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.

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.

12. It follows from 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 (hereinafter, "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. Procedure

Pre-litigation procedure

13. By a letter dated 14 December 2000 the EFTA Surveillance Authority 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.

14. 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 Directive.

15. The parties subsequently exchanged additional correspondence. On 14 December 2001, the EFTA Surveillance Authority requested additional information on the disputed Regulation 1989 No 1167, to which the Government of Norway responded by letter dated 23 January 2002. On 21 February 2002, the EFTA Surveillance Authority invited the Government of Norway to submit further information and observations on the matter, which the Government of

Norway did by letter dated 22 March 2002. In a letter dated 9 July 2002, the EFTA Surveillance Authority stressed its position, and in a letter dated 2 April 2003, the EFTA Surveillance Authority issued a formal notice to the Government of Norway where it was submitted that the EFTA Surveillance Authority considered the requirement of up-front payment of 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.

16. By a letter 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 effective competition and consumer protection and the measure was both necessary and proportionate.

17. On 17 July 2003, the EFTA Surveillance Authority 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.

18. In its answer, by a letter dated 21 November 2003, the Government of Norway maintained its view that the requirement of the up-front payment of completion costs 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.

Procedure before the Court

19. Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed an application commencing this action, which was registered at the Court on 11 January 2005.

IV. Forms of order sought by the parties

20. The EFTA Surveillance Authority claims that the Court should:

- (i) *declare that by maintaining in force the requirement on up-front payment of 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 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, the Kingdom of Norway has failed to fulfill its obligation pursuant to Article 33 of the Act referred to at point 11 of Annex IX to the EEA Agreement (Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance), as adapted to the EEA Agreement by Protocol 1 thereto;

(ii) *order the Kingdom of Norway to bear the costs.*

21. The Kingdom of Norway contends that the Court should:

(i) *dismiss the application as unfounded;*

(ii) *order the EFTA Surveillance Authority to bear the costs.*

V. Written procedure

22. Written arguments have been received from the parties:

- the EFTA Surveillance Authority represented by Niels Fenger, Director, and Per Andreas Bjørgan, Senior Officer, in the Department of Legal & Executive Affairs, acting as Agents;
- the Government of Norway, represented by Christian F. Galtung, Advocate, Attorney General for Civil Affairs and Guro Hansson Bull, Legal Adviser, Ministry of Foreign Affairs, acting as Agents.

23. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by John Forman, Legal Adviser and Georges Zavvos, Member of its Legal Service, acting as Agents.

VI. Summary of the pleas in law and arguments

The EFTA Surveillance Authority

24. The application is based on the plea that the Government of Norway 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 the completion costs associated with life assurance contracts are to be charged and paid up-front.

25. The EFTA Surveillance Authority notes at the outset that Directive 2002/83/EC repealed Directives 79/267/EEC, 90/619/EEC and 92/96/EEC, and that both its letter of formal notice and reasoned opinion were based on Article 28 of Directive 92/96/EEC. The EFTA Surveillance Authority further notes that Article 33 of Directive 2002/83/EC corresponds both in wording and substance to Article 28 of Directive 92/96/EEC. Therefore, it bases its application on the current provision in force under Directive 2002/83/EC.¹

26. The EFTA Surveillance Authority first addresses the arguments presented by Norway in the course of the formal investigation procedure, where Norway contested that the provisions at issue constituted a restriction within the meaning of Article 33 of Directive 2002/83/EC.

27. The EFTA Surveillance Authority maintains that the contested 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 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.

28. The EFTA Surveillance Authority contests that Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, and other cases which concern free movement of goods and selling arrangements, are relevant in the present case. In that regard the EFTA Surveillance Authority submits, inter alia, that Article 33 of Directive 2002/83/EC itself defines what constitutes a restriction, and defines the relevant test as whether a national provision prevents a policy holder from concluding a contract. In the view of the EFTA Surveillance Authority a restriction exists in the case of the national requirement at issue, which requirement affects the content of a contract. The EFTA Surveillance Authority also expresses the view that case law on selling arrangements of goods is not relevant in relation to the freedom to provide services² and even if it was regarded relevant the requirement of upfront payment cannot be qualified as a selling arrangement. In the opinion of the EFTA Surveillance Authority, the *Keck* doctrine is confined to measures where market access is not materially threatened.³

¹ The EFTA Surveillance Authority refers in this regard to Case E-4/03 *EFTA Surveillance Authority v Norway* [2004] EFTA Court Report 3, para 21, and Case C-363/00 *Commission v Italy* [2003] ECR I-5767, paras 20-24.

² In this regard the EFTA Surveillance Authority refers, inter alia, to Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paras 36-38, and Case C-36/02 *Omega v Oberbürgermeisterin der Bundesstadt Bonn* [2004], judgment of 14 October 2004, not yet reported.

³ For a further definition of the *Keck* doctrine the EFTA Surveillance Authority refers, inter alia, to Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, para 27, Case C-71/02 *Herbert Karner Industrie-Auktionen v Troostwijk* [2004] ECR I-3025, paras 37-39, and the Opinion of Advocate General Alber in Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v*

29. As regards possible effect on intra-EEA trade, the EFTA Surveillance Authority maintains that the contested requirement has posed genuine inconveniences for non-Norwegian life assurance providers. The EFTA Surveillance Authority also points out that the relevant test under Article 33 of Directive 2002/83/EC is not whether the national legislative requirements only have an indirect and uncertain effect on the provision of cross border services, but whether a policy holder is prevented from concluding a contract with a life assurance provider authorised in another Contracting Party. The harmonised rules on life assurance services seek to prevent providers of such services from being required to make unnecessary adjustments to their products before entering each and every national market. Moreover, the EFTA Surveillance Authority states that even if the case law on free movement could be applied in relation to Article 33 of Directive 2002/83/EC, the Court has held that Article 36 EEA prevents any unjustified restriction to the free provision of services, however minor.⁴ In the view of the EFTA Surveillance Authority the relevant fact is that the contested requirement has a direct and immediate impact on trade.⁵

30. The EFTA Surveillance Authority then turns to the question of whether the requirement of an up-front payment of completion costs in Section 3(2) of Regulation 1989 No 1167 can be justified on the basis of general good within the meaning of Article 33 of Directive 2002/83/EC. The EFTA Surveillance Authority submits that the concept of general good should be interpreted in accordance with the case law of the Court and the Court of Justice of the European Communities concerning freedom of establishment and freedom to provide services. Therefore, the measure must, firstly, be justified by overriding reasons based on the general interest; secondly, be suitable for securing the attainment of the objective that it pursues; and, thirdly, not exceed what is necessary in order to attain that objective.⁶

31. The EFTA Surveillance Authority does not contest that consumer protection may fall within the scope of the general good but states that the objective of strengthening competition within the Norwegian market can not be a basis for such justification.⁷ The EFTA Surveillance Authority points out that the marketplace is the EEA and not the national market and that Directive

Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) [2000] ECR I-2681, para 48, Case C-3/99 *Cidrerie Ruwet v Cidre Stassen and HP Bulmer* [2000] ECR I-8749, para 46, and the Opinion of Advocate General Stix-Hackl in Case C-322/01 *Deutscher Apothekerverband v 0800 DocMorris and Waterval* [2003] ECR I-14887, para 63.

⁴ The EFTA Surveillance Authority refers to Case E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Ct. Rep. 143, para 30.

⁵ For comparison, reference is made, inter alia, to Case C-67/97 *Bluhme* [1998] ECR I-8033, paras 16 and 22.

⁶ Reference is made to Case E-4/00 *Brändle* [2001] EFTA Court Report 123, at para 27.

⁷ A reference is made to Case C-367/98 *Commission v Portuguese Republic* [2002] ECR I-4731, para 52, to the Opinion of Advocate General Léger in Case C-422/01 *Skandia and Ramstedt v Riksskatteverket* [2003] ECR I-6817, para 51, and to the judgment in the same case, para 58.

2002/83/EC is aimed at creating competition in the EEA by ensuring the greatest possible choice of life assurance products for the consumers. In the opinion of the EFTA Surveillance Authority, the fact that the aim of strengthening competition within the national market is not legitimate, in itself, raises doubt about the legality of the contested requirement even if the contested requirement also entails the laudable aim of consumer protection.⁸

32. In any event, the EFTA Surveillance Authority submits that the requirement of an up-front payment of completion costs is neither suitable nor necessary to achieve the aims of the contested requirement. On the contrary, the requirement may impede competition by limiting the number of available life assurance products in Norway. Therefore, as regards the fostering of competition, even if it would be an acceptable basis for justification, the requirement is not suitable to achieve this aim.

33. The EFTA Surveillance Authority then addresses two specific issues, referred to by the Government of Norway in the formal investigation proceedings, regarding justification of the contested requirement that relates to increased transparency and consumer awareness. First, whether the contested requirement is suitable and necessary to eliminate a possible tie-in-effect caused by a deduction of completion costs from the funds to be paid or transferred upon termination or transfer of a contract, and second, whether it is suitable and necessary in order to ensure the lowest possible completion costs.

34. As regards the issue of the tie-in-effect, the EFTA Surveillance Authority notes that consumers will have to pay the full completion costs with no reimbursement upon changing insurance provider, irrespective of whether the costs are paid up front or distributed over a longer period. Therefore, any tie-in-effect resulting from the costs will still exist. Furthermore, the EFTA Surveillance Authority notes that the costs comprise relatively small amounts in the context of the contracts involved, and therefore outstanding costs should not constitute a tie-in-effect. Moreover, as completion costs would have to be paid in full upon the entering into of a new life assurance contract, the contested requirement itself might result in a significant obstacle to changing insurance providers.

35. In relation to the second issue, i.e. the decrease in the amount of the completion costs, the EFTA Surveillance Authority maintains that no direct link exists between the contested requirement of an up-front payment of completion costs and the reduction of such costs. The reduction of completion costs that has occurred is in the EFTA Surveillance Authority's view more likely to be related to Section 3(3) of Regulation 1989 No 1167 which defines what can be included in completion costs. In fact, the completion costs only decreased after 1994 when such definition had been included in the Regulation. Concerning other possible factors that may have contributed to increased competition in the market, the

⁸ Reference is made to Case E-1/04 *Fokus Bank v Norway* [2004] EFTA Court Report 11, para 33.

EFTA Surveillance Authority considers it likely that the EEA Agreement itself had a positive effect on competition in the Norwegian market.

36. In any event, the EFTA Surveillance Authority maintains that increased transparency and competition can be adequately achieved by less restrictive means, i.e. by requiring insurance undertakings to calculate and present information on the amount of completion costs, and the conditions for their payment, before a contract is concluded. The EFTA Surveillance Authority is of the opinion that presentation of such information *before* a contract is concluded is in fact necessary in order to ensure transparency and competition, and points out that the contested requirement only ensures that consumers are aware of the costs *after* the contract is concluded, i.e. upon payment of the first premium. Moreover, the EFTA Surveillance Authority points out, that in the EEA Agreement itself, preference is expressed for consumers' making their own choice based on all the information. In that regard the EFTA Surveillance Authority refers to Article 36 of Directive 2002/83/EC and its Annex III(A) and to recital 52 of the preamble to the Directive. Finally, the EFTA Surveillance Authority submits that the Court of Justice of the European Communities has, in consistent case law, expressed its preference for providing information to consumers as an equivalent alternative to a prohibitive regulation.⁹

The Kingdom of Norway

37. The Government of Norway claims that the application is unfounded as the disputed requirement has the legitimate purpose of consumer protection and applies equally to national and non-national service providers. The Government claims furthermore that the requirement is suitable to achieve its aim, which cannot be achieved by other less restrictive means as it is not sufficient to require information on the completion costs to ensure consumer protection.

38. At the outset, the Government of Norway stresses the factual elements concerning the contested requirement. The Government notes, inter alia, that the contested requirement is a necessary and important part of the insurance legislation in Norway, which has as its main objective to effectively enable consumers to transfer their life assurance contracts from one insurance undertaking to another. In this regard, the Government points out that in the previous system, where contract completion costs could be spread over a longer period, the policy holders were faced with charges or large deductions from accrued funds upon termination or transfer of their contracts. This, the Government claims, served to fundamentally impede the right to terminate and transfer life assurance contracts. The Government also points out that consumers

⁹ Reference is made, inter alia, to Case C-120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR-649; Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-667; Case C-313/94 *Graffione v Fransa* [1996] ECR I-6039, para 24; C-386/00 *Axa Royal v Ochoa and Stratégie Finance* [2002] ECR I-2209, para 29; and, Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, judgment of 5 October 2004, not yet reported, paras 20-24.

and consumers' organisations have consistently and strongly argued in favour of rules similar to those laid down in Section 3 of Regulation 1989 No 1167, whereas insurance undertakings and their interest groups have consistently opposed such legislation. Finally, the Government notes that the former "completion cost debt" practice was unique to individual life assurance. Providers of other alternative financial products have not used a similar practice and this practice was not used in the case of collective life assurance.

39. The Government of Norway does not contest that the disputed requirement may constitute a restriction within the meaning of Article 33 of Directive 2002/83/EC, which, in its view, should be understood as a reference to the right to freedom of establishment and free provision of services, laid down in Articles 31 and 36 of the EEA Agreement. Therefore, Article 33 of Directive 2002/83/EC should be interpreted in light of case law of the Court and the Court of Justice of the European Communities in those fields, which provides a basis for justification of the restriction at issue.

40. As regards justification, the Government of Norway notes first that all insurance undertakings within the European Economic Area will have to adjust to contract requirements in each individual State, and that contract law is clearly within the competence of the host State as explicitly stated in recital 44 of Directive 2002/83/EC. Even if this does not mean that case law on restrictions is not applicable to the Contracting Parties' contract law, it should, in the view of the Government, be noted that in the insurance sector, national insurance contract law provisions are normally adopted in order to protect the consumer. In this regard, the Government refers to the interpretive communication of the Commission of the European Communities where it is stated that there is a strong possibility of such rules of substantive law being justified on the basis of furthering the general good.¹⁰

41. As regards justificatory grounds for the restriction in question, the Government submits that the disputed requirement is obviously aimed at ensuring consumer protection, which is generally accepted as a legitimate public interest. The Government furthermore states, that as the requirement applies equally to nationals and non-nationals, it is not discriminatory.

42. The Government of Norway then addresses the question of whether the contested requirement is suitable for achieving its legitimate aim. In the view of the Government that is the case, as the contested requirement clearly leads to increased consumer awareness. Sharp focus on the costs leads to increased competition, making it difficult for life assurance providers to charge unfair completion costs. The logical consequence is a lower price on transfer. In addition the Government points out that it is the size of the completion costs that

¹⁰ Commission's interpretive communication "Freedom to provide services and the general good in the insurance sector", OJ 2000 C 43, p. 5.

creates the so-called “tie-in-effect” but not, in itself, the issue of when the costs should be paid.

43. As regards proportionality, the Government of Norway states that in accordance with the case law referred to by the EFTA Surveillance Authority in this regard, the key question is whether the consumers would be *sufficiently protected* by a mere information requirement.¹¹ In the view of the Government, that is not the case. In this context, the Government stresses the volume and complexity of life assurance contracts, rarely encountered elsewhere by consumers. Consumers are faced with complex contract regulations and contracts. Moreover, the long duration of these types of contracts means that the amounts payable and receivable will be of considerable size. Finally, in the view of the Government, it has to be borne in mind that in a system where completion costs are spread over a longer period it will be difficult to present one figure for the completion costs, as long as the insurance undertakings may determine different rates and payment profiles for the completion costs debt. Consequently, it will be too difficult for customers to evaluate and compare the actual costs involved.

The Commission of the European Communities

44. The Commission of the European Communities agrees with the EFTA Surveillance Authority that the contested requirement of Section 3(2) of Regulation 1989 No 1167 constitutes a restriction within the meaning of Article 33 of Directive 2002/83,¹² and concurs in general with the arguments advanced by the EFTA Surveillance Authority regarding this issue. The effect of the disputed Norwegian requirement, the Commission argues, is that insurance undertakings have to adjust their products or be excluded from the Norwegian market. Furthermore, a whole range of products is in fact banned from the Norwegian market, i.e. any life assurance product spreading completion costs over the term of the contract.

45. As regards the question of whether the restriction can be justified, in that it protects the general good within the meaning of Article 33 of Directive 2002/83/EC, the Commission states that for restrictions to be justified in the field of free provision of services and freedom of establishment, they must be within a field which has not been harmonised; pursue an objective of the general good; be non-discriminatory; and be objectively necessary and proportionate to the objective pursued. Furthermore, such restrictions must not protect a general good already protected in the home state of the economic operator.¹³ All of these

¹¹ In the view of the Government of Norway, Cases C-442/02 *CaixaBank* and C-386/00 *Axa Royal*, to which the EFTA Surveillance Authority refers, have no relevance to the case at hand. On the other hand, Case C-346/02 *Commission v Luxembourg*, judgment of 7 September 2004, not yet reported, is of interest in the view of the Government, which quotes in that respect, para 24 of the judgment.

¹² The Commission refers to Case C-255/97 *Pfeiffer v Löwa* [1999] ECR I-2835, para 20.

¹³ The Commission refers, inter alia, to Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para 57; Case C-108/96 *Mac Quen, Pouton, Godts, Antoun and*

requirements must be fulfilled. The Commission also stresses that as an exception to the fundamental principles of the EC Treaty, the concept of general good must be interpreted restrictively. It is for the State imposing the restriction to show that the measure meets these conditions.

46. The Commission submits that the disputed Norwegian requirement is neither suitable nor necessary to realise the objective of consumer protection and agrees in general with the EFTA Surveillance Authority on this issue. In its view, making sure that information on the calculation and conditions for payment of completion costs is available to customers would suffice to achieve this objective.¹⁴

47. Finally, as regards promotion of competition as justificatory grounds, the Commission submits that the disputed requirement does not promote competition since consumers are, by the contested requirement, deprived of an entire range of insurance products, and foreign insurance undertakings are not allowed to offer an important life assurance service, namely the payment of completion costs over a lengthy period of time. In any event, the aim of increased competition within the national market can not be the basis for justification of a breach of a fundamental principle of EEA law.¹⁵

Thorgeir Örlygsson
Judge-Rapporteur

Grandvision Belgium [2001] ECR I-837; Case C-439/99 *Commission v Italy* [2002] ECR I-305, para 23; and, Case E-4/00 *Brändle* [2001] EFTA Court Report 123, para 127.

¹⁴ The Commission refers to Case C-442/02 *CaixaBank France*, paras 21-22.

¹⁵ The Commission refers to C-367/98 *Commission v Portugal* [2002] ECR I-4731, para 52.