



JUDGMENT OF THE COURT

2 December 2013

(Failure by an EEA State to fulfil its obligations –Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)

In Case E-13/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Dag Sørli Lund, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents,

defendant,

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX of the Agreement on the European Economic Area (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur) Judges,

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

Judgment

I Introduction

- 1 By an application lodged at the Court on 3 July 2013, the EFTA Surveillance Authority (“ESA”) brought an action under 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 (“SCA”) seeking a declaration from the Court that the Kingdom of Norway has failed to fulfil its obligations to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ 2005 L 309, p. 15, [“the Directive”]) as adapted to the EEA Agreement (“EEA”) by Protocol 1 thereto.

II Facts and pre-litigation procedure

- 2 By Decision No 87/2006 of 7 July 2006, the EEA Joint Committee amended Annex IX to the EEA Agreement by adding the Directive to point 23b of that Annex. The Decision was to enter into force on 8 July 2006, provided that all the notifications under Article 103(1) EEA, regarding the fulfilment of constitutional requirements, had been made to the EEA Joint Committee. As the last notification was made by the Principality of Liechtenstein on 14 February 2007, the decision entered into force on 1 April 2007, pursuant to the second subparagraph of Article 103(1) EEA. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 3 By a letter dated 11 May 2009, the Norwegian Government provided ESA with a table of correspondence for the Directive on the basis of which ESA undertook a conformity assessment.
- 4 By a letter dated 16 November 2009, ESA sent a request for information to the Norwegian Government, setting out the questions raised by the conformity

assessment of the national measures implementing the Directive. The Norwegian Government replied to this request by a letter dated 15 January 2010, in which it stated that the scope of the Financial Supervision Act did not cover (i) trust or company service providers; or (ii) other natural or legal persons trading in goods that make payments in cash of 15 000 EUR or more.

- 5 In this letter, the Norwegian Government conceded that “trust or company service providers not already covered under points (a) or (b) of Article 2 of the Directive and other natural or legal persons trading in goods are not subject to supervision by a public authority”. Moreover, it stated that it was intending to follow up the matter, through industry consultation and consultation with other EEA States.
- 6 ESA sent a second request for information to Norway by a letter of 23 March 2010, in which Norway was invited to provide a full timeframe for implementation of the Directive. The Norwegian Government responded on 20 May 2010, stating that it was in consultation with other EEA States through the Committee on the Prevention of Money Laundering and Terrorist Financing. It further indicated that it intended to consult the Financial Supervisory Authority (“the FSA”) following the responses of the EEA States.
- 7 By a letter dated 21 December 2011, ESA sent a third request for information. The Norwegian Government responded by a letter of 21 March 2012. In that letter, the Norwegian Government indicated that it was trying to find “an appropriate and practical solution for the required monitoring”, and noted that the FSA had recommended that such monitoring be carried out by the County Governor (*fylkesmannen*) or the Norwegian Tax Administration.
- 8 On 28 March 2012, ESA sent the Norwegian Government a letter of formal notice for failure to correctly implement Article 37(1) of the Directive. The Norwegian Government responded by a letter dated 14 June 2012 from the Ministry of Finance. In that letter it was stated that based on advice from, among others, the Norwegian FSA, the Ministry had decided to go forward and to explore further the possibility to provide the Norwegian Tax Authority with the authority to monitor these two groups of reporting entities for anti-money laundering compliance purposes.
- 9 The matter was subsequently discussed at a meeting in Oslo on 25 and 26 October 2012. In a follow-up e-mail dated 20 November 2012, the Norwegian Government informed ESA that the Norwegian Tax Authority had requested additional time to consider “the feasibility and of any resource implications” of an arrangement whereby it took on the role of supervisor.
- 10 In the continuing absence of any legislative proposal to rectify the shortcomings in Norwegian law, ESA sent a reasoned opinion to Norway on 12 December 2012. Pursuant to the first paragraph of Article 31 SCA, ESA concluded that by failing to implement correctly Article 37(1) of the Directive as adapted to the EEA Agreement by Protocol 1 thereto, the Kingdom of Norway had failed to

fulfil its obligations arising under that Act and under Article 7 EEA. Pursuant to the second paragraph of Article 31 SCA, ESA accordingly required the Kingdom of Norway to take the measures necessary to comply with its reasoned opinion within a period of two months following notification thereof (i.e. no later than 12 February 2013).

- 11 The Norwegian Government replied to the reasoned opinion on 12 February 2013, stating that the Norwegian Tax Authority had been requested to assess the organisational and economic implications of an arrangement where it was granted the power to monitor trust and company service providers and other natural or legal persons trading in goods for the purposes of the Directive. However, the Norwegian Government stated that the process was taking longer than was initially expected, and that a conclusion from the Norwegian Tax Authority was expected by the end of February 2013.

III Procedure before the Court and forms of order sought

- 12 ESA lodged the present application at the Court on 3 July 2013. The statement of defence from the Kingdom of Norway was received on 12 September 2013. ESA requests the Court to declare that:

1. The Kingdom of Norway, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (i.e. Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto, has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.

2. The Kingdom of Norway bears the costs of these proceedings.

- 13 The Kingdom of Norway requests the Court to:

Declare the application to be founded.

- 14 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV Arguments of the parties

- 15 ESA submits that the Kingdom of Norway's implementation of the Directive, as it stood on 12 February 2013, and at the time the application was lodged, is neither complete nor correct. Moreover, it is submitted that Norwegian law has not ensured the effective monitoring of the activities of certain persons within the scope of the Directive.
- 16 ESA argues that Article 37(1) of the Directive should be read together with Articles 2(1)(3)(c) and 2(1)(3)(e) of the Directive. While Article 37(1) sets out the obligation for a State to ensure that its competent authorities monitor and

ensure compliance with the Directive by all those falling within its scope, it is Article 2 which defines that scope. According to ESA it does so by setting out the entities and persons to which the Directive applies.

- 17 In ESA's view, when read together, Articles 37(1), 2(1)(3)(c) and 2(1)(3)(e) of the Directive foresee that (i) trust and company service providers and (ii) other natural or legal persons trading in goods that make payments in cash of 15 000 EUR or more, should at least be effectively monitored by the competent authorities. These authorities are also to be required to take the necessary measures to ensure that such persons comply with the Directive's requirements.
- 18 ESA argues that for the Kingdom of Norway to comply with the requirements of the Directive, a provision reflecting Articles 2(1)(3)(c) and 2(1)(3)(e) must be introduced into national law setting out the scope of the competent financial supervisory authority's powers. Currently under Norwegian law, neither trust nor company service providers, nor other natural or legal persons trading in goods that make payments in cash of EUR 15 000 or more, are subject to any form of supervision by any public authority for the purposes of the Directive. In ESA's view, the shortcomings in Norwegian law create a vacuum in its implementation of the Directive.
- 19 The Norwegian Government acknowledges that it has not yet fully adopted the relevant measures in order to implement the Act into its legal order, and thus that it has thereby not fully fulfilled its obligations under Article 45 of the Directive and under Article 7 EEA. Accepting ESA's claim, the Norwegian Government requested that the application be declared to be founded.

V Findings of the Court

- 20 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA v Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.
- 21 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA v Iceland*, cited above, paragraph 21, and case law cited). It is undisputed that the Kingdom of Norway has not correctly implemented the Directive.
- 22 It must therefore be held that, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area, i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist

financing, as adapted to the Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations arising under that Act and under Article 7 EEA.

VI Costs

- 23 Under Article 66(2) of the Rules of Procedure (“RoP”), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since ESA has requested that the Kingdom of Norway be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) RoP apply, the Kingdom of Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Declares that the Kingdom of Norway, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto, has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.**
- 2. Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 2 December 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President