



JUDGMENT OF THE COURT

19 June 2015

*(Non-compliance with a judgment of the Court establishing a failure to fulfil obligations –
Article 33 SCA – Measures necessary to comply with a judgment of the Court)*

In Case E-19/14,

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Jenny Sandvig, advokat, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Senior Adviser, Ministry of Foreign Affairs, acting as Agents,

defendant,

APPLICATION for a declaration that, by failing to take, within the time prescribed, the measures necessary to comply with the judgment of 16 July 2012 in Case E-9/11 *ESA v Norway*, the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the European Commission, represented by Elisabetta Montaguti and Julie Samnadda, members 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 Agents Markus Schneider and Auður Ýr Steinarsdóttir, the defendant, represented by its Agent Janne Tysnes Kaasin, and the European Commission, represented by its Agent Julie Samnadda, at the hearing on 20 May 2015,

gives the following

Judgment

I The application

- 1 By application lodged at the Court Registry on 23 September 2014, 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”) for a declaration that the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by failing to take, by the date of expiry of the period prescribed in the reasoned opinion sent to the Kingdom of Norway by the EFTA Surveillance Authority pursuant to Article 31(2) of that Agreement, the measures necessary to comply with the judgment of the Court of 16 July 2012 in Case E-9/11 EFTA Surveillance Authority v the Kingdom of Norway [2012] EFTA Ct. Rep. 442.

II The judgment in Case E-9/11 *ESA v Norway*

- 2 On 17 July 2003, ESA issued a letter of formal notice concluding that certain provisions on financial infrastructure institutions in Norwegian legislation infringed Article 40 of the Agreement on the European Economic Area (“EEA”) by providing for a restriction on stock exchange or securities depository ownership. No shareholder was allowed to own more than 10 per cent of the share capital or voting rights. No shareholder was allowed to cast votes representing more than 10 per cent of the total voting capital or 20 per cent of the stocks represented at the general meeting. Exceptions were applicable under certain conditions.
- 3 ESA delivered a first reasoned opinion on 1 June 2004. Following the exchange of several letters and the establishment of a working group to revise the relevant legislation, Norway informed ESA on 23 June 2009 that the Norwegian Parliament had adopted amending legislation which would enter into force on 1

July 2009. The amendments raised the thresholds for ownership and voting rights from 10 to 20 per cent. Holding acquisitions between 10 and 20 per cent were made subject to a notification procedure and limited exemptions continued to apply with some alterations.

- 4 ESA closed the case by a decision of 10 March 2010, but opened a new case in relation to the amended legislation, as it was of the opinion that the amendments did not sufficiently address the concerns raised in the first reasoned opinion.
- 5 On 16 December 2009, ESA issued a letter of formal notice to Norway, arguing that the contested amended legislation was contrary, in particular, to Article 31 EEA on the right of establishment and Article 40 EEA on the free movement of capital. Norway replied that the restrictive provisions were justified as suitable, necessary and proportionate means in pursuit of legitimate objectives, such as ensuring independent and neutral stock exchanges and securities depositories.
- 6 ESA delivered a second reasoned opinion on 15 December 2010 concluding that Articles 31 and 40 EEA had been infringed and that the restrictive measures were unjustified and disproportionate. A period of two months was set for Norway to take the necessary steps to comply with the reasoned opinion. Norway replied by a letter of 21 February 2011, rejecting ESA's position. On 21 July 2011, ESA filed an application against Norway before the Court.
- 7 On 16 July 2012, the Court delivered its judgment in Case E-9/11. The Court held that:

[B]y maintaining in force restrictions on the rights of persons and undertakings established in EEA States to own holdings and exercise voting rights in financial services infrastructure institutions in Norway, such as provided for in Sections 35(1), (2) and (3), and 36 of the Act of 29 June 2007 No 74 on Regulated Markets (the Stock Exchange Act) and Sections 5-3(1), (2) and (3), and 5-4 of the Act of 5 July 2002 on the Registration of Financial Instruments (the Securities Depositories Act), the Kingdom of Norway has failed to fulfil its obligations arising from Articles 31 and 40 of the EEA Agreement.

III Relevant law

EEA law

- 8 Article 3 EEA reads:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

9 Article 31 SCA reads:

If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court.

10 Article 33 SCA reads:

The EFTA States concerned shall take the necessary measures to comply with the judgments of the EFTA Court.

11 Article 62 of the Rules of Procedure (“RoP”) reads:

The judgment shall be binding from the date of its delivery.

IV Pre-litigation procedure

- 12 On 15 August 2012, ESA informed the Norwegian Government that it had opened a case regarding Norway’s implementation of the judgment in Case E-9/11 and invited Norway to provide information regarding amendments or planned amendments to the Norwegian Stock Exchange Act and the Securities Deposit Act (“the Acts”).
- 13 On 11 October 2012, Norway informed ESA that the relevant provisions of the Acts restricting the freedom of establishment and the free movement of capital were still in force. It had commissioned the Norwegian Financial Supervisory Authority (*Finanstilsynet*) (“FSA”) on 9 October 2012 to prepare new ownership rules on financial services infrastructure by 15 January 2013. The proposal was to be sent to a public hearing shortly thereafter and then presented to the Parliament. As explained to ESA on 25 and 26 October 2012, Norway expected the new rules to enter into force in January 2014.
- 14 On 14 January 2013, the FSA submitted a request for an extension of the time limit to the Ministry of Finance, *inter alia*, to take account of staffing issues. The Ministry granted an extension until 5 March 2013. On that day, the FSA submitted its recommendation.
- 15 On 20 February 2013, ESA issued a letter of formal notice. ESA concluded that, by failing to take the measures necessary to comply with the Court’s judgment in Case E-9/11, Norway had failed to fulfil its obligations under Article 33 SCA.

Norway was invited to submit its observations within two months of receipt of the letter.

- 16 On 24 April 2013, Norway responded that the Ministry of Finance had launched a public hearing on the draft proposal from the FSA open until 15 June 2013 and indicated that, subject to the approval of Parliament, entry into force could be expected on 1 January 2014.
- 17 On 26 June 2013, ESA delivered a reasoned opinion, maintaining the conclusions set out in its letter of formal notice. It requested Norway to take the measures necessary to comply with the reasoned opinion no later than 26 August 2013.
- 18 By letter of 23 August 2013, Norway informed ESA that a bill was being prepared and that the provisions could be expected to enter into force on 1 January 2014.
- 19 Following discussions of the case on 21 and 22 November 2013, ESA invited Norway to provide information concerning the content of the proposal by 15 January 2014.
- 20 On 17 January 2014, Norway requested an extension of the deadline until 7 February 2014, which was granted. Not having received a reply, ESA invited Norway to submit the requested information by 7 April 2014.
- 21 On 19 May 2014, Norway informed ESA that a proposal including amendments to the Acts had been submitted to Parliament on 9 May 2014.
- 22 On 18 June 2014, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.
- 23 By Act of 20 June 2014 No 29 (*lov 20. juni 2014 nr. 29 om endringer i børsloven og verdipapirhandelloven mv.*), which entered into force on 1 July 2014, Norway adopted certain legislative amendments to the Acts aimed at securing compliance with the obligations resulting from the judgment.

V Procedure before the Court

- 24 ESA lodged the present application at the Court Registry on 23 September 2014. ESA requests the Court to declare that:

1. *The Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by failing to take, by the date of expiry of the period prescribed in the reasoned opinion sent to the Kingdom of Norway by the EFTA Surveillance Authority pursuant to Article 31(2) of that Agreement, the measures necessary to comply with the judgment of the Court of 16 July 2012 in Case E-9/11 EFTA Surveillance Authority v the Kingdom of Norway [2012] EFTA Ct. Rep. 442;*

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

- 25 In its statement of defence registered at the Court on 26 November 2014, Norway contests the application and requests the Court to dismiss the action as unfounded and to order ESA to bear the costs.
- 26 The reply from ESA was registered on 15 January 2015. The rejoinder from Norway was registered on 23 February 2015.
- 27 Written observations were received from the European Commission (“the Commission”) on 5 February 2015.
- 28 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

VI Pleas and arguments submitted to the Court

- 29 The applicant contends that, despite the enactment of the amending legislation on 20 June 2014, it retains an interest in obtaining a decision of the Court on whether Norway failed to comply with Article 33 SCA and considers that such a decision is relevant for reasons of homogeneity.
- 30 ESA submits that the question 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. Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken. However, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and must be completed as soon as possible. These factors determine what constitutes a sufficient time limit to be set.
- 31 In the case at issue, the period laid down in the reasoned opinion expired on 26 August 2013, i.e. more than thirteen months after the judgment. The legislative measures undertaken by the defendant to comply with the judgment did not enter into force until more than ten months after the expiry of that period and more than twenty-three months after the delivery of judgment.
- 32 The applicant contends that internal circumstances or practical difficulties may not be taken into account when establishing whether the EFTA State has failed to fulfil its obligations.
- 33 The defendant contends that, while an obligation exists to commence the process of compliance with a judgment immediately and to complete it as soon as possible, this does not impose an obligation to comply with that judgment within a fixed timeframe. On the contrary, the setting of the timeframe presupposes a concrete assessment of the actions taken by the government in each individual

case. The substantive obligations of the State to comply with a judgment is in fact defined and circumscribed by the judgment itself.

- 34 The defendant submits that a failure of ESA to grant the EFTA States sufficient time to comply with a judgment before initiating proceedings for a breach of Article 33 SCA must result in a dismissal of the case on its merits. The determination of a sufficient period of time must take into account the complexity and duration of the operations necessary to comply with a judgment, in particular the discretion left to the States. The time limit set must be practicable and allow for a sound and well-informed national process based on, inter alia, a broad and transparent public hearing allowing for the opinions of stakeholders and civil society to be taken into account. Those are vital elements of law making in a democratic society. In the case at issue, insufficient time would undermine the well-founded broad democratic process needed to find the most suitable and necessary measures to pursue the legitimate objectives permitted in the context of Articles 31 and 40 EEA.
- 35 The defendant contends further that the complexity of the matter warranted a selective and thorough approach. At the oral hearing, Norway added that it would have been reasonable to allow for a little more time than 13 months. ESA's action was therefore premature. Accordingly, in its view, Norway did not infringe Article 33 SCA on the expiry of the time limit in August 2013.
- 36 The Commission submits that Norway should have complied with the judgment within the period of time laid down in the reasoned opinion. Furthermore, the arguments raised by Norway largely concern provisions, practices or situations prevailing in its domestic legal order that cannot justify its failure to observe obligations. These circumstances are not relevant to the establishment of the infringement, which flows from the date laid down in the reasoned opinion.
- 37 The Commission contends that the proper enforcement of EEA law, especially in the absence of an enforcement procedure in the EFTA pillar similar to that of Article 260 of the Treaty on the Functioning of the European Union ("TFEU"), requires that account should be taken of the length of a continuing breach beyond the date of the judgment and thereafter following the expiry of the period given in the reasoned opinion.

VII Findings of the Court

- 38 Regardless of the adoption of the Act of 20 June 2014 No 29, ESA has a legitimate interest to obtain the Court's decision whether Norway failed to fulfil its obligations under the EEA by the end of the period laid down in the reasoned opinion.
- 39 Pursuant to Article 3 EEA, an EEA State shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement, and to facilitate cooperation within its framework. One expression of this obligation is that an EFTA State must take the measures

necessary to comply with a judgment of the Court under Article 33 SCA. That provision corresponds in substance to Article 260 TFEU, regarding an EU Member State's obligation to comply with a judgment of the Court of Justice of the European Union ("ECJ") and the Commission's right to bring infringement proceedings against a Member State for non-compliance.

- 40 However, Article 260(2) TFEU provides that if such infringement proceedings are brought, the Commission shall specify the lump sum or penalty payment it considers appropriate. If the ECJ finds that the Member State has not complied with its judgment, the ECJ may impose a lump sum or penalty payment upon the Member State. This sanction was introduced with the Maastricht Treaty in 1993.
- 41 The SCA does not provide for a lump sum or a penalty payment for an EFTA State's non-compliance with a judgment by the Court. However, this does not entail that the obligation on EFTA States to comply with the judgments of the Court is less strict than the corresponding obligation on EU Member States. Moreover, if an EFTA State violates EEA law, the State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement (see Case E-18/10 *ESA v Norway* [2011] EFTA Ct. Rep. 202, paragraph 28 and case law cited).
- 42 Although Article 33 SCA does not specify the period within which measures necessary to comply with a judgment must be taken, the interest in the immediate and uniform application of EEA law requires that the process of compliance with a judgment must be commenced immediately and completed as soon as possible (see Case E-18/10 *ESA v Norway*, cited above, paragraph 29 and case law cited).
- 43 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. The Court is precluded from taking into account any subsequent changes in that situation (see Case E-3/00 *ESA v Norway* [2000-2001] EFTA Ct. Rep. 73).
- 44 The period prescribed in the reasoned opinion in this case expired on 26 August 2013. At that time, Norway had not adopted the measures necessary to comply with the judgment in Case E-9/11, which had been handed down more than thirteen months earlier. Norway has nevertheless argued that the action is premature.
- 45 The effective enforcement of EEA law requires timely implementation in the EFTA States. This requirement applies not only to new EEA legislation, but also to the proper implementation of a judgment of the Court. Should the lack of a sanction similar to that of Article 260(2) TFEU cause delays in EFTA States in the implementation of a judgment of the Court, it would be to the detriment of the functioning of the EEA. This point reinforces the necessity for compliance to be commenced immediately and to be completed as soon as possible.

- 46 An EFTA State is only obliged to commence implementation of the judgment after the Court has found that it has infringed EEA law. Nevertheless, in prescribing the period within which an EFTA State must comply with the reasoned opinion pursuant to Article 31 SCA, ESA may take due account of the overall period involved in the administrative phase of an infringement procedure. Indeed, in the present case, ESA initiated its first investigation in 2001. That is some fourteen years ago.
- 47 Furthermore, in its judgment in Case E-9/11, the Court specifically found it likely that measures other than the contested system would prove to be less restrictive, to be within the boundaries of EEA law and to be equally effective to attain a high level of protection. A system based on a suitability assessment, similar to the one already applied to certain economic operators in the Norwegian market, would be less restrictive and equally effective (see paragraph 98 of the judgment).
- 48 Norway has alleged circumstances concerning provisions, practices or situations prevailing in its domestic legal order. Such circumstances are the responsibility of the EFTA State and cannot justify failure to observe obligations arising under EEA law.
- 49 In light of the above, the length of the period set by ESA was objectively sufficient in this case for Norway to adopt the measures needed to comply with the Court's judgment. It must therefore be held that the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by failing to take, by the date of expiry of the period prescribed in the reasoned opinion sent to the Kingdom of Norway by the EFTA Surveillance Authority pursuant to Article 31(2) of that Agreement, the measures necessary to comply with the judgment of the Court of 16 July 2012 in Case E-9/11 EFTA Surveillance Authority v the Kingdom of Norway.

VIII Costs

- 50 Under Article 66(2) 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 Norway be ordered to pay the costs and the latter has been unsuccessful, Norway must be ordered to pay the costs. The costs incurred by the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that the Kingdom of Norway has failed to fulfil its obligations under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by failing to take, by the date of expiry of the period prescribed in the reasoned opinion sent to the Kingdom of Norway by the EFTA Surveillance Authority pursuant to Article 31(2) of that Agreement, the measures necessary to comply with the judgment of the Court of 16 July 2012 in Case E-9/11 *EFTA Surveillance Authority v the Kingdom of Norway*.**
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 19 June 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President