



## JUDGMENT OF THE COURT

2 October 2015

*(Failure by an EFTA State to fulfil its obligations – Directive 2008/50/EC on ambient air quality and cleaner air for Europe – Limit values for certain pollutants in ambient air – Air quality plan)*

In Case E-7/15,

**EFTA Surveillance Authority**, represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Øyvind Bø, Officers, and subsequently by Auður Ýr Steinarsdóttir and Øyvind Bø, Department of Legal & Executive Affairs, acting as Agents,

*applicant,*

v

**The Kingdom of Norway**, represented by Ingunn Skille Jansen, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Magnus Schei, 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 under the Act referred to at point 14c of Annex XX to the Agreement on the European Economic Area (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe) by surpassing the limit values of sulphur dioxide (SO<sub>2</sub>), particulate matter (PM<sub>10</sub>) and nitrogen dioxide (NO<sub>2</sub>) in ambient air in certain zones in Norway variously for the years 2008 to 2012 and by failing to comply with the air quality plan obligation set out therein.

THE COURT,

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Christiansen

and Páll Hreinsson, 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 Registry on 16 February 2015, 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 that Norway has failed to fulfil its obligations under the Act referred to at point 14c of Annex XX to the Agreement on the European Economic Area (“EEA”), Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1 and Icelandic EEA Supplement 2012 No 59, p. 1) (“the Directive”) by surpassing the limit values for sulphur dioxide (SO<sub>2</sub>), particulate matter (PM<sub>10</sub>) and nitrogen dioxide (NO<sub>2</sub>) in the ambient air during the years 2008 to 2012 variously in zones NO1, NO3, NO4, NO5 and NO6 referred to in Articles 3 to 5 of Directive 1999/30/EC, now Article 13 of the Directive; and by failing to comply with the air quality plan obligation as set out in Article 8(3) of Directive 96/62/EC, now Article 23 of the Directive variously as regards zones NO1, NO2, NO3, NO4 and NO5.
- 2 Under the ambient air quality legislation, EEA States are obliged to ensure, inter alia, that the levels of nitrogen dioxide (NO<sub>2</sub>), particulate matter (PM<sub>10</sub>) and sulphur dioxide (SO<sub>2</sub>) in ambient air do not exceed certain limits. If such limits are exceeded, the EEA States are obliged to draw up air quality plans setting out how they intend to reach those specified limits. ESA takes the view that Norway has failed to comply with these obligations.

### **II Law**

- 3 Article 3(1) 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.*

4 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.*

5 EEA Joint Committee Decision No 121/2011 of 21 October 2011 (OJ 2011 L 341, p. 86 and EEA Supplement 2011 No 70, p. 22) (“Decision 121/2011”) amended Annex XX (Environment) to the EEA Agreement by adding the Directive to point 14c of the Annex.

6 All three EEA/EFTA States indicated constitutional requirements for the purposes of Article 103 EEA. By 6 September 2012, all the EEA/EFTA States had notified that the constitutional requirements had been fulfilled. Consequently, Decision 121/2011 entered into force on 1 November 2012. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

7 Before 1 November 2012, air quality in the EEA was regulated by several directives, including Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55 and EEA Supplement 1999 No 30, p. 142) (“Directive 96/62”) and Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41, Icelandic EEA Supplement 2002 No 31, p. 98 and Norwegian EEA Supplement 2002 No 31, p. 152) (“Directive 1999/30”).

8 Directives 96/62, 1999/30, 2000/69, 2002/3 were repealed by the Directive and subsequently removed from the EEA Agreement.

9 Article 4 of the Directive reads:

*Member States shall establish zones and agglomerations throughout their territory. Air quality assessment and air quality management shall be carried out in all zones and agglomerations.*

10 Article 13 of the Directive reads:

*1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM<sub>10</sub>, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.*

*In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.*

*Compliance with these requirements shall be assessed in accordance with Annex III.*

*The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).*

*2. The alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII.*

11 Article 22 of the Directive reads:

*1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline.*

*2. Where, in a given zone or agglomeration, conformity with the limit values for PM<sub>10</sub> as specified in Annex XI cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State shall be exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in paragraph 1 are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to meet the deadlines.*

*3. Where a Member State applies paragraphs 1 or 2, it shall ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned.*

*4. Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the Commission shall take into account estimated effects on ambient air quality in the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current Community measures and planned Community measures to be proposed by the Commission. Where the Commission has raised no objections within nine months of receipt of that notification, the relevant conditions for the application of paragraphs 1 or 2*

*shall be deemed to be satisfied. If objections are raised, the Commission may require Member States to adjust or provide new air quality plans.*

12 Article 23 of the Directive reads:

*1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.*

*In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.*

*Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.*

*Where air quality plans must be prepared or implemented in respect of several pollutants, Member States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.*

*2. Member States shall, to the extent feasible, ensure consistency with other plans required under Directive 2001/80/EC, Directive 2001/81/EC or Directive 2002/49/EC in order to achieve the relevant environmental objectives.*

### **III Facts and pre-litigation procedure**

13 For the purposes of air quality assessment and management, the territory of Norway has been divided into seven zones, in accordance with Article 4 of the Directive. Three zones cover the cities of Oslo (NO1), Bergen (NO2) and Trondheim (NO3), whereas four cover the eastern (NO4), western (NO5), middle (NO6) and northern (NO7) regions of Norway.

14 By a letter of 2 November 2011, ESA requested information from Norway concerning the latter's compliance with the directives relating to ambient air quality. On the same date, ESA received a complaint against Norway regarding alleged non-compliance with the limit values set out in EEA legislation on ambient air quality. On 4 November 2011, ESA informed the Norwegian Government of the complaint. On 16 December 2011, Norway replied to the request for information.

- 15 By letter of 1 July 2013, ESA received an application from Norway pursuant to Article 22 of the Directive for an extension of the deadline to comply with the limit values of NO<sub>2</sub> in Oslo, Bergen, Trondheim and the western zone until 1 January 2015. On 9 October 2013, ESA requested further information in support of the application. On 1 November 2013, Norway submitted additional information.
- 16 On 6 November 2013, ESA issued a letter of formal notice, concluding that Norway had failed to fulfil its obligations under the Directive by surpassing the limit values for PM<sub>10</sub>, NO<sub>2</sub> and SO<sub>2</sub> in ambient air referred to in Articles 3 to 5 of Directive 1999/30, now Article 13 of the Directive, during the years 2008 to 2012 variously in all zones; by not complying with the action plan obligation as set out in Article 8(3) of Directive 96/62, now Article 23 of the Directive; and by not complying with the duty to conduct accurate measurements.
- 17 By a letter dated 13 January 2014, the Norwegian Government replied to the letter of formal notice.
- 18 On 26 March 2014, ESA decided to accept the requested extension of the deadline for complying with the limit values of NO<sub>2</sub> as regards Bergen, as the information notified demonstrated that compliance with the limit value could be achieved by 1 January 2015. However, objections were raised to the extension in relation to Oslo on the grounds that the accompanying air quality plan did not demonstrate that compliance with the limit value could be achieved by 1 January 2015. Objections were also raised to the extension in relation to Trondheim and the western zone on the grounds that compliance had already been achieved in both zones.
- 19 Also on 26 March 2014, ESA delivered a reasoned opinion, maintaining the conclusion set out in its letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA required Norway to take the measures necessary to comply with the reasoned opinion within two months following its notification.
- 20 By letter of 26 May 2014, Norway acknowledged that the measures taken were not sufficient to comply with the limits set forth in the Directive, within the deadline set in the reasoned opinion.
- 21 By a letter of 10 October 2014, Norway provided ESA with a number of clarifications regarding the proposed timing for the finalisation of air quality action plans across a number of zones in Norway.
- 22 On 18 December 2014, having received no further information with respect to compliance with the Directive, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

#### **IV Procedure and forms of order sought**

- 23 On 16 February 2015, ESA lodged its application at the Court Registry.
- 24 The applicant, ESA, requested the Court to:

1. *Declare that by*

*i) surpassing the limit values for sulphur dioxide (SO<sub>2</sub>), particulate matter (PM<sub>10</sub>) and nitrogen dioxide (NO<sub>2</sub>) in the ambient air during the years 2008 to 2012 variously in the zones NO1, NO3, NO4, NO5 and NO6 referred to in Articles 3 to 5 of Directive 1999/30, now Article 13 of Directive 2008/50; and*

*ii) failing to comply with the air quality plan obligation as set out in Article 8(3) of Directive 96/62/EC, now Article 23 of Directive 2008/50 variously as regards zones NO1, NO2, NO3, NO4 and NO5,*

*Norway has failed to fulfil its obligations arising under the Act referred to at point 14c of Annex XX of the Agreement on the European Economic Area (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).*

2. *Order Norway to bear the costs of these proceedings.*

25 On 27 April 2015, Norway's statement of defence was registered at the Court. Norway acknowledged that it had surpassed the limit values set out in the Directive for PM<sub>10</sub>, NO<sub>2</sub> and SO<sub>2</sub> in the ambient air for the period from 2008 to 2012. Furthermore, Norway admitted that the requirements in the Directive in relation to preparing and implementing air quality plans for the relevant zones where the limit values, or the limit values plus the relevant margin of tolerance had been exceeded, were not fully met. Norway thus accepted ESA's assessment that the limit values for PM<sub>10</sub>, NO<sub>2</sub> and SO<sub>2</sub> had been exceeded variously in Oslo, Trondheim and the eastern, western and middle regions, and that the relevant air quality plans regarding Oslo, Bergen, Trondheim and the eastern and western regions were not adequate at all levels.

26 However, Norway submitted that the limit values for NO<sub>2</sub> were to be met only by 1 January 2010. Exceedances of the limit values plus the relevant margin of tolerance for NO<sub>2</sub> in 2008 and 2009, therefore did not constitute a breach of the obligation under Article 13 of the Directive. As to the remainder of the application, Norway did not dispute the declaration sought. Norway further consented to dispense with the oral procedure.

27 On these grounds, Norway requested the Court to:

*1. Declare the application unfounded as regards exceedances of the limit values plus the relevant margin of tolerance for nitrogen dioxide (NO<sub>2</sub>) in the years 2008 and 2009.*

*2. Declare the application to be founded as to the remainder.*

28 On 8 June 2015, ESA's reply was registered at the Court. ESA agreed with Norway that surpassing the limit values of NO<sub>2</sub> in 2008 and 2009 did not constitute a breach of the Directive, and therefore partially withdrew its declaration sought. ESA also

consented to dispense with the oral hearing should the Court wish to do so. ESA now requests the Court to:

*1. Declare that by*

*i) surpassing the limit values for sulphur dioxide (SO<sub>2</sub>) and particulate matter (PM<sub>10</sub>) in ambient air during the years 2009 to 2012 variously in zones NO<sub>3</sub>, NO<sub>4</sub> and NO<sub>6</sub> referred to in Articles 3 and 5 of Directive 1999/30, now Article 13 of Directive 2008/50;*

*ii) surpassing the limit values for nitrogen dioxide (NO<sub>2</sub>) in ambient air during the years 2010 to 2012 variously in the zones NO<sub>1</sub>, NO<sub>3</sub> and NO<sub>5</sub> referred to in Article 4 of Directive 1999/30, now Article 13 of Directive 2008/50; and*

*iii) failing to comply with the air quality plan obligation as set out in Article 8(3) of Directive 96/62/EC, now Article 23 of Directive 2008/50 variously as regards zones NO<sub>1</sub>, NO<sub>2</sub>, NO<sub>3</sub>, NO<sub>4</sub> and NO<sub>5</sub>,*

*the Kingdom of Norway has failed to fulfil its obligations arising under the Act referred to at point 14c of Annex XX of the Agreement on the European Economic Area (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).*

*2. Order the Kingdom of Norway to bear the costs of these proceedings.*

29 On 29 June 2015, Norway's rejoinder was registered at the Court. Norway requests the Court to declare the application, as amended in the reply, to be founded.

30 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided pursuant to Article 41(2) of the Rules of Procedure ("RoP") to dispense with the oral procedure in this case.

**V Findings of the Court**

31 Article 3 EEA imposes upon the EEA/EFTA States 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-2/15 *ESA v Iceland*, judgment of 15 July 2015, not yet reported, paragraph 18, and the case law cited).

32 Article 13 of the Directive obliges EEA States to ensure that, *inter alia*, throughout their zones and agglomerations, levels of SO<sub>2</sub>, PM<sub>10</sub> and NO<sub>2</sub> do not exceed the limit values laid down in Annex XI. The same obligation followed from Articles 3 to 5 of Directive 1999/30. The obligation has been in force since 2005 as regards SO<sub>2</sub> and PM<sub>10</sub>, and since 1 January 2010 as regards NO<sub>2</sub> for all zones other than Bergen. Following ESA Decision No 132/14/COL of 26 March 2014, the deadline



to ensure compliance as regards Bergen was extended to 1 January 2015 pursuant to Article 22 of the Directive.

- 33 The limit value for PM<sub>10</sub> was exceeded in Trondheim between 2009 and 2012 and was also exceeded in the middle zone in 2012.
- 34 The limit value for NO<sub>2</sub> was exceeded in fact between 2008 and 2012 in Oslo, in 2008, 2010 and 2012 in Bergen; in 2008 to 2011 in Trondheim; and in 2008 to 2011 in the western zone. However, ESA withdrew its application as regards the surpassing of the limit values for NO<sub>2</sub> in ambient air for the years 2008 and 2009 as the deadline for complying with the limit values for NO<sub>2</sub> laid down in Annex XI to the Directive was 1 January 2010.
- 35 The limit value for SO<sub>2</sub> was exceeded in 2009 to 2012 in the northern zone and in 2011 in the eastern zone.
- 36 These facts are undisputed and amount to an infringement of the obligation in Article 13 of the Directive. While, as regards SO<sub>2</sub>, PM<sub>10</sub>, lead and carbon monoxide, the first subparagraph of Article 13(1) of the Directive provides that EEA States are to ‘ensure’ that the limit values are not exceeded, the second subparagraph of Article 13(1) states that, as regards NO<sub>2</sub> and benzene, the limit values ‘may not be exceeded’ after the specified deadline, which amounts to an obligation to achieve a certain result. Consequently, EEA States must take all the measures necessary to secure compliance with that requirement and cannot consider that the power to postpone the deadline, which they are afforded by Article 22(1) of the Directive, allows them to defer, as they wish, implementation of those measures.
- 37 When the levels of pollutants in ambient air in a geographical zone exceed a specified limit value, plus any relevant margin of tolerance, Article 23 of the Directive obliges the EEA State to ensure that an air quality plan is established for that zone in order to achieve the related limit value. That plan shall be communicated to the Commission or ESA as appropriate without delay, but no later than two years after the end of the year the first exceedance was observed. The same obligation followed from Article 8(3) of Directive 96/62.
- 38 It is not disputed that the limit value plus the margin of tolerance for NO<sub>2</sub> was exceeded in Oslo, Bergen, Trondheim and the western region as early as 2008, thereby giving rise to an obligation for Norway to establish air quality plans for those zones by the end of 2010 as the obligation to prepare and implement air quality plans in Article 8(3) of Directive 96/92, now Article 23 of the Directive, is not subject to the compliance date set out in Annex XI to the Directive. Furthermore, the limit value for SO<sub>2</sub> was exceeded in the eastern region in 2011, thereby giving rise to an obligation to establish an air quality plan for that zone by the end of 2013.
- 39 Article 23(1) of the Directive requires that in the event of exceedances of those limit values for which the attainment deadline has already expired, the air quality

plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children. Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to ESA without delay, but no later than two years after the end of the year the first exceedance was observed. Where air quality plans must be prepared or implemented in respect of several pollutants, EEA States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.

- 40 Air quality plans have been adopted for Oslo, Bergen, Trondheim and the western zone, but they do not conform to the requirements of Article 23 of the Directive in that they fail to fulfil the requirements of Section A of Annex XV to the Directive. For the eastern zone, no air quality plan has been established at all. These findings have not been disputed by Norway. Norway has therefore infringed the air quality plan obligation as set out in Article 23 of the Directive.
- 41 It must therefore be held that Norway has failed to fulfil its obligations under the Directive by i) surpassing the limit values for sulphur dioxide (SO<sub>2</sub>) and particulate matter (PM<sub>10</sub>) in ambient air referred to in Articles 3 and 5 of Directive 1999/30, now Article 13 of the Directive, during the years 2009 to 2012 variously in Trondheim and the eastern and middle zones; ii) surpassing the limit values for nitrogen dioxide (NO<sub>2</sub>) in ambient air referred to in Article 4 of Directive 1999/30, now Article 13 of the Directive, during the years 2010 to 2012 variously in Oslo, Trondheim and the western zone; and iii) failing to comply with the air quality plan obligation as set out in Article 8(3) of Directive 96/62, now Article 23 of the Directive variously as regards Oslo, Bergen, Trondheim and the eastern and western zones.

## **VI Costs**

- 42 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 and none of the exceptions in Article 66(3) RoP apply, Norway must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

**1. Declares that by: -**

**i) surpassing the limit values for sulphur dioxide (SO<sub>2</sub>) and particulate matter (PM<sub>10</sub>) in ambient air during the years 2009 to 2012 variously in the zones NO3, NO4 and NO6 referred to in Articles 3 and 5 of Directive 1999/30, now Article 13 of Directive 2008/50;**

**ii) surpassing the limit values for nitrogen dioxide (NO<sub>2</sub>) in ambient air during the years 2010 to 2012 variously in the zones NO1, NO3 and NO5 referred to in Article 4 of Directive 1999/30, now Article 13 of Directive 2008/50; and**

**iii) failing to comply with the air quality plan obligation as set out in Article 8(3) of Directive 96/62/EC, now Article 23 of Directive 2008/50 variously as regards zones NO1, NO2, NO3, NO4 and NO5,**

**the Kingdom of Norway has failed to fulfil its obligations arising under the Act referred to at point 14c of Annex XX of the Agreement on the European Economic Area (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).**

**2. Orders Norway to bear the costs of these proceedings.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 2 October 2015.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President