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Judgment in Case E-9/11 *EFTA Surveillance Authority v Kingdom of Norway*

OWNERSHIP LIMITATIONS AND VOTING RIGHTS RESTRICTIONS IN STOCK EXCHANGES AND CENTRAL SECURITIES DEPOSITORIES HELD TO BE INCOMPATIBLE WITH ARTICLES 31 EEA AND 40 EEA

In a judgment delivered today, the Court held that by 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, the Kingdom of Norway has infringed the freedom of establishment and the free movement of capital as laid down Articles 31 and 40 EEA.

The rules in question, Sections 35(1), (2) and (3), and 36 of the Stock Exchange Act, and Sections 5-3(1), (2) and (3), and 5-4 of the Central Securities Depositories Act, prohibit the holding of more than 20 percent of the shares in stock exchanges or central securities depositories, or the voting rights of more than 20 percent of the total voting capital or 30 percent of the shares represented at a general meeting.

This legislation is based on a so-called dual-track system. Under this system, a distinction is made based on the shareholder's activity and the risk posed in relation to the independence, neutrality and integrity of the relevant institution. Shareholders that for the most part operate or own a regulated market or a securities depository, similar marketplaces or related infrastructure, are eligible for an exception from that ceiling, subject to a suitability assessment. Other shareholders are subject to a main rule imposing an absolute ceiling on ownership, with the possibility of exceptions only under exceptional circumstances, which are limited in time.

The objectives of the contested measures are to promote the well-functioning and efficiency of the financial markets by creating safeguards against conflicts of interests and covert misuse of powers in infrastructure institutions, such as the ones at issue, as well as to ensure the independence, neutrality and integrity of these important financial infrastructure institutions in the market.

The Court found that the dual track system restricts the freedom of establishment and the free movement of capital as laid down in Articles 31 and 40 EEA. Furthermore, the objectives of the contested national legislation reflect overriding reasons in the general interest capable of justifying national measures restricting the fundamental freedoms. The Court also held that the contested measures were suitable to achieve the public interest pursued.

The question therefore arose whether this dual-track system is necessary. The Court held that economic operators which do not for the most part of their economic activity operate or own a regulated market, similar marketplaces or related infrastructure, are, in principle, excluded from owning more than 20 percent of the share capital of a stock exchange. Furthermore, they are subject to a parallel exclusion on voting rights in general meetings of a stock exchange. Identical exclusions apply in relation to ownership and voting rights in securities depositories.

The Court found that Norway has not sufficiently demonstrated that other forms of control, even if administratively more burdensome, may not achieve the relevant public interest objectives in an equally effective way. The dual-track system goes beyond what is necessary to achieve the objective pursued. In this respect, the Court recalls that the holding of shares in contravention of the contested rules may lead to a compulsory sale which is subject to the exercise of discretion by the competent authority.

It is likely that measures other than the contested system would prove to be less restrictive and within the boundaries of the EEA Agreement and, at the same time, equally as effective to attain a high level of protection such as the one sought by the defendant. For example, equally effective would be a system based on a suitability assessment, similar to the one presently only applicable to a limited group of economic operators under national law and amended according to the specific circumstances of the national market and the specific business conducted by stock exchanges and central securities depositories and the legitimate public interests to be attained and would be less restrictive. However, any national system intended to implement the Annexes to the EEA Agreement must be designed in accordance with the general principles of EEA law.

Finally, the Court found that the latitude of the discretion and the uncertainty of the scope of the exemption that applies also to such economic operators that are not mostly engaged in similar infrastructural activities as the ones in question entail an interference with the principle of legal certainty.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.