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Judgment in Case E-9/16 *EFTA Surveillance Authority v Kingdom of Norway*

NORWAY DID NOT BREACH EEA LAW BY MAINTAINING IN FORCE A NATIONAL RESTRICTION ON A CHEMICAL PENDING A FINAL DECISION UNDER THE REACH RESTRICTIONS PROCEDURE

In a judgment delivered today, the Court dismissed an application from the EFTA Surveillance Authority (“ESA”) alleging that Norway had infringed Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (“the REACH Regulation”), by maintaining in force a national restriction on perfluorooctanoic acid in consumer products (“PFOA”).

The Norwegian restriction on PFOA entered into force in May 2013, and was notified to ESA in August 2013. In October 2014, Norway submitted, together with Germany, a dossier to the European Chemicals Agency under Article 69(4) of the REACH Regulation, proposing an EEA-wide restriction of PFOA.

ESA initiated infringement proceedings against Norway. ESA submitted that the REACH Regulation entailed a harmonisation of all substances falling within its scope. Therefore, restrictions on substances raising EEA-wide concerns could only be adopted following a restrictions procedure under Articles 69 to 73 of the REACH Regulation. National restrictions were thus prohibited, save in cases of urgency and subject to the procedure in Article 129 of the REACH Regulation. Norway had not followed that procedure. Consequently, ESA argued that the Norwegian restriction on PFOA was in breach of the REACH Regulation.

Norway argued that the national restriction was justified by Article 128(2) of the REACH Regulation. That provision allows EEA States to maintain or lay down national rules to protect workers, human health and the environment applying in cases where the REACH Regulation does not harmonise the requirements on manufacture, placing on the market or use. Since PFOA had not been the subject of a restriction by the REACH Regulation, Norway argued that the requirements on PFOA were not harmonised and that it was therefore entitled to lay down a national prohibition on PFOA, subject to the free movement rules of the EEA Agreement.

The Court noted that an EEA State may have legitimate concerns for reasons of human health or the environment to introduce or maintain national measures pending the outcome of the REACH restrictions procedure. A substance, the requirements of which have not yet been harmonised, may give rise to sufficiently serious concern for an EEA State temporarily to apply a national measure until the REACH restrictions procedure is brought to an end. Under such circumstances, Article 128(2) of the REACH Regulation will accommodate such concerns and may efficiently support the precautionary principle in order to maintain a high level of protection for human health and the environment.

Referring to the legislative history of the REACH Regulation, the Court found that Article 128(2) supplements the safeguard clause in Article 129 and gives the EEA States the right to

adopt national measures regarding substances where requirements have not yet been harmonised under the REACH restrictions procedure.

Furthermore, the Court noted that an interpretation of Article 128(2) to the effect that a national measure is permitted pending a final decision under the REACH restrictions procedure is not disruptive of the overall REACH system. Such measure will be provisional and cannot be maintained in contravention of the final outcome of the REACH restrictions procedure. Furthermore, in cases where an EEA State adopts a national measure, the State must initiate the restrictions procedure under Article 69(4) of the REACH Regulation. It follows from Article 3 EEA that the EEA State must fulfil this obligation without delay. A failure to do so may prompt ESA or the Commission to initiate infringement proceedings.

The Court therefore held that the requirements on manufacture, placing on the market or use mentioned in Article 128(2) of the REACH Regulation are harmonised only when a substance has been subject to a final decision under the REACH restrictions procedure. Since PFOA had not been subject to such a final decision at the end of the period set in ESA's reasoned opinion, Norway did not breach its obligations under the REACH Regulation by invoking Article 128(2) as a basis for laying down in national law a provisional restriction on PFOA in articles.

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.