ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 22 March 2024

Written Observations by the Kingdom of Norway

represented by Lisa-Mari Moen Jünge, advocate at the Office of the Attorney General for Civil Affairs, and Bojana Stankovic, senior advisor at the Ministry of Foreign Affairs, acting as agents, in

Case E1/24 - TC

in which the Administrative Court of the Principality of Liechtenstein has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("the AML Directive"), as amended by Directive (EU) 2018/843 ("the Amending Directive").

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1 OPENING REMARKS

(1) This case concerns the interpretation of the AML Directive and the regime of disclosure of information on beneficial ownership as inherent in particular in Articles 30 and 31. The preliminary question centres on what type of information an applicant, in accordance with national law, must put forth to access registered information on beneficial ownership and the requirements which could be rendered from the AML Directive in that regard. For details on the background, the Norwegian Government refers to page 1-4 of the request for an advisory opinion.

(2) The referring court has submitted the following question to the EFTA Court:

> *Must Directive (EU) 2015/849, as amended by Directive (EU) 2018/843, be interpreted as meaning that it precludes a national provision according to which the request of a*

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domestic or foreign person or organisation for disclosure of the data entered in the register of beneficial owners on legal entities must include the naming of the firm name or name of the legal entity whose data are to be disclosed?

(3) Before proceeding with an assessment of the referred question, the Government finds it necessary to address the question of applicable law. In Section 2, the Government will argue that the Amending Directive must be regarded as inapplicable to the case at hand. Following that, the Government will in Section 3 provide for a full assessment of the AML Directive, and in particular Article 30 thereof, as it stands before the amendments introduced by the Amending Directive.[1]

2 APPLICABILITY OF THE AMENDING DIRECTIVE

(4) The Norwegian Government contends that the Amending Directive is inapplicable in the case at hand, as it has not yet entered into force as EEA law.[2]

(5) The Amending Directive was incorporated into the EEA Agreement through Decision of the EEA Joint Committee No 63/2020 of 30 April 2020 ("the JCD"). However, that JCD has not yet entered into force since the constitutional requirements of all Contracting Parties have not been lifted and the Amending Directive is consequently not yet part of EEA law.[3]

(6) The Government recalls that an obligation that follows from an EEA legal act "arises on the day the respective legal act is made part of the EEA Agreement".[4] As that is not the case for the Amending Directive, no consequences can be drawn from that act.

(7) The EFTA Court has indeed in some cases agreed to interpret EEA law even though it is not applicable, specifically in relation to certain so-called "internal situations", namely "where domestic legislation, in regulating purely internal situations, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition".[5] The Court of Justice of the European Union (CJEU) has done the same insofar as the relevant EU law has been made applicable by national law in a "direct and unconditional way".[6]

(8) However, the Government considers that this doctrine cannot be transposed to the situation in the case at hand, for two independent reasons:

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[1] The Government's assessment in the following is without prejudice to conclusions which may be drawn from the interpretation of Article 15 of Regulation (EU) 2016/679. The Government will not address questions which may occur in relation to the right of access by the data subject in accordance with that regulation.

[2] The following assessment is in line with the Norwegian Government's expressed view in Case E-13/22 and Case E-1/23, pending before the Court.

[3] Cf. Article 103 of the EEA Agreement and Article 3 of the JCD.

[4] Case E-3/15 *Liechtensteinische Gesellschaft* para. 75. See also Article 7 of the EEA Agreement.

[5] Case E-25/13 *Engilbertsson* para. 54 with further references.

[6] Case C-298/15 *Borta* para. 34.

(9) Firstly, the case law governing "internal situations" presupposes that the EEA rules at issue, even though not applicable, are in fact EEA rules, that is to say that they have been made part of EEA law at the material time. That is clear from the wording of the doctrine and its purpose. Since that is not the case here, the doctrine is not applicable.

(10) The Government recalls that it is settled case law that "the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only".[7] Furthermore, it follows from the Article 34(1) SCA, cf. Article 1(a) that "[t]he EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement". In the Government's view, this must be understood as a requirement that, in order for a legal act to be subject to the EFTA Court's jurisdiction, such legal act must have been incorporated into the EEA Agreement, and hence made part of EEA law, at the material time.

(11) Secondly, even presupposing that the doctrine concerning internal situations could be applied by analogy to our situation, its conditions would in any event not be fulfilled.

(12) The application of this doctrine presupposes that the relevant EEA rules have been made applicable to the situation at hand by national law in a "direct and unconditional way".[8] However, there is nothing in the request for an advisory opinion to that effect.

(13) It follows from the request that "[s]hortly after the implementation of Article 30 and Article 31 of the Fourth Money Laundering Directive by way of the VwEG, the requirements of the Fifth Money Laundering Directive (Directive (EU) 2018/843) in relation to Article 30 and Article 31 had to be incorporated into Liechtenstein law."[9] This indicates indeed that the Liechtenstein legislator has taken steps to implement the Amending Directive with a view to fulfilling the legal obligations that would arise if and when the Amending Directive enters into force in the EEA and the deadline for implementation has expired. It cannot be inferred from such common-place practice, however, that the Liechtenstein legislator thereby also, in a "direct and unconditional" manner, wanted to make the Amending Directive applicable and binding before its entry into force.

(14) The Government emphasises that the opposite conclusion could entail a disincentive for timely implementation of directives. The EFTA states could be encouraged to wait until the deadline before implementing a directive, in order to ensure that future directives do not de facto become binding before they have entered into force as a consequence of national implementing measures.

(15) On this basis, the Government respectfully submits that the Amending Directive must be considered inapplicable to the case at hand and cannot be taken into consideration in order to answer the questions referred.

(16) Should the Court nevertheless consider itself to have jurisdiction to interpret the Amending Directive, it is important that the Court reiterates that this is without prejudice to the

[7] See e.g. case E-3/16 *Follo Taxi* para. 27.
[8] Case C-298/15 *Borta* para. 34.
[9] The request for an advisory opinion p. 4.

national court's assessment of whether the Amending Directive has been made applicable to the situation at hand by national law in a direct and unconditional way.

(17) In light of the above, the Government will not provide an assessment of the Amending Directive. In any case, the Government cannot see that the Amending Directive would alter the assessment of or conclusion on the referred question, as will be presented under Section 3.

3 ASSESSMENT OF THE AML DIRECTIVE AS INCORPORATED INTO THE EEA AGREEMENT

(18) The referring court essentially asks whether the AML Directive precludes a national arrangement that denies access to the data registered in the register of beneficial owners ("the BO-register") when the applicant merely provides for the names of the persons allegedly registered as beneficial owners. This is in contrast to a request for access to beneficial ownership information related to specific legal entities and by naming them in the request. As the Government understands it, the national arrangement facilitates for access only in the latter situation, provided that the material conditions and procedural requirements are fulfilled.

(19) It is important to note, as a starting point, that no provisions in the AML Directive explicitly contravene such national arrangements as described in the referred question. In the Government's view, the AML Directive does in fact neither preclude nor require a national provision that denies access under the given circumstances. In the Government's view, the AML Directive provides for variations of national solutions. This can be demonstrated by firstly assessing whether there are indications that the AML Directive directly precludes such an arrangement, and secondly by assessing whether there are indications that the AML Directive allows for access to information registered by providing the names of expected or alleged beneficial owners.

(20) As for the first point, there are no provisions in the AML Directive that explicitly regulate the question and thus precludes such an arrangement as in the case at hand.

(21) According to Article 30(1), Member States must ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held. It is hence the legal entities that are subject to the duty to provide the specific information required to be contained in the register. The beneficial owners must, on the other hand, accept the fact that information regarding them is to be held in a central register, see also Article 30(3). This indicates that the register should at least be open to access information regarding those who are subject to the duty, namely the legal entities.

(22) Article 30(5) regulates access to information in the register. Member States shall ensure that the information on the beneficial ownership is accessible in all cases to subjects as mentioned in the first subparagraph letters (a)-(c). The second subparagraph states that persons or organisations that can demonstrate a legitimate interest, shall access at least "the

name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest". Read in conjunction, this indicates that the duty of the Member States established under the AML Directive is to ensure that in particular *that type* of information shall be disclosed in relation to a particular legal entity. The AML Directive does not, however, establish a duty for the Member States to disclose all information in relation to a particular named natural person, whom one might suspect is registered as a beneficial owner of one or more legal entities. Accordingly, it cannot be concluded that the AML Directive precludes national arrangements as described in the question referred.

(23) The fact that the AML Directive does not preclude an arrangement such as the one discussed above, does not however entail that it *requires* this exact arrangement. For the sake of completeness, the Government will make submissions also in this regard, even though it falls outside the scope of the specific question raised in the request for an advisory opinion.

(24) Hereby moving on to the second part of the assessment, it is clear that the AML Directive facilitates for wider access than the minimum requirements that Member States are obliged to ensure under the directive. This is proven by recital 15 in the preamble, which holds that Member States under national law can "allow for access that is wider than the access provided for under this Directive" and is corroborated by the fact that the AML Directive leaves it open to Member States to set the precise level of protection against money laundering and terrorist financing.[10]

(25) As regards the wording of Article 30(5), it does not preclude access to information on the basis of providing the name of the expected or alleged beneficial owners. The provision regulates access on "the information on the beneficial ownership". The AML Directive does not preclude a national provision which enables access to information concerning named individuals.

(26) The Government has the following comments regarding the relevance and possible conclusions drawn from the Joined Cases C-37/20 and C-601/20 *Sovim*, as referred to in the request for an advisory opinion:

(27) Firstly, that case law is not relevant in our context. The case concerned the validity of the amendment of Article 30(5) first subparagraph, point (c) as introduced by the Amending Directive, which is not applicable in this case.[11] Furthermore, the CJEU held by its judgment that the removal of the condition requiring the Applicant to "demonstrate a legitimate interest" before disclosure was not limited to what is a strictly necessary and proportionate interference with the fundamental rights enshrined in Article 7 and 8 of the Charter, i.e.

[10] See recital 2 in the preamble, stating that the AML Directive only intend for "certain coordinating measures", as further exemplified by, for instance, Article 4 (extending the scope of the AML Directive to other professions and categories of undertakings), Article 5 (adoption or retention of stricter provisions in general), recital 6 (thresholds and limitations to the use of cash) and recital 12 (indication of ownership or control).

[11] See section 2 above.

respect for private life and protection of personal data, respectively.[12] Simultaneously, the CJEU indicated that it regarded the system established by Article 30(5)(c) of the AML Directive as compatible with these fundamental rights.[13]

(28) Secondly, the *Sovim* case addressed questions of a different character than the referred case. The *Sovim* case centred on the regulatory framework as a whole under the Amending Directive. The question referred, however, seemingly rests on the opposite situation as there is only one single applicant in the main proceedings who claims to have a legitimate reason for her application for disclosure (and upon which it ultimately is for the referring court to decide). Furthermore, the disputed national provision also holds demonstration of a legitimate interest as a prerequisite for disclosure.[14] Finally, and in any event, the question as to whom can access the information registered in general, as in the *Sovim* case, is a quite different one than a question concerning what type of information that can be disclosed in given circumstances, i.e. the topic in the main proceedings.

(29) The Government also stresses that the *Sovim* case concerned the validity of a provision in the Amending Directive, assessed against the purpose of the AML-legislation. The AML Directive does not, in the Government's view, preclude the national authorities from establishing a register that is based on *broader purposes* than combating money laundering and terror financing. The fact that the CJEU ruled on the validity of a provision, based on the purposes set out in the Amending Directive, has a bearing on its relevance for determining the authorities' discretion in setting up their BO-registers, as these registers can be based on additional purposes than anti-money laundering and combating the financing of terrorism.

(30) For the sake of completeness, it should be added that this line of argument does not alter the fact that national provisions regulating disclosure of information on beneficial owners in general must fulfil the requirements which can be rendered from general principles of EEA law. These general principles include fundamental rights, where provisions of the ECHR, here in particular Article 8, and judgments of the ECtHR, are important sources for determining the scope of these fundamental rights.[15] Furthermore, the AML Directive presupposes that access to information on beneficial ownership shall be in accordance with data protection rules, including the standards set in Regulation (EU) 2016/679 (GDPR), which is part of EEA law.[16]

(31) Provided that the national regime of disclosure satisfies the standards and guarantees as protected by relevant fundamental rights and data protection rules as part of EEA law, it cannot be held in general that it will be in conflict with EEA law to have national arrangements that grant access to information on the basis of providing the names of individual natural persons expected or alleged to be beneficial owners.

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[12] See the judgment para. (76) et seq.
[13] See the comparison between Directive 2015/849 and 2018/843 in para. 85 of the judgment.
[14] See the request for an advisory opinion, page 3, Article 17(2)(c) and (5)(d).
[15] See Case E-14/15 *Holship Norge AS*, para. 123.
[16] Article 30(5) third subparagraph and recital 14 in the preamble.

(32) To summarise, the Government submits that the AML Directive does not preclude a national provision according to which the request of a domestic or foreign person or organisation for disclosure of the data entered in the register of beneficial owners on legal entities must include the naming of the legal entity whose data are to be disclosed. Nor does the AML Directive require such a national provision. It cannot be held in general that national arrangements which enable access to registered information on the basis of the names of the expected or alleged beneficial owners will be in conflict with general principles of EEA law.

(33) The Government thus respectfully invites the EFTA Court to specify that it is for the EEA States to decide whether the national regime shall enable access to information on beneficial ownership based on the names of expected or alleged owners, provided that the arrangement respects the general principles of EEA law and otherwise is in accordance with data protection rules within the EEA.

4 ANSWER TO THE QUESTION

(34) Based on the foregoing, the Government respectfully submits that the question posed by the referring court should be answered as follows:

> *Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing does not preclude a national provision according to which the request of a domestic or foreign person or organisation for disclosure of the data entered in the register of beneficial owners on legal entities must include the naming of the firm name or name of the legal entity whose data are to be disclosed. It is for the EEA States to decide whether the national regime shall enable access to information on beneficial ownership upon providing names of expected or alleged owners, provided that the arrangement respects the general principles of EEA law and otherwise is in accordance with data protection rules within the EEA.*

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