

Case

E-4/16

EFTA Surveillance Authority



The Kingdom of Norway

(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)

— *Table of Contents* —

919

Judgment of the Court, 16 November 2016

Summary of the Judgment

- 1 EFTA States must take the measures necessary to comply with a judgment of the Court under Article 33 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”). That provision corresponds in substance to Article 260(1) of the Treaty on the Functioning of the European Union (“TFEU”), regarding an EU Member State’s obligation to comply with a judgment of the Court of Justice of the European Union (“ECJ”).
- 2 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.
- 3 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 the 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.
- 4 It is settled case law that 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. In the case at hand, it is undisputed that at the time of expiry of the period prescribed in the reasoned opinion, namely on 8 September 2015, that is, almost two years after the

Court had delivered its judgment in Case E-13/13, Norway had not adopted the measures necessary to comply with that judgment.

- 5 The Kingdom of Norway failed to fulfil its obligations under Article 33 SCA by failing, within the time prescribed, to take the measures necessary to comply with the judgment of the Court of 2 December 2013 in Case E-13/13 ESA v Norway.

Judgment of the Court

16 November 2016

*(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-4/16,

EFTA Surveillance Authority, represented by Carsten Zatschler, Clémence Perrin and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents,
– *applicant*,

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The Kingdom of Norway, represented by Janne Tysnes Kaasin, Senior Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, 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 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, within the time prescribed, the measures necessary to comply with the judgment of the Court of 2 December 2013 in Case E-13/13 ESA v Norway,

The Court

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), 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 THE APPLICATION

- 1 By application lodged at the Court Registry on 2 March 2016, 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 SCA by failing to take, within the time prescribed, the measures necessary to comply with the judgment of the Court of 2 December 2013 in Case E-13/13 *ESA v Norway* [2013] EFTA Ct. Rep. 914.

II RELEVANT LAW

- 2 Article 3 of the Agreement on the European Economic Area (“the EEA Agreement” or “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.

3 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.

4 Article 33 SCA reads:

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

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

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

6 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15) (“the Directive”) was incorporated into Annex IX to the EEA Agreement at point 23b by a Decision of the EEA Joint Committee No 87/2006 of 7 July 2006 (OJ 2006 L 289, p. 23, and EEA Supplement 2006 No 52, p. 19). The decision entered into force on

1 April 2007. The time limit for the EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

III THE JUDGMENT IN CASE E-13/13 ESA V NORWAY

- 7 On 28 March 2012, ESA sent Norway a letter of formal notice for failure to implement correctly Article 37(1) of the Directive, as the Norwegian legislation did not ensure the effective monitoring of trust and company service providers and other natural or legal persons trading in goods as set out in the Directive.
- 8 Norway responded to the letter of formal notice by a letter of 14 June 2012 where it stated that it had decided to further explore the possibility to provide the Norwegian Tax Authority with the authority to monitor these two groups of reporting entities for anti-money laundering compliance purposes.
- 9 On 12 December 2012, following further discussions with the Norwegian authorities, ESA sent Norway a reasoned opinion maintaining its conclusion set out in the letter of formal notice, that by failing to correctly implement Article 37(1) of the Directive as adapted to the EEA Agreement under its Protocol 1, Norway had failed to fulfil its obligations arising under that Act and Article 7 EEA. Pursuant to the second paragraph of Article 31 SCA, ESA required Norway to take the measures necessary to comply with its reasoned opinion within a period of two months following the notification.
- 10 On 12 February 2013, Norway replied to the reasoned opinion stating that the Norwegian Tax Authority had been requested to assess the organisational and economic implications of an arrangement where it was granted the power to monitor trust and company service providers and other natural or legal persons trading in goods for the

purposes of the Directive. However, the process was taking longer than was initially expected. A conclusion from the Norwegian Tax Authority was expected by the end of February 2013.

- 11 On 3 July 2013, ESA filed an application against Norway, registered at the Court as Case E-13/13.
- 12 On 2 December 2013, the Court delivered its judgment. The Court held that:

the Kingdom of Norway, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto, has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.

IV PRE-LITIGATION PROCEDURE

- 13 On 18 February 2014, ESA informed the Norwegian Government that it had opened a case regarding Norway's implementation of the judgment in Case E-13/13 and invited Norway to inform the Authority how and when it intended to rectify the breach as found in the judgment.
- 14 On 6 May 2014, Norway informed ESA that it remained dedicated to find a solution on how to monitor trust and company service providers and natural and legal persons trading in goods for anti-money laundering purposes. However, it had not yet been able to reach a conclusion on how to organize the supervision. Norway indicated that it was in the process of preparing the appointment of

a working group/committee which would be mandated to propose amendments to the Norwegian legislation in this regard.

- 15 On 2 July 2014, ESA issued a letter of formal notice to Norway, concluding that by failing to comply with the judgment in Case E-13/13, 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 6 November 2014, Norway replied to ESA's letter of formal notice explaining that, regrettably, no further progress had been made in order to comply with the Court's judgment. Furthermore, the Norwegian authorities were not able to provide ESA with additional information on how the supervisory regime for dealers in high value goods and trust and company service providers would be organised in Norway.
- 17 On 8 July 2015, ESA delivered a reasoned opinion to Norway maintaining its conclusion set out in the letter of formal notice. ESA contented that Norway had had sufficient time to take the measures necessary to comply with the Court's judgment in Case E-13/13. 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 the notification.
- 18 On 8 September 2015, Norway replied to the reasoned opinion and informed ESA that it had not been able to designate a supervisory authority for traders in high-value goods and trust and company service providers within the time limit prescribed. Norway further informed ESA that in February 2015, a committee had been mandated to propose solutions on how to organise the supervision of the relevant bodies in order to comply with the Court's judgment.
- 19 As Norway had not complied with the reasoned opinion by the deadline set therein, ESA decided to bring the matter before the Court pursuant to the second paragraph of Article 31 SCA.

V PROCEDURE AND FORMS OF ORDER SOUGHT

20 ESA lodged the present application at the Court Registry on 2 March 2016. Norway's statement of defence was registered at the Court on 3 May 2016, in which Norway consented to dispensing with the oral procedure in the present case. By letter of 10 May 2016, ESA waived its right to submit a reply and consented to dispense with the oral procedure should the Court wish to do so.

21 *The applicant, 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 delivered to the Kingdom of Norway pursuant to Article 31(2) of that Agreement, the measures necessary to comply with the judgment of the Court of 2 December 2013 in Case E-13/13 EFTA Surveillance Authority v the Kingdom of Norway.*
2. *The Kingdom of Norway bears the costs of these proceedings.*

22 The defendant, Norway, accepts ESA's claim that it has failed to fulfil its obligations arising from Article 33 SCA and requests the Court to declare the application to be founded.

23 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) RoP to dispense with the oral procedure.

VI FINDINGS OF THE COURT

24 Pursuant to Article 3 EEA, an EFTA 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. An essential 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(1) of the Treaty on the Functioning of the European Union (“TFEU”), regarding an EU Member State’s obligation to comply with a judgment of the Court of Justice of the European Union (“ECJ”).

- 25 The provision of Article 260(2) TFEU provides that if the European Commission brings infringement proceedings for non-compliance, it shall specify the lump sum or penalty payment it considers appropriate in the circumstances. If the ECJ finds that the Member State has not complied with its judgment, it may impose a lump sum or penalty payment upon the Member State. This sanction was introduced with the Maastricht Treaty in 1993.
- 26 However, Article 33 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. This nevertheless 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-19/14 *ESA v Norway* [2015] EFTA Ct. Rep. 300, paragraph 41 and case law cited).
- 27 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-19/14 *ESA v Norway*, cited above, paragraph 42 and case law cited).

- 28 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 (see Case E-19/14 *ESA v Norway*, cited above, paragraph 45).
- 29 It is settled case law that 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 (see Case E-35/15 *ESA v Norway*, judgment of 2 August 2016, not yet reported, paragraph 46 and case law cited).
- 30 In the case at hand, it is undisputed that at the time of expiry of the period prescribed in the reasoned opinion, namely on 8 September 2015, that is, almost two years after the Court had delivered its judgment in Case E-13/13, Norway had not adopted the measures necessary to comply with that judgment.
- 31 It must therefore be held that the Kingdom of Norway has failed to fulfil its obligations under Article 33 SCA by failing, within the time prescribed, to take the measures necessary to comply with the judgment of the Court in Case E-13/13 *ESA v Norway*.

VII COSTS

- 32 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, the latter has been unsuccessful and none of the

exceptions in Article 66(3) RoP apply, Norway must be ordered to pay the costs.

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, within the time prescribed, to take the measures necessary to comply with the judgment of the Court of 2 December 2013 in Case E-13/13 ESA v 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
16 November 2016.*

Gunnar Selvik
Registrar

Carl Baudenbacher
President