



## JUDGMENT OF THE COURT

28 September 2015

*(Failure by an EFTA State to fulfil its obligations – Freedom to provide services – Directive 2006/123/EC on services in the internal market – Local authorisation requirement for construction works)*

In Case E-6/15,

**EFTA Surveillance Authority**, represented by Xavier Lewis, Director, and Clémence Perrin, Officer, and subsequently by Markus Schneider, Deputy Director, and Clémence Perrin, Department of Legal & Executive Affairs, acting as Agents,

*applicant,*

v

**The Kingdom of Norway**, represented by Dag Sørli Lund, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, 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 16 of the Act referred to at point 1 of Annex X of the Agreement on the European Economic Area (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) (OJ 2006 L 376, p. 36 and EEA Supplement 2011 No 10, p. 146), or, alternatively, Article 36 of the Agreement on the European Economic Area, by maintaining in force sections 20-1, second paragraph and 22-3 of the Planning and Building Act, read in conjunction with sections 9-1 to 9-4 and 11-1 of the Building Regulation, which require undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity.

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, and the written observations of the European Commission (“the Commission”), represented by H el ene Tserempa-Lacombe and Nicola Yerrell, members of its Legal Service, acting as Agents,

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 Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (“the Services Directive” or “the Directive”), or, alternatively, Article 36 of the Agreement on the European Economic Area (“EEA”), by maintaining in force national rules which provide that undertakings carrying out construction works are required to obtain an authorisation by local municipalities prior to the beginning of their activity.

**II Law**

*EEA law*

- 2 The first and second paragraph of Article 3 EEA read:

*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.*

- 3 Article 33 EEA reads:

*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or*

*administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

4 Article 36(1) EEA reads:

*Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

5 Article 39 EEA reads:

*The provisions of Articles 30 and 32 to 34 shall apply to the matters covered by this Chapter.*

6 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.*

7 The Services Directive was made part of the EEA by Decision No 45/2009 of 9 June 2009 of the EEA Joint Committee amending Annex X (Audiovisual services) and Annex XI (Telecommunication services) to the EEA Agreement (OJ 2009 L 162, p. 23 and EEA Supplement 2009 No 33 p. 8) (“Decision No 45/2009), which added the Directive to point 1 of Annex X to the EEA Agreement. Constitutional requirements were indicated by Iceland and Liechtenstein for the purposes of Article 103 EEA. By March 2010, both States had notified that the constitutional requirements had been fulfilled. Consequently, Decision No 45/2009 entered into force on 1 May 2010. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive and to notify ESA accordingly expired on the same date. The Directive was therefore applicable when the time prescribed in ESA’s reasoned opinion of 16 May 2012 to Norway expired on 16 July 2012.

8 Article 16 of the Services Directive reads:

*1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.*

*The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.*

*Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:*

*(a) non-discrimination: ...*

*(b) necessity: ...*

*(c) proportionality: ...*

*2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:*

*...*

*(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;*

*...*

*3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.*

*...*

#### *National law*

The following overview will describe national law as it stood on 16 July 2012, that is, at the end of the period laid down in ESA's reasoned opinion.

#### The Planning and Building Act

- 9 According to the first paragraph of section 20-1 of the Planning and Building Act of 27 June 2008 No 71 (*lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling*) all construction works, except for those specifically exempted under section 20-3 of the Act, or those falling within the purview of other legislation, must be authorised by the relevant local authorities.
- 10 According to the second paragraph of section 20-1 of the Planning and Building Act the application, planning, execution and control of works falling under the first paragraph can only be carried out by undertakings which have been authorised to

accept the relevant responsibility in accordance with the rules in sections 22 and 23 of the Act.

- 11 Section 22-3 of the Planning and Building Act provides that local approval is given to “qualified undertakings”. Different approval levels exist, depending on the level of complexity of the construction work and the possible consequences for health, environment and security if a construction error was to occur.
- 12 In order to obtain approval, the undertaking needs to substantiate that it has in place a system of organisation and routines aimed at ensuring that the requirements set out in the Planning and Building Act are fulfilled and that it has the necessary and relevant expertise to carry out the construction works.
- 13 Furthermore, the second paragraph of section 22-3 of the Planning and Building Act provides that if the National Office of Building Technology and Administration has approved an undertaking in accordance with the procedure in section 22-1, this shall normally be the basis upon which local approval is granted. The central authorisation scheme is only optional for undertakings carrying out construction work.
- 14 According to the second paragraph of Section 23-3 of the Planning and Building Act the authorisation expires upon completion of the building work.

#### The Building Regulation

- 15 In the first paragraph of section 9-1 of the Building Regulation of 26 March 2010 No 488 (*forskrift 26. mars 2010 nr. 488 om byggesak*) it is provided that undertakings authorised to accept responsibility must fulfil the relevant requirements of chapter 3 of the Building Regulation. The third paragraph furthermore states that central authorisation is voluntary for all undertakings. However, according to an exception in the fourth paragraph, central authorisation is mandatory for undertakings carrying out controlling functions. Section 9-1 reiterates that local approval is mandatory for all undertakings falling within the scope of section 20-1 of the Planning and Building Act.
- 16 Sections 9-3 and 9-4 of the Building Regulation establish three categories of authorisation, based on the level of complexity of the work at issue.
- 17 The first paragraph of section 11-1 of the Building Regulation states that an undertaking applying for central and local authorisation must document that it has an overall competence that is suited to the relevant authorisation category.
- 18 The second paragraph of section 11-1 of the Building Regulation provides that an undertaking’s application for local authorisation shall show that the applicant will be using necessary and relevant expertise in order to carry out the construction works.

### III Facts and pre-litigation procedure

- 19 On 12 January 2009, ESA received a complaint against Norway regarding provisions contained in the Norwegian Planning and Building Act according to which it is required for undertakings carrying out construction work to have met specific requirements and obtained an authorisation by local municipalities before they start their activity in Norway.
- 20 During the years of 2009 and 2010, the case was subject to an exchange of information between ESA and the Norwegian Government, where *inter alia* the Norwegian Government replied to two requests by ESA for information.
- 21 On 18 July 2011, ESA issued a letter of formal notice concluding that the measure amounted to an authorisation scheme under Article 16(2)(b) of the Services Directive and by maintaining in force legal provisions for the scheme, Norway had failed to fulfil its obligation arising from Article 16 of the Services Directive or, in the alternative, Article 36 EEA.
- 22 On 2 November 2011, the Norwegian Government replied to the letter of formal notice reiterating that the measure was not contrary to the Services Directive, as it was justified under Article 16(1) and (3) of the Directive.
- 23 On 16 May 2012, ESA delivered a reasoned opinion upholding its conclusions from the 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, that is, no later than 16 July 2012
- 24 By a letter of 13 July 2012, the Norwegian Government replied to the reasoned opinion contesting that the measure was in breach of Article 16 of the Services Directive. However, Norway acknowledged the necessity to comply with the reasoned opinion. In the letter the Norwegian Government informed ESA of their plan to adopt a bill revising the Planning and Building Act which would include a proposal that undertakings authorised centrally would not have to also be locally authorised and that an undertaking authorised by a municipality did not have to document specific qualifications before starting a new building project in the same municipality. The date of entry into force of the legislation was set to be 1 January 2014.
- 25 On 7 May 2013, the Norwegian Government sent a draft bill to ESA. The bill was subject to discussions between ESA and the Norwegian Government, which by a letter of 11 April 2014 provided ESA with an updated timetable as regards the adoption of the bill, confirming that the legislative amendments would not come into force until 1 January 2015.
- 26 On 16 June 2014, Norway adopted the bill (*lov 20. juni 2014 nr. 52 om endringer i plan- og bygningsloven (forenklinger i byggesaksdelen og oppheving av krav om*

*lokal godkjenning av foretak) m.m.*). In addition, the underlying regulations were notified to ESA on 29 August 2014 in accordance with the Services Directive.

- 27 By a letter of 1 December 2014, the Norwegian Government informed ESA that the Act would not come into force until 1 January 2016 due to additional amendments to the underlying regulations. On 6 February, the Norwegian Government informed ESA that the King in Council had set the date of entry into force of the legislation to 1 January 2016.
- 28 Following this third postponement in the adoption of the amending legislation by the Norwegian authorities, 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**

- 29 On 16 February 2015 ESA lodged the present application at the Court Registry. Norway's statement of defence was registered at the Court on 27 April 2015. In its defence Norway consented to dispense with the oral procedure. By letter of 8 June 2015, ESA submitted its reply and consented to dispense with the oral procedure should the Court wish to do so. On 29 June 2015 Norway submitted its rejoinder. On 7 July 2015 written observations were submitted by the Commission..

- 30 The applicant, ESA, requests the Court to declare that:

1. *By maintaining in force Sections 20-1, second paragraph and 22-3 of the Planning [and] Building Act, read in conjunction with Sections 9-1 to 9-4 and 11-1 of the Building Regulation, which require undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity, Norway has failed to fulfil its obligations under Article 16 of the Act referred to at point 1 of Annex X of the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the council of 12 December 2006 on services in the internal market) or, alternatively, Article 36 of the EEA Agreement.*

2. *The Kingdom of Norway bears the costs of the proceedings.*

- 31 The defendant, Norway, requests the Court to:

*Declare the application to be founded.*

- 32 The Commission requests the Court to declare that:

*By maintaining in force Sections 20-1, second paragraph and 22-3 of the Planning Building Act, read in conjunction with Sections 9-1 to 9-4 and 11-1 of the Building Regulation, which require undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity, Norway has failed to fulfil its obligations*

*under Article 16 of the Act referred to at point 1 of Annex X of the EEA Agreement namely Directive 2006/123/EC on services in the internal market.*

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

## **V Arguments of the parties**

- 34 ESA submits that whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State at the end of the period laid down in the reasoned opinion. In the present case, the reasoned opinion was delivered on 16 May 2012 and confirmed the conclusions in the letter of formal notice of 18 July 2011 that by maintaining in force Sections 20-1, second paragraph and 22-3 of the Planning and Building Act, read in conjunction with sections 9-1 to 9-4 and 11-1 of the Building Regulation, Norway has failed to fulfil its obligations under Article 16 of the Services Directive, or alternatively, Article 36 EEA.
- 35 ESA submits that the Norwegian Government had stated that it intended to comply with the conclusion of the reasoned opinion and explained that would repeal the relevant provisions by revising the Planning and Building Act and its underlying regulations. The deadlines for the implementation of those deadlines have been repeatedly postponed and ESA has no certainty as to when such amendments will come into force. ESA reiterates that both parties are in agreement that the authorisation scheme must be repealed.
- 36 ESA submits that sections 20-1, second paragraph and 22-3 of the Planning and Building Act, read in conjunction with sections 9-1 to 9-4 and 11-1 of the Building Regulation, require that undertakings carrying out construction work cannot initiate such works before they have been authorised by local municipalities. Such authorisation must be obtained before each individual construction project. An undertaking can obtain approval centrally in accordance with section 22-1 of the Planning and Building Act. Central approval is voluntary in all instances, except with regard to undertakings carrying out controlling functions. While central approval creates a presumption that local authorisation should be granted, it does not absolve the undertaking from applying for such local authorisation before each new project. ESA submits that the Court of Justice of the European Union has repeatedly held that national legislation which makes the delivery of certain services in a State, by an undertaking established in another Member State, subject to the issue of an administrative authorisation, constitutes a restriction on the freedom to provide services.
- 37 ESA submits that the local authorisation scheme in Norway constitutes an authorisation scheme within the meaning of Article 16(2)(b) of the Services Directive. Such an authorisation scheme can only be imposed if it is justified by one of the public interest objectives listed under Article 16(3) of the Services

Directive, provided that such measure is non-discriminatory, necessary and proportionate to the objective sought, in accordance with Article 16(1)(a) to (c). ESA contends that the list of justifications provided for in Article 16(3) is exhaustive.

- 38 ESA contends that the authorisation scheme cannot be justified under any of the public interest objectives listed in Article 16(3) of the Services Directive. In any event, ESA submits that the Norwegian Government has failed to provide the appropriate evidence justifying derogation from Article 16(2) of the Services Directive. In ESA's view the Norwegian Government has not substantiated how the authorisation scheme can cause a threat of great magnitude to the nation as a whole and therefore amount to a public security justification. The same applies in the case of public health. The Norwegian Government has therefore failed to substantiate the existence of a threat to any of the relevant public interest objectives.
- 39 In addition, ESA maintains that the authorisation scheme does not fulfil the requirements of non-discrimination and proportionality established in Article 16(1) of the Services Directive.
- 40 Alternatively, ESA submits that the Norwegian authorisation scheme amounts to a restriction on the freedom to provide services under Article 36 EEA, which cannot be justified under Article 33 EEA.
- 41 In its defence, Norway states that since necessary legislative amendments have already been made and since there is not sufficient documentation for the necessity of the authorisation scheme it accepts the request sought by ESA and asks the Court to declare that the application is founded.
- 42 However, Norway cautions against accepting the view of ESA that the list of justifications in Article 16(3) of the Directive is exhaustive. Furthermore, Norway maintains that ESA's interpretation of the justification grounds in Article 16(3) is too strict. Finally Norway contends that the Preamble to the Directive suggests a much broader interpretation of the concepts of public policy and public security than ESA has submitted in its application.
- 43 The Commission submits that it is well-established that measures which make the provision of temporary construction services in another EEA State subject to an administrative authorisation procedure constitute a restriction to the freedom to provide services. The Commission shares ESA's view that the authorisation scheme at issue clearly falls within the scope of Article 16(2)(b) of the Services Directive. Such a restriction, where as in the present case, it applies to a service provider moving temporarily to Norway, may in principle be justified by one of the public interest objectives listed in Article 16(3) of the Directive. Those public interest objectives are public policy, public security, public health and protection of the environment, provided that the requirements of non-discrimination, necessity and proportionality set out in Article 16(1)(a) to (c) of the Directive are respected. The Commission submits that this list of possible public interest

objectives is exhaustive in the context of the Directive and refers to Case C-593/13 *Rina*, judgment of 16 June 2015, published electronically, paragraph 40. Recital 41 in the preamble to the Directive suggests that ‘public policy’ may include issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare’. This does not permit a broader interpretation of Article 16(3) to encompass additional public interest objectives.

- 44 The Commission takes the view that since the authorisation scheme in issue clearly falls within the scope of Article 16(2)(a) of the Directive, any analysis should take place within the context of the Directive and in particular its Article 16.

## **VI Findings of the Court**

- 45 Article 3 EEA imposes upon the EFTA States a 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*, Cases E-1/15 *ESA v Iceland*, judgment of 15 July 2015, not yet reported, paragraph 15, and E-2/15 *ESA v Iceland*, judgment of 15 July 2015, not yet reported, paragraph 18, and case law cited).
- 46 Under Article 7 EEA, the EEA/EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from Article 44 of the Directive. The Court observes that the lack of direct legal effect of acts referred to in decision by the EEA Joint Committee makes timely implementation crucial for the proper functioning of the EEA Agreement also in Norway. The EEA/EFTA States find themselves under an obligation of result in that regard (see, *inter alia*, cases E-1/15 and E-2/15, *ESA v Iceland*, cited above, paragraphs 19 and 20 respectively and case law cited).
- 47 Decision No 45/2009 entered into force on 1 May 2010. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.
- 48 The question 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, *inter alia*, cases E-1/15 and E-2/15, *ESA v Iceland*, cited above, paragraphs 18 and 21 respectively and case law cited).
- 49 The period laid down in the reasoned opinion expired on 16 July 2012. The national rules requiring undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity, are still in force. According to the Norwegian Government, these rules will be repealed on 1 January 2016.
- 50 It is undisputed that the requirement of the Norwegian legislation to seek prior authorisation from local municipalities in Norway to carry out construction works

as described above, constitutes an obligation to obtain an authorisation within the meaning of Article 16(2)(b) of the Services Directive.

- 51 According to Article 16(3) of the Services Directive, such a restriction to the freedom to provide services can only be justified by reasons of public policy, public security, public health or the protection of the environment. In addition, such a restriction must be non-discriminatory, necessary and proportionate to the objective sought, cf. Article 16(1)(a) to (c).
- 52 In the present case, Norway states that it acknowledges that there is not sufficient documentation for the necessity of the authorisation scheme in question and accepts the application sought by ESA. Consequently, the requirement of Article 16(1)(b) of the Services Directive is not fulfilled and the authorisation scheme cannot be viewed as justifiable according to Article 16(3) of the Services Directive. It is therefore not necessary to assess the parties' arguments concerning the other aspects of Article 16(3) of the Services Directive or the alternative plea concerning a violation of Article 36 EEA.
- 53 It must therefore be held that Norway has failed to fulfil its obligations arising from Article 16 of the Act referred to at point 1 of Annex X of the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the council of 12 December 2006 on services in the internal market) as adapted to the Agreement by way of Protocol 1 thereto, by maintaining in force Section 20-1, second paragraph and section 22-3 of the Planning and Building Act, read in conjunction with Sections 9-1 to 9-4 and 11-1 of the Building Regulation, which require undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity.

## **VI Costs**

- 54 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 the Kingdom of 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 the Kingdom of Norway has failed to fulfil its obligations under Article 16 of the Act referred to at point 1 of Annex X of the EEA Agreement (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) by maintaining in force Section 20-1, second paragraph and section 22-3 of the Planning and Building Act, read in conjunction with Sections 9-1 to 9-4 and 11-1 of the Building Regulation, which require undertakings carrying out construction works to obtain an authorisation by local municipalities prior to the beginning of their activity.**
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 28 September 2015.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President