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Judgment in Case E-8/16 *Netfonds Holding ASA, Netfonds Bank AS and Netfonds Livsforsikring AS v the Norwegian Government*

NATIONAL RULES AND PRACTICES APPLICABLE TO THE OWNERSHIP OF NORWEGIAN COMPANIES MUST BE COMPATIBLE WITH THE FREEDOM OF ESTABLISHMENT

In a judgment delivered today, the Court answered questions referred to it by Oslo District Court (*Oslo tingrett*) on the interpretation of Articles 31, 36 and 40 EEA in the context of the rules and practices applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks or insurance companies.

Netfonds Holding ASA, Netfonds Bank AS and Netfonds Livsforsikring AS (“the plaintiffs”) have claimed compensation from the Norwegian Government (“the defendant”) on the basis that the defendant issued only limited banking and insurance company licences despite the plaintiffs’ request for full licences. The essential and recurring conditions that the plaintiffs contest are the defendant’s requirement that, in order to be granted a full banking and insurance licence, three quarters or more of the share capital must be dispersed through a capital increase or sale effected without any preferential or pre-emption right for shareholders or others, known as a “dispersion sale”, or that, as an alternative to a dispersion sale, only a limited licence for banking and insurance activity (referred to as “niche activity”) is issued.

By its three questions, the referring court asked, in essence, whether the relevant legislation or the defendant’s administrative practice applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks or insurance companies constituted a restriction under Articles 31, 36 or 40 EEA. If that were the case, the referring court asked whether such a restriction could be justified in accordance with the legal test that the Court applies having regard to the legitimacy of a national measure’s objectives, its suitability and necessity. Since the three questions relate to similar interpretive choices of national law and administrative practice, the Court found it appropriate to address them together.

The Court concluded that, at the material time, the relevant secondary legislation of the European Union which had been incorporated into the EEA Agreement did not prevent the EEA States from maintaining stricter rules concerning the procedure for the authorisation of banks and insurance companies. Nonetheless, such rules must be compatible with the fundamental freedoms guaranteed by the EEA Agreement. Legislation and administrative practice, such as described in the questions referred, constitute restrictions that appear to fall predominantly within the scope of Article 31 EEA. Whether this is indeed the case is for the referring court to assess having regard to the facts of the case.

Turning to the issue of legitimacy of the aims pursued by the contested measures, the Court found that the objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, reflects overriding reasons in the general interest capable of justifying national measures which restrict the freedom of establishment as guaranteed by Article 31 EEA. The Court added, however, that it is for the referring court to identify the objectives

which are in fact pursued by the national measures, as well as to determine whether the legitimate aims are pursued in a suitable and consistent manner.

With regard to the issue of suitability, the Court stated that the national rules, as described in Questions 1 and 2, do not seem suitable to achieve the legitimate objective that has been identified by the Court, whereas the administrative practice, as described in Question 3, appears suitable to the extent that it applies to applications for authorisation as a bank or an insurance company and not to secondary acquisitions after the granting of authorisation.

Finally, the Court concluded that in the event that the referring court finds one or more of the national measures suitable for attaining a legitimate objective, it must also assess whether they go beyond what is necessary in order to attain that objective. In the present proceedings, the Court found that it appeared that measures other than those contested were less restrictive while equally effective in attaining the legitimate objective identified.

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.