JUDGMENT OF THE COURT
20 December 2024*

(*Failure by an EFTA State to fulfil its obligations — Directive 2009/138/EC – Directive 2013/36/EU – Directive 2003/41/EC – Directive (EU) 2015/2366 – Directive 2009/110/EC – Article 31 EEA – Admissibility – Formal requirements of the application initiating proceedings — Coherent statement of the pleas in law*)

In Case E-13/23,

EFTA Surveillance Authority, represented by Ingibjörg Ólöf Vilhjálmsdóttir, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Kristin Hallsjø Aarvik, Thea Westhagen Edell and Fredrik Bergsjø, acting as Agents,

defendant,

APPLICATION seeking a declaration that, by maintaining in force an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States, Norway has breached the following provisions: Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16 and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, Article 3 of Directive 2009/110/EC and Article 31 of the EEA Agreement.

* Translations of national provisions are unofficial and based on those contained in the documents of the case.

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant and the defendant, and the written observations submitted on behalf of:

- the European Commission ("the Commission"), represented by Gaetane Goddin, Dimitrios Triantafyllou, and Corneliu Hoedlmayr, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Kyrre Isaksen and Erlend Møinichen Leonardsen; the defendant, represented by Kristin Hallsjø Aarvik and Thea Westhagen Edell; and the Commission, represented by Dimitrios Triantafyllou, at the hearing on 24 April 2024,

gives the following

JUDGMENT

I INTRODUCTION

1 By an application lodged at the Court's Registry on 9 October 2023, 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 breached the following provisions: Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16 and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, Article 3 of Directive 2009/110/EC and Article 31 of the Agreement on the European Economic Area ("EEA Agreement" or "EEA").

2 Norway contests the action.

II LEGAL BACKGROUND

EEA law

3 Article 31(1) EEA reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State*

or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

4 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1) ("Directive 2009/138") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45) and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Norway on 23 October 2012, and the decision entered into force on 1 December 2012.

5 Article 14 of Directive 2009/138, entitled "Principle of authorisation", reads:

1. The taking-up of the business of direct insurance or reinsurance covered by this Directive shall be subject to prior authorisation.

2. The authorisation referred to in paragraph 1 shall be sought from the supervisory authorities of the home Member State by the following:

(a) any undertaking which is establishing its head office within the territory of that Member State; or
(b) any insurance undertaking which, having received an authorisation pursuant to paragraph 1, wishes to extend its business to an entire insurance class or to insurance classes other than those already authorised.

6 Article 26 of Directive 2009/138, entitled "Prior consultation of the authorities of other Member States", reads:

1. The supervisory authorities of any other Member State concerned shall be consulted prior to the granting of an authorisation to:

(a) a subsidiary of an insurance or reinsurance undertaking authorised in that Member State;
(b) a subsidiary of the parent undertaking of an insurance or reinsurance undertaking authorised in that Member State; or
(c) an undertaking controlled by the same person, whether natural or legal, who controls an insurance or reinsurance undertaking authorised in that Member State.

2. The authorities of a Member State involved which are responsible for the supervision of credit institutions or investment firms shall be consulted prior to the granting of an authorisation to an insurance or reinsurance undertaking which is:

(a) a subsidiary of a credit institution or investment firm authorised in the Community;

(b) a subsidiary of the parent undertaking of a credit institution or investment firm authorised in the Community; or

(c) an undertaking controlled by the same person, whether natural or legal, who controls a credit institution or investment firm authorised in the Community.

3. The relevant authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the fit and proper requirements of all persons who effectively run the undertaking or have other key functions involved in the management of another entity of the same group.

They shall inform each other of any information regarding the suitability of shareholders and the fit and proper requirements of all persons who effectively run the undertaking or have other key functions which is of relevance to the other competent authorities concerned for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

7 Article 34 of Directive 2009/138, entitled "General supervisory powers", reads, in extract:

1. Member States shall ensure that the supervisory authorities have the power to take preventive and corrective measures to ensure that insurance and reinsurance undertakings comply with the laws, regulations and administrative provisions with which they have to comply in each Member State.

2. The supervisory authorities shall have the power to take any necessary measures, including where appropriate, those of an administrative or financial nature, with regard to insurance or reinsurance undertakings, and the members of their administrative, management or supervisory body.

…

8 Article 57 of Directive 2009/138, entitled "Acquisitions", reads:

1. Member States shall require any natural or legal person or such persons acting in concert (the proposed acquirer) who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance or reinsurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance or reinsurance undertaking as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would become its subsidiary (the proposed acquisition), first to notify in writing the supervisory authorities of the insurance or reinsurance undertaking in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 59(4). Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

2. Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an insurance or reinsurance undertaking first to notify in writing the supervisory authorities of the home Member State, indicating the size of that person's holding after the intended disposal. Such a person shall likewise notify the supervisory authorities of a decision to reduce that person's qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would cease to be a subsidiary of that person. Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

9 Article 60 of Directive 2009/138, entitled "Acquisitions by regulated financial undertakings", reads:

1. The relevant supervisory authorities shall work in full consultation with each other when carrying out the assessment if the proposed acquirer is one of the following:

(a) a credit institution, insurance or reinsurance undertaking, investment firm or management company within the meaning of point 2 of Article 1a of Directive 85/611/EEC (the UCITS management company) authorised in another Member State or in a sector other than that in which the acquisition is proposed;

(b) the parent undertaking of a credit institution, insurance or reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed; or

(c) a natural or legal person controlling a credit institution, insurance or reinsurance undertaking, investment firm or UCITS management company

authorised in another Member State or in a sector other than that in which the acquisition is proposed.

2. The supervisory authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the supervisory authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the supervisory authority that has authorised the insurance or reinsurance undertaking in which the acquisition is proposed shall indicate any views or reservations expressed by the supervisory authority responsible for the proposed acquirer.

10 Article 145 of Directive 2009/138, entitled "Conditions for branch establishment", reads, in extract:

1. Member States shall ensure that an insurance undertaking which proposes to establish a branch within the territory of another Member State notifies the supervisory authorities of its home Member State. ...

11 Article 146 of Directive 2009/138, entitled "Communication of information", reads, in extract:

1. Unless the supervisory authorities of the home Member State have reason to doubt the adequacy of the system of governance or the financial situation of the insurance undertaking or the fit and proper requirements in accordance with Article 42 of the authorised agent, taking into account the business planned, they shall, within three months of receiving all the information referred to in Article 145(2), communicate that information to the supervisory authorities of the host Member State and shall inform the insurance undertaking concerned thereof. ...

12 Article 247 of Directive 2009/138, entitled "Group Supervisor", reads, in extract:

1. A single supervisor, responsible for coordination and exercise of group supervision (group supervisor), shall be designated from among the supervisory authorities of the Member States concerned.

2. Where the same supervisory authority is competent for all insurance and reinsurance undertakings in a group, the task of group supervisor shall be exercised by that supervisory authority.

In all other cases and subject to paragraph 3, the task of group supervisor shall be exercised:

(a) where a group is headed by an insurance or reinsurance undertaking, by the supervisory authority which has authorised that undertaking;

(b) where a group is not headed by an insurance or reinsurance undertaking, by the following supervisory authority:

(i) where the parent of an insurance or reinsurance undertaking is an insurance holding company or mixed financial holding company, the supervisory authority which has authorised that insurance or reinsurance undertaking,

(ii) where more than one insurance or reinsurance undertaking which have their head offices in the Union have as their parent the same insurance holding company or mixed financial holding company, and one of those undertakings has been authorised in the Member State in which the insurance holding company or mixed financial holding company has its head office, the supervisory authority of the insurance or reinsurance undertaking authorised in that Member State,

(iii) where the group is headed by more than one insurance holding company or mixed financial holding company which have their head offices in different Member States and there is an insurance or reinsurance undertaking in each of those Member States, the supervisory authority of the insurance or reinsurance undertaking with the largest balance sheet total,

(iv) where more than one insurance or reinsurance undertaking which have their head offices in the Union have as their parent the same insurance holding company or mixed financial holding company and none of those undertakings has been authorised in the Member State in which the insurance holding company or mixed financial holding company has its head office, the supervisory authority which authorised the insurance or reinsurance undertaking with the largest balance sheet total, or

(v) where the group is a group without a parent undertaking, or in any circumstances not referred to in points (i) to (iv), the supervisory authority which authorised the insurance or reinsurance undertaking with the largest balance sheet total.

…

13 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (OJ 2013 L 176, p. 338), as corrected by OJ 2017 L 20, p. 1, ("Directive 2013/36") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019 (OJ 2019 L 321, p. 170) and is referred to at point 14 of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Norway on 25 June 2019 and the decision entered into force on 1 January 2020.

14 Article 8 of Directive 2013/36, entitled "Authorisation", reads, in extract:

> *1. Member States shall require credit institutions to obtain authorisation before commencing their activities. Without prejudice to Articles 10 to 14, they shall lay down the requirements for such authorisation and notify EBA.*
>
> *2. EBA shall develop draft regulatory technical standards to specify:*
>
> *(a) the information to be provided to the competent authorities in the application for the authorisation of credit institutions, including the programme of operations provided for in Article 10;*
>
> *(b) the requirements applicable to shareholders and members with qualifying holdings pursuant to Article 14; and*
>
> *(c) obstacles which may prevent effective exercise of the supervisory functions of the competent authority, as referred to in Article 14.*
>
> ...

15 Article 16 of Directive 2013/36, entitled "Prior consultation of the competent authorities of other Member States", reads:

> *1. The competent authority shall, before granting authorisation to a credit institution, consult the competent authorities of another Member State where the credit institution is:*
>
> *(a) a subsidiary of a credit institution authorised in that other Member State;*
>
> *(b) a subsidiary of the parent undertaking of a credit institution authorised in that other Member State;*
>
> *(c) controlled by the same natural or legal persons as those who control a credit institution authorised in that other Member State.*
>
> *2. The competent authority shall, before granting authorisation to a credit institution, consult the competent authority that is responsible for the supervision of insurance undertakings or investment firms in the Member State concerned where the credit institution is:*
>
> *(a) a subsidiary of an insurance undertaking or investment firm authorised in the Union;*
>
> *(b) a subsidiary of the parent undertaking of an insurance undertaking or investment firm authorised in the Union;*

(c) controlled by the same natural or legal persons as those who control an insurance undertaking or investment firm authorised in the Union.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of members of the management body involved in the management of another entity of the same group. They shall exchange any information regarding the suitability of shareholders and the reputation and experience of members of the management body which is of relevance for the granting of an authorisation and for the ongoing assessment of compliance with operating conditions.

16 Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10) ("Directive 2003/41") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 88/2006 of 7 July 2006 (OJ 2006 L 289, p. 26) and is referred to at point 30cb of Annex IX (Financial Services) to the EEA Agreement. The decision entered into force on 12 April 2007.

17 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (OJ 2015 L 337, p. 35), as corrected by OJ 2018 L 102, p. 97, ("Directive 2015/2366") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 of 14 June 2019 (OJ 2022 L 291, p. 50) and is referred to at point 16e of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Norway on 28 March 2022 and the decision entered into force on 1 May 2022.

18 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions (OJ 2009 L 267, p. 7) ("Directive 2009/110") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 120/2010 of 10 November 2010 (OJ 2011 L 58, p. 77) and is referred to at point 15 of Annex IX (Financial Services) to the EEA Agreement. The decision entered into force on 1 November 2012.

National law

19 Section 1-3 of the Norwegian Financial Institutions Act of 10 April 2015 No 17 (*Lov om finansforetak og finanskonsern (finansforetaksloven)*) ("the FIA") provides the definition of a financial institution and reads:

Section 1-3. Financial institutions

(1) A 'financial institution' is an entity carrying on business as a

a. bank,

b. mortgage credit institution,

c. finance company,

d. insurance undertaking,

e. pension undertaking,

f. holding company of a financial group.

(2) Except as otherwise provided by or pursuant to this Act, an entity licensed to operate as a payment institution or electronic money institution is also considered to be a financial institution

20 Section 4-1 of the FIA reads:

Section 4-1. Purchase of a qualifying holding in and establishment of a subsidiary in another EEA Member State

(1) A Norwegian financial institution shall notify Finanstilsynet if the institution acquires a holding of 10 per cent or more of the capital or votes in a financial institution in another EEA Member State. The same applies to any acquisition which increases a qualifying holding to respectively 20, 30 or 50 per cent or more of the capital or votes in a financial institution, or such that the holding confers a controlling influence in the financial institution as referred to in section 1-3 of the Public Limited Liability Companies Act. The provisions of section 6-1, subsections (4) and (5), and section 6-5 apply to the calculation of holdings. The provisions of section 17-9 subsections (2) and (3) apply to the disposal of such holdings. Section 17-1 subsection (1) is not applicable.

(2) A Norwegian financial institution shall notify Finanstilsynet of its establishment of a financial institution as a subsidiary in another EEA Member State. Section 17-1 subsection (1) of the Financial Institutions Act is not applicable.

(3) Notification pursuant to subsection (1) or (2) shall at minimum contain information on:

a. the financial institution to be established or in which a qualifying holding is to be acquired,

b. the purpose of the establishment or acquisition,

c. financing of the establishment or acquisition, and

d. the group structure after the establishment or acquisition.

(4) Finanstilsynet may set conditions or make an order to the effect that the establishment or acquisition shall not be carried out if:

a. the acquisition or establishment will expose the Norwegian institution or group to particular risk, or

b. the acquisition or establishment will impede supervision of the group.

(5) In the assessment pursuant to subsection 4(a), emphasis shall be placed on whether the establishment or acquisition is prudent in the light of the financial situation of the Norwegian institution or group, including the effect on financial stability.

(6) The deadlines in section 6-2, subsection (3), apply when processing a notification under subsection (1) or (2). If Finanstilsynet has not adopted a decision pursuant to subsection (4) by the expiry of the deadline under section 6-2 subsection (3), Finanstilsynet shall be considered not to have objections to the establishment or acquisition.

III FACTS AND PRE-LITIGATION PROCEDURE

21 By letter dated 15 October 2015, ESA informed Norway that it had opened an own initiative case concerning the authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States, prescribed by Section 4-1 of the FIA. In the letter ESA asked Norway to provide certain information for the purpose of ESA's examination of the matter.

22 On 8 February 2016, the Norwegian Government provided the requested information, as well as essentially claiming that the authorisation requirement in the first paragraph of Section 4-1 of the FIA ensures financial stability and complies with Article 31 EEA.

23 Following an exchange of correspondence with the Norwegian Government, ESA sent Norway a letter of formal notice on 11 December 2019. In that letter, ESA claimed that by maintaining in force an authorisation requirement such as that established in the first paragraph of Section 4-1 of the FIA, Norway was in breach of Directives 2013/36, 2009/138, 2003/41, 2015/2366 and 2009/110 and/or of Article 31 EEA.

24 Norway replied to the letter of formal notice on 2 March 2020. In the reply, Norway still maintained that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. Moreover, the reply noted that the Norwegian Government would ask a forthcoming working group to assess whether it might be possible to achieve the same high level of financial stability through measures other than the prior authorisation scheme.

25 After further correspondence between ESA and the Norwegian Government with regard to the working group, ESA, on 8 July 2020, sent a reasoned opinion to Norway maintaining the view expressed in the letter of formal notice.

26 Norway replied to the reasoned opinion on 9 December 2020 and maintained that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. In the same reply, Norway set out the text and translations of the proposed amendments to Section 4-1 of the FIA.

27 On 7 July 2022, Norway informed ESA that, as of 1 June 2022, the relevant provisions of Section 4-1 of the FIA had been amended.

28 After assessing the amended Norwegian provisions as well as other information provided by Norway, ESA issued a supplementary letter of formal notice to Norway on 5 October 2022. In the letter, ESA concluded that the amendments made to the relevant legislation amounted to a de facto prior authorisation requirement and that, by maintaining in force an authorisation requirement such as that established in the first paragraph of Section 4-1 of the FIA, Norway was in breach of Directives 2013/36, 2009/138, 2003/41, 2015/2366 and 2009/110 and/or Article 31 EEA.

29 Norway replied to ESA's supplementary letter of formal notice on 2 December 2022. In the reply, Norway stated that it did not agree with the assessment conducted by ESA and argued that the amendments made to the relevant legislation had not resulted in a de facto authorisation scheme as concluded by ESA. Moreover, Norway argued that the requirement, which it referred to as a notification requirement accompanied by a defined and limited power for the FSA to intervene, and the safety measures attached thereto – which are only applicable in the cases of special risk, or if the acquisition or establishment would impede supervision of the group – contribute to the legitimate goal of safeguarding financial stability in Norway.

30 On 19 April 2023, ESA sent a supplementary reasoned opinion to Norway in which it maintained its conclusions in the supplementary letter of formal notice.

31 Norway replied to ESA's supplementary reasoned opinion on 20 June 2023. In the reply, Norway rejected ESA's conclusions in the supplementary reasoned opinion and requested a time extension to allow them to further revise Section 4-1 of the FIA.

32 On 25 July 2023, ESA denied Norway's request for a time extension, principally on the grounds that amendments had already been made to the legislation in question, which had not resolved ESA's concerns as expressed in prior correspondence.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

33 On 9 October 2023, ESA lodged an application ("the application") pursuant to the second paragraph of Article 31 of the SCA seeking a declaration that by maintaining in force an authorisation requirement to set up subsidiaries of Norwegian financial

institutions in other EEA States, Norway has breached the following provisions: Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16 and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, Article 3 of Directive 2009/110/EC and Article 31 of the EEA Agreement.

34 ESA requests the Court to declare that:

(i) By maintaining in force an authorisation requirement in Section 4-1 of the Norwegian Financial Institutions Act to set up subsidiaries or acquiring of Norwegian financial institutions in other EEA States, Norway has breached:

- *Articles 14, 26, 57 and 60 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast);*
- *Articles 8, 16 and 24 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;*
- *Articles 9 and 20 of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision;*
- *Article 5 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market;*
- *Article 3 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions; and*
- *Article 31 of the EEA Agreement.*

35 On 18 December 2023, Norway submitted its defence ("the defence"), pursuant to Article 107 of the Rules of Procedure ("RoP"). Norway requests the Court to:

(i) Dismiss the Application of the EFTA Surveillance Authority as unfounded.

(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.

36 On 31 January 2024, ESA submitted its reply.

37 On 8 February 2024, ESA requested a stay of proceedings pursuant to Article 47 RoP. On the same day, the Court invited Norway to give its view on the request for a stay of proceedings, pursuant to Article 47(1) RoP. On 13 February 2024, Norway stated that it did not object to a stay of proceedings and left the decision to the Court's discretion. On 14 February 2024, the President, pursuant to Article 47(2) RoP, decided not to stay the proceedings.

38 On 20 February 2024, the Commission submitted written observations. On 6 March 2024, Norway submitted its rejoinder. The hearing was held on 24 April 2024.

39 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V THE ACTION

The form of order sought

40 By the present application ESA seeks a declaration that Norway has breached its obligations under EEA law by maintaining an authorisation requirement for Norwegian financial institutions setting up subsidiaries or acquiring Norwegian financial institutions in other EEA States.

41 At the hearing, in response to questions by the Court, ESA informed the Court that in the form of order sought the reference to the acquiring of "Norwegian" financial institutions was due solely to a clerical error and that the form of order should be read as referring to any acquisitions of financial institutions as subsidiaries in other EEA States, and not specifically acquisitions of "Norwegian financial institutions" in other EEA States.

42 It should firstly be noted that both in the supplementary letter of formal notice and the supplementary reasoned opinion and in the arguments set out in the application, ESA consistently referred to Section 4-1 of the FIA governing any acquisitions of financial institutions as subsidiaries in other EEA States, without referring only to acquisitions of Norwegian financial institutions in other EEA States. Secondly, the reference in the form of order sought did not in any way mislead Norway as both in its defence and its rejoinder Norway referred consistently to any acquisitions of financial institutions as subsidiaries in other EEA States.

43 Moreover, at the hearing, in response to questions by the Court, Norway stated that it had not understood the form of order as being limited to Norwegian financial undertakings. Thus, the clerical error referred to above did not affect the rights of defence of Norway.

44 In the light of the foregoing considerations, it must be held that the form of order sought in ESA's application must be construed as referring to any acquisitions of financial institutions as subsidiaries in other EEA States.

45 In support of its action, ESA raises three complaints, the first alleging infringement of Articles 14, 26, 57 and 60 of Directive 2009/138; the second alleging infringement of Articles 8, 16 and 24 of Directive 2013/36, Articles 9 and 20 of Directive 2003/41, Article 5 of Directive 2015/2366 and Article 3 of Directive 2009/110; and the third alleging infringement of Article 31 EEA.

The first complaint, alleged infringement of Directive 2009/138 as regards insurance undertakings

Arguments submitted to the Court

46 The first complaint put forward by ESA is that by maintaining in force a de facto prior authorisation requirement for the establishment or acquisition of subsidiaries set out in Section 4-1 of the FIA, Norway breached Articles 14, 26, 57 and 60 of Directive 2009/138 as regards insurance undertakings. ESA notes that Section 4-1 of the FIA, as defined in Section 1-3(1)(d) of the same act, applies to financial institutions operating as an insurance undertaking.

47 ESA argues that Article 14 of Directive 2009/138 subjects the establishment or acquisition of an insurance undertaking as a subsidiary in another EEA State to a single authorisation from the competent authority in the EEA State in which the subsidiary is to be established. ESA argues that this is further borne out by Article 57 of Directive 2009/138, which requires that any entity proposing or intending to acquire a qualifying holding in another EEA State, must first notify the supervisory authority in that EEA State with details of the proposed acquisition.

48 In addition, ESA notes that Articles 26 and 60 of Directive 2009/138 provide for a consultation mechanism, whereby the competent supervisory authority of the EEA State in which the establishment or acquisition of a subsidiary is sought is required to consult with the competent authority of the EEA State of the parent undertaking, before an authorisation is granted when the insurance undertaking concerned is a subsidiary of an insurance or reinsurance undertaking authorised in another EEA State, or a parent undertaking of an insurance or reinsurance undertaking.

49 In ESA's submission, the consultation obligation in Articles 26 and 60 of Directive 2009/138 entails that the Norwegian Financial Supervisory Authority ("FSA") would always be informed of the intended establishment or acquisition of a subsidiary in another EEA State, and would have an opportunity to provide the competent authority in the EEA State of the subsidiary with any information or views it deemed relevant prior to the granting of an authorisation. Therefore, this would allow the FSA to raise any concerns it might have with regard to the authorisation of a subsidiary in another EEA State.

50 ESA asserts that the fourth paragraph of Section 4-1 of the FIA effectively requires that any establishment or acquisition of a subsidiary in another EEA State by a Norwegian financial institution may be subject to conditions set by the FSA with regard to the establishment or acquisition, or subject to the FSA's veto of the establishment or acquisition. Therefore, according to Norwegian law, a Norwegian financial institution cannot apply for an authorisation to the competent authority in the EEA State of the subsidiary as provided for in Directive 2009/138, if the FSA orders that the establishment or acquisition shall not be carried out.

51 ESA submits that the effect of Section 4-1 of the FIA is such that a financial institution is required, de facto, to obtain an authorisation, or failing that, to wait for three months to ensure that the FSA does not object to the establishment or acquisition in question. This infringes upon the authorisation procedures applicable to the establishment and acquisition of insurance undertakings set out by Directive 2009/138. ESA also contends that the authorisation requirement interferes with the competences of the EEA State where a subsidiary is sought to be established or acquired, which is not in accordance with either the principle of mutual recognition or the harmonisation of the authorisation and supervisory systems in the EEA.

52 ESA submits further that rules relating to the relevant procedures and conditions governing authorisation for the initial establishment, as well as rules for subsequent acquisitions of qualifying holdings in insurance undertakings, have been fully harmonised at EEA level. In the light of the foregoing, ESA submits that, by subjecting the establishment or acquisition by a Norwegian financial institution of an insurance undertaking as a subsidiary in another EEA State to oversight amounting to a de facto authorisation requirement, Norway is in breach of the authorisation procedures applicable to the establishment or acquisition of insurance undertakings as provided for in Articles 14, 26, 57 and 60 of Directive 2009/138.

53 Moreover, ESA asserts, as regards Article 34 of Directive 2009/138, that the supervisory powers it establishes do not include a power for the home EEA State to object to, or veto, an establishment or acquisition of a subsidiary in another EEA State, nor to subject financial institutions to a de facto prior authorisation by the home EEA State. Thus, Article 34 of the Directive precludes a right for the supervisory authorities of the parent undertaking to object to, or set conditions for, the establishment or acquisition of a subsidiary in another EEA State.

54 In the course of its argumentation, ESA also contrasted the provisions of Directive 2009/138 dealing with the establishment or acquisition of subsidiaries, with Articles 145 and 146 of that directive, which deal with the right for insurance undertakings to establish branches. In such cases the competent supervisory authority in the EEA State of the parent is the first port of call, insofar as the insurance undertaking must notify this supervisory institution when it wishes to establish a branch in another EEA State. ESA argues that this demonstrates different criteria, insofar as no analogous powers are provided for the EEA State of the parent institution when an insurance undertaking is established or acquired as a subsidiary in another EEA State.

55 ESA acknowledges, as noted by the Norwegian Government, that Article 34 of Directive 2009/138 requires that the supervisory authority of the parent institution has the power to take preventive and corrective measures to ensure that the parent undertaking complies with the laws, regulations, and administrative provisions with which they are obliged to comply in each EEA State. However, ESA claims that such powers do not include a power for the EEA State of the parent undertaking to object to, set conditions regarding, or veto an establishment or an acquisition of a subsidiary in another EEA State, or to subject it to a condition of de facto prior authorisation.

56 Norway maintains that Directive 2009/138 does not regulate the powers of the competent authority in the EEA State of the parent undertaking in the event of an acquisition or establishment of a subsidiary in another EEA State, thus it does not preclude national rules under which the competent authority in the EEA State of the parent undertaking may supervise and regulate the parent undertaking in this respect.

57 Norway asserts that the establishment of a group with subsidiaries may alter the prudential profile of the parent undertaking. In such cases, Articles 27 and 34 of Directive 2009/138 provide supervisory authorities with the powers necessary to ensure that the parent undertaking is operated prudently. Articles 27 and 34 establish a home State supervisory system, which supports the notion that competent supervisory authorities should be able to assess the impact that a potential group establishment may have on insurance or reinsurance undertakings. Norway asserts that the power to object to an establishment or acquisition of a subsidiary in another EEA State, as well as to subject it to conditions, falls within the scope of those articles of Directive 2009/138.

58 Norway submits that Articles 14, 26, 57 and 60 of Directive 2009/138 do not regulate or prohibit the right of an undertaking’s home State authorities to assess and, in cases of special risk, to intervene in the parent undertaking’s acquisition or establishment of a subsidiary in another EEA State. Further, Norway contends that Articles 57 and 60 of Directive 2009/138, which largely correspond to Articles 22 and 24 of Directive 2013/36, do not concern the effects which the acquisition may have on financial stability in the home State of the prospective parent undertaking. Therefore, Norway is of the view that Articles 57 and 60 of Directive 2009/138 do not prevent the supervisory authority of the prospective parent undertaking from ensuring that all relevant aspects of the group establishment, are prudent and appropriate from the parent undertaking’s perspective, and in certain cases, where it is deemed necessary, from objecting to, or attaching conditions to, the proposed establishment.

59 The Commission observes that Article 26 of Directive 2009/138 provides for consultation of the supervisory authority of the Member State where an insurance undertaking is authorised for requests to authorise a subsidiary. In this regard, the Commission submits that Directive 2009/138 leaves the implementation of this consultation to national discretion, potentially in the form of a notification to the parent's supervisory authority. The Commission considers that the question of whether Directive 2009/138 encompasses the obligation to notify the supervisor of the parent undertaking depends on whether or not Directive 2009/138 is considered to be exhaustive. The Commission notes that if Directive 2009/138 is interpreted as entailing complete

harmonisation, a mere notification requirement could be regarded as compatible with its provisions. Such a requirement facilitates the essential consultation and cooperation between authorities, especially when the information from the applicant is incomplete or misleading. Requiring a parallel notification to the parent's supervisor could be seen as a reasonable measure to activate consolidated supervision through collaborative efforts.

Findings of the Court

60 The Court observes at the outset that although Norway has not put forward a plea that all or part of the present action is inadmissible, the Court may of its own motion examine whether the conditions laid down in Article 31 SCA for bringing an action for failure to fulfil obligations are satisfied, and whether the claim put forward fulfils the relevant procedural requirements (compare the judgment of 2 June 2016 in *Commission* v *Netherlands*, C-233/14, EU:C:2016:396, paragraph 43 and case law cited).

61 In proceedings pursuant to Article 31 SCA for failure to fulfil obligations, it is incumbent upon ESA to prove the allegation that the obligation has not been fulfilled. Therefore, it is also ESA's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in doing so ESA may not rely on any presumption (see the judgment of 15 July 2021 in *ESA* v *Norway*, E-9/20, paragraph 106 and case law cited).

62 In accordance with Article 101(1)(c) RoP, an application initiating proceedings in respect of direct actions must state the subject-matter of the proceedings and set out a summary of the pleas in law on which the application is based, and that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself and for the form of order to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint (see the judgment of 5 May 2022 in *Telenor ASA and Telenor Norge AS* v *ESA*, E-12/20, paragraph 87 and case law cited).

63 It is also settled case law that, in an action under Article 31 SCA, the letter of formal notice issued by ESA to the EFTA State and the reasoned opinion delivered by ESA delimit the subject-matter of the dispute, so that it cannot afterwards be extended. The opportunity for the EFTA State concerned to submit its observations, even if it chooses not to make use of it, is an essential guarantee intended by the SCA, adherence to which is an essential formal requirement of the procedure for finding that an EFTA State has failed to fulfil its obligations. Consequently, the reasoned opinion and the action brought by ESA must be based on the same complaints as those in the letter of formal notice initiating the pre-litigation procedure (compare the judgment of 8 May 2024 in *Commission* v *Czech Republic*, C-75/22, EU:C:2024:390, paragraph 49 and case law cited).

64 When assessing the admissibility of a claim before the Court, it must be borne in mind that the purpose of the pre-litigation procedure is to give the EFTA State concerned an opportunity, on the one hand, to comply with its obligations under EEA law and, on the other hand, to avail itself of its right to defend itself against the charges formulated by ESA. The proper conduct of that procedure constitutes an essential guarantee not only in order to protect the rights of the EFTA State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (compare the judgment 30 November 2023, *Commission* v *Slovenia*, C-328/22, EU:C:2023:939, paragraph 19 and case law cited).

65 Hence, where an action is brought under Article 31 SCA, the application must set out the complaints coherently and precisely, so that the EFTA State and the Court can know exactly the scope of the alleged infringement of EEA law, a condition that must be satisfied if the EFTA State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged. In particular, ESA's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the EFTA State in question has failed to fulfil one of its obligations under the EEA Agreement (compare the judgment of 21 December 2023 in *Commission* v *Denmark*, C-167/22, EU:C:2023:1020, paragraphs 26 and 27 and case law cited).

66 In the present case, the Court observes that Directive 2009/138 sets out rules with respect to the relevant procedures and conditions governing authorisation for the initial establishment, as well as the subsequent acquisition, of qualifying holdings in insurance and reinsurance undertakings. That directive is both detailed and technical in nature. It contains a total of 312 articles and seven annexes.

67 The application is, however, confined to Articles 14, 26, 57 and 60 of Directive 2009/138. Articles 14 and 57 deal with an obligation for the company to seek authorisation from the supervisory authority of the subsidiary, while Articles 26 and 60 provide for a consultation mechanism between the competent authorities concerned. The wording of these provisions does not explicitly prohibit an element of further control or supervision by the supervisory authority of the parent undertaking. As noted by the Commission, the key question of whether the contested measures in relation to the supervisory authority of the parent undertaking are covered or not by the Directive depends on whether the latter represents an exhaustive harmonisation.

68 It is settled case law that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EEA law may also reveal elements that are relevant to its interpretation (see the judgment of 9 August 2024 in *X*, E-10/23, paragraph 52 and case law cited).

69 The Court observes, in this regard, as noted by the Commission, that several other provisions of Directive 2009/138 are relevant in assessing whether the Directive represents a measure of exhaustive harmonisation in relation to authorisations for the acquisitions of subsidiaries, and, therefore, whether a scheme such as that provided for

by Section 4-1 of the FIA is compatible with Directive 2009/138. The Commission, in this regard, makes reference to Articles 133(2), 218, 248 and 258 of the Directive, also noting that a notification obligation to the supervisory authority of the parent institution could be construed as necessary to render effective the consultation and cooperation between the respective supervisory authorities provided for in the Directive.

70 The Court acknowledges that ESA should not be subjected to overly stringent requirements in its application, so as to avoid placing an unreasonable burden on the institution and to preserve the effectiveness of the procedure. Thus, arguments may evolve and become more precise as an infringement procedure progresses, as this is inherent to adversarial proceedings. However, as described above, the Article 31 SCA standard must be met.

71 In this regard, the Court observes that ESA's claim is far-reaching, involving a complex area of EEA law governed by detailed and technical rules.

72 The Court observes that Articles 14, 26, 57 and 60 of Directive 2009/138 do not explicitly regulate the powers of the supervisory authority of the parent undertaking in the event of an acquisition or establishment of a subsidiary in another EEA State. Thus, as noted by the Commission, it could be considered that the Norwegian measure falls outside the scope of the above-mentioned provisions. ESA has not sufficiently explained why it considers that those provisions prohibit the home State authorities of the parent undertaking from assessing and intervening in the parent undertaking's acquisition or establishment of a subsidiary in another EEA State.

73 In this regard, the Court, for example, observes that the main responsibility for supervising insurance groups lies, in accordance with Article 247(2) of Directive 2009/138, with the competent authority of the parent undertaking. The measures facilitating group supervision, as outlined in Chapter III of Title III of that directive, are relevant to the Court's substantive assessment in this case. Neither ESA nor Norway addressed these rules.

74 When important elements of law are first introduced after the written submissions of the parties to the dispute – in this case, by the Commission – it casts doubt on whether the infringement procedure has enabled the EEA State to present an effective defence and whether the Court has been provided with the information needed to determine whether there has been a breach of obligations.

75 This concern is reinforced by the other purpose of the pre-litigation procedure: to give the EEA State concerned an opportunity to comply with its obligations under EEA law. For this objective to be achieved, ESA must ensure that the EFTA State is in a position to fully understand the nature of the alleged breach. This requires that ESA conducts a thorough investigation and properly defines the case at the administrative stage of the procedure, rather than deferring essential analyses until the final phase, such as the oral hearing.

76 In light of all the above, the action in respect of Directive 2009/138 must be dismissed as inadmissible.

The second complaint, concerning alleged infringements of Directives 2013/36, 2003/41, 2015/2366 and 2009/110 as regards credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions

Arguments submitted to the Court

77 ESA's second complaint contends that the arguments concerning the breach of Directive 2009/138 are equally applicable with regard to the establishment or acquisition in another EEA State of credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions. In this regard, ESA specifically refers to Articles 8, 16 and 24 of Directive 2013/36, Articles 9 and 20 of Directive 2003/41, Article 5 of Directive 2015/2366 and Article 3 of Directive 2009/110. ESA submits that these provisions contain, in relation to cross-border activities, a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial institutions are sought to be established or acquired.

78 Norway maintains that the above directives do not regulate the powers of the competent authority in the home EEA State in the event of an acquisition or establishment of a subsidiary in another EEA State.

79 In this regard, Norway submits that none of the directives referred to by ESA provide for exhaustive harmonisation on every aspect therein. Norway notes that all of the relevant directives contain a large number of provisions, and several are formulated in broad terms, not only leaving room for national discretion but also requiring more detailed regulation in national law. Thus, the directives leave it to national law to decide which supervisory powers are necessary to ensure the sound and prudent management of the institutions. Norway submits that this is acknowledged, inter alia, by the Commission's Impact Assessment Report of 27 October 2021, in which the Commission stated that, while Directive 2013/36 ensures a minimum level of harmonisation across the European Union, some Member States have added provisions to their national laws to address specific areas, making use of the discretion allowed under that directive. In Norway's submission, this confirms that the current framework in Directive 2013/36 does not preclude EEA States from enacting national rules that grant supervisory powers to the competent authorities of a parent undertaking regarding the establishment or acquisition of a subsidiary in another EEA State.

80 Norway claims that Directive 2003/41 only contains minimum prudential requirements, as can be seen in recitals 18 and 20 of that directive. Thus, as expressly stated in Article 9(3) of Directive 2003/41, an EEA State is allowed to make the conditions of operation of an institution located in their territory subject to requirements in addition to those listed in that directive.

81 Norway asserts that Article 20 of Directive 2003/41, invoked by ESA, appears to only regulate cross-border activities related to sponsorship between retirement institutions. Norway submits that Article 20 does not concern supervisory powers concerning the establishment of financial groups and is, therefore, irrelevant to the case at hand. Further, Norway maintains that Directive 2003/41 does not, in any event, preclude competent authorities from requiring notification from supervised entities which wish to establish or acquire a subsidiary in another EEA State and, where appropriate, from attaching conditions to, or opposing, the proposed establishment or acquisition.

82 The Commission submits that the degrees and authority of market monitoring and supervision attributed to the national authorities are different depending on the applicable sectoral legislation. As regards Directive 2013/36, the Commission observes that the fourth paragraph of Section 4-1 of the FIA grants the FSA powers to impose conditions on, or prohibit, the establishment or acquisition of a subsidiary, powers not directly mentioned in Directive 2013/36. However, the Commission considers them consistent with the supervisory power to restrict or limit business, operations, or networks, or even to order divestment from risky endeavours, as provided for in Article 104 of Directive 2013/36. As regards Directive 2015/2366, the Commission states that although the powers granted to the FSA by the fourth paragraph of Section 4-1 of the FIA extend beyond mere cooperation between authorities, they are not necessarily in conflict with that directive, which lacks provisions on group supervision. According to the Commission, Directive 2015/2366 provides in Article 28 for an obligation to notify new establishments to the Member State of origin, and allows, in Article 29, for objections to the establishment of branches. In these circumstances, the Commission indicates that it lacks detailed information on the exercise of these powers and whether their exercise is proportionate to the risks to financial stability.

Findings of the Court

83 The Court reiterates that it may on its own motion assess the admissibility of a case submitted to it pursuant to Article 31(2) SCA. This includes whether the application meets the requirements of clarity, precision and coherence outlined above.

84 In the present case, ESA requests the Court to declare that by maintaining in force an authorisation requirement in Section 4-1 of the FIA to set up subsidiaries or acquiring financial institutions in other EEA States, Norway has breached Directives 2013/36, 2003/41, 2015/2366 and 2009/110 as regards credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions.

85 However, it is not clear from the submissions made in the body of ESA's application, on which grounds ESA bases its claim. The obligations following from the provisions of the directives named in the previous paragraph are not coherently defined.

86 In the present case, it should be noted that, although Articles 8, 16 and 24 of Directive 2013/36, Articles 9 and 20 of Directive 2003/41, Article 5 of Directive 2015/2366 and Article 3 of 2009/110 are referred to in the form of order sought in the application, the

arguments set out in that application and the related arguments made by ESA do not, by contrast, contain explanations as regards those provisions and their possible infringement, nor, a fortiori, does it contain details as regards the reasons why the national provision contested is capable of infringing those articles (compare the judgment of 5 June 2023 in *Commission* v *Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442, paragraph 191).

87 As far as concerns more particularly the obligation to indicate the legal particulars on which the complaints made by ESA are based, it is not sufficient for ESA, in order to claim that the defendant EFTA State has not complied with a provision of EEA law, merely to cite that provision in the section of the reasoned opinion or of the application which covers the legal context and which is purely descriptive and lacking of any explanatory character (compare the judgment of 29 November 2001 in *Commission* v *Italy*, C-202/99, EU:C:2001:646, paragraph 21).

88 ESA claims that the arguments set out in its application with respect to the alleged infringement of Directive 2009/138 as regards insurance undertakings, are equally applicable with regard to the establishment or acquisition in another EEA State of credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions. In its brief analysis, to which only three paragraphs are dedicated in total, ESA appears to imply that the exact same obligations may be derived from the cited provisions of Directive 2013/36, Directive 2003/41, Directive 2015/2366 and Directive 2009/110 as from the provisions of Directive 2009/138.

89 However, as noted by the Commission in its written observations, the degrees and authority of market monitoring and supervision that are attributed to the national authorities vary depending on the applicable sectoral directives. In addition, as noted by the Norwegian Government, there are significant differences between the regimes set out by the directives in question, for example, concerning to what extent they harmonise rules on prudential requirements.

90 As argued by Norway, the basis of ESA's complaint, that these directives can be equated and that the same obligations may be derived from these directives as from Directive 2009/138, is incorrect.

91 Given that ESA has not provided an adequate examination of the provisions of the directives that it alleges Norway has infringed, the application does not meet the requirements of clarity, precision and coherence as set out above. The fact that that alleged infringement was substantiated by ESA in greater detail in the reasoned opinion, is not capable of remedying the irregularity vitiating the application in respect of Directives 2013/36, 2003/41, 2015/2366 and 2009/110 (compare the judgment in *Commission* v *Poland (Independence and private life of judges)*, C-204/21, cited above, paragraph 192).

92 In light of the above, the action in respect of Directives 2013/36, 2003/41, 2015/2366 and 2009/110 must also be dismissed as inadmissible.

The third complaint, alleged infringement of Article 31 EEA

Arguments submitted to the Court

93 ESA requests the Court to declare that by maintaining in force a de facto authorisation requirement in Section 4-1 of the FIA to set up subsidiaries or acquiring of financial institutions in other EEA States, Norway has breached Article 31 EEA.

94 ESA submits that the authorisation requirement set out in Section 4-1 of the FIA restricts the freedom of establishment as it is liable to hinder Norwegian financial institutions from establishing or acquiring financial institutions as subsidiaries in other EEA States.

95 ESA acknowledges that the objective of the Norwegian measure may generally reflect overriding reasons in the general public interest. However, in ESA's submission, it must still comply with the principle of proportionality. ESA takes the view that Norway has not provided substantial arguments concerning the necessity of the national measure as regards situations in which finance companies are established or acquired as subsidiaries of Norwegian financial institutions in other EEA States. Accordingly, the Norwegian measure goes beyond what is necessary for the purpose of ensuring financial stability.

96 As regards the assessment under the freedom of establishment, Norway maintains that Section 4-1 of the FIA is a restriction which is justified by overriding reasons in the general interest and which is suitable and proportionate.

97 Norway submits that supervision by the competent authority in the EEA State of the parent undertaking is appropriate and necessary to safeguard the aim of maintaining financial stability. The competent authority in the EEA State of the subsidiary and the EEA State of the parent undertaking will assess different aspects of the establishment or acquisition.

98 Norway submits that it has chosen a high level of protection for its financial services sector.

99 The Commission states that the additional notification obligation might be considered as compatible with the freedom of establishment as provided for in Article 31 EEA, to the extent that it is justified by the legitimate objective of efficiently ensuring financial stability in the parent's EEA State and the EEA as a whole.

Findings of the Court

100 In its reply ESA explains that the plea regarding Article 31 EEA is an alternative to its claims of a breach of the directives under the first and second pleas. Moreover, this plea also covers financial institutions not subject to any harmonising legislation and thus not encompassed by the first two complaints.

101 The Court observes that it is settled case law that the freedom of establishment laid down in Article 31 EEA, like the other freedoms of movement, applies only to matters which have not been the subject of exhaustive harmonisation (see the judgment of 16 July 2012 in *ESA* v *Norway*, E-9/11, paragraph 72 and the case-law cited). Accordingly, in order to assess the third complaint put forward by ESA as regards any of the areas covered by the directives subject to the first two complaints, it is necessary to determine whether the directives provide for exhaustive harmonisation in this regard.

102 However, the Court observes, in this regard, that ESA, in its application, has not provided any detailed analysis as to whether the directives represent a measure of exhaustive harmonisation in relation to authorisations for the acquisitions of subsidiaries.

103 For this reason, as well as the fact that the Court has dismissed as inadmissible the pleas regarding the directives, it follows that any part of this plea related to financial institutions coming within the scope of the directives is also inadmissible. In the following, the Court will therefore only examine this plea regarding financial institutions outside the scope of the directives.

104 It is not disputed among the parties that Section 4-1 of the FIA constitutes a restriction on the freedom of establishment, as it is liable to hinder Norwegian financial institutions from establishing or acquiring financial institutions as subsidiaries in other EEA States. The focal point of the case at issue, insofar as it relates to Article 31 EEA, is thus on the question as to whether the contested legislation can be objectively justified.

105 It is settled case law that a national measure which hinders the freedom of establishment laid down in Article 31 EEA may be justified by overriding reasons in the general interest, provided that it is appropriate to securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it (see the judgment of 20 November 2024 in *Bygg & Industri Norge AS and Others*, E-2/24, paragraph 94 and case law cited).

106 Norway submits that it has opted for a particularly high level of protection in the financial sector, and that integrity and stability of the financial system are essential elements of the Norwegian approach to these issues.

107 It is not disputed among the parties that those aims pursued are overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Article 31 EEA (see the judgment of 16 May 2017 in *Netfonds Holding and Others*, E-8/16, paragraphs 113 and 114 and case law cited).

108 Norway further argues that there are no alternative, less restrictive measures equally effective in achieving the objectives pursued. Norway maintains that a mere notification requirement, without the right for the FSA to intervene in a proposed acquisition in limited circumstances, will not function as a safety mechanism for ensuring financial stability in the national market. Thus, such a notification requirement would not ensure

an equally high level of protection as the intervention right set out in Section 4-1 of the FIA.

109 The Court observes that when it comes to regulating financial institutions, special concerns arise concerning financial stability in the national market. In this regard, the Court has emphasised that soundly regulated and safe financial institutions are of decisive importance for financial stability in the EEA (see the judgment of 28 January 2013 in *ESA* v *Iceland*, E-16/11, paragraph 129). This is mainly due to the particular function of financial institutions for the economy as a whole (see the judgment in *Netfonds Holding and Others*, E-8/16, cited above, paragraph 132).

110 The Court observes that outside the categories of institutions falling within the scope of the directives in question, it is not clear from ESA's application which category or categories of institutions will be assessed on the basis of the freedom of establishment principle. This uncertainty was confirmed at the hearing where ESA, in response to a question from the bench, was unable to provide the Court with concrete examples of institutions that would not fall under these directives, and which, accordingly, should be assessed under the freedom of establishment principle.

111 In proceedings for a declaration of failure to fulfil obligations, it is for ESA to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is established, and ESA may not rely on any presumption for that purpose (see the judgment in *ESA* v *Norway*, E-9/20, cited above, paragraph 106 and case law cited). However, the EFTA States are required, pursuant to Article 3 EEA, to facilitate the achievement of ESA's tasks. It follows in particular that, where ESA has adduced sufficient evidence of certain matters in the territory of the defendant EFTA State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (see the judgment of 11 February 2014 in *ESA* v *Iceland*, E-12/13, paragraph 83 and the case-law cited). Once the EFTA State has substantiated a particular justification, the burden shifts back to ESA to put forward sufficient proof opposing such justifications (compare, to that effect, the judgment of 24 March 2011 in *Commission* v *Spain*, C-400/08, EU:C:2011:172, paragraphs 100 to 103).

112 In the present circumstances, this information should necessarily include the nature of the financial institutions affected by the measures in question, in order to inform any assessment of the proportionality of those measures.

113 The nature and scope of the activities of financial institutions falling outside the scope of the directives regulating financial services under the EEA Agreement are significant when it comes to examining the necessity of the Norwegian measures. ESA has not provided sufficient explanation as to why the national legislation is not compatible with the principle of proportionality, apart from its observation that Norway has not provided any substantial arguments concerning the necessity of the national measures.

114 In the absence of adequate knowledge of the activities carried out by the institutions to be assessed under the freedom of establishment, the Court is not in a position to assess

whether the contested measure complies with the principle of proportionality. Accordingly, as ESA has failed to identify the financial institutions it considers to be the subject of the alleged breach of Article 31 EEA, it must be held that ESA has failed to demonstrate to the requisite standard of proof that Norway has failed to fulfil its obligations in respect of Article 31 EEA.

115 Accordingly, the third complaint, as regards financial institutions outside the scope of secondary legislation, must be dismissed as unfounded.

VI COSTS

116 Under Article 121(1) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Norway has requested that ESA be ordered to pay the costs. The Court finds that none of the exceptions in Article 121(2) RoP apply. ESA must therefore be ordered to pay the costs. The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the EFTA Surveillance Authority to bear the costs of the proceedings.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 20 December 2024.

Ólafur Jóhannes Einarsson
Registrar

Michael Reiertsen
Acting President