

Brussels, 18 July 2011
Case No: 65860
Event No: 572230

EFTA SURVEILLANCE
AUTHORITY

Ministry of Local Government and Regional Development
Akersgata 59
N-0032 Oslo
Norway

Dear Sirs,

Subject: Letter of formal notice to Norway concerning authorisation schemes in the construction sector

1 Introduction

By letter dated 29 January 2009, the EFTA Surveillance Authority (hereafter referred to as “the Authority”) informed the Norwegian Government that it had received a complaint against Norway regarding provisions contained in the Norwegian Planning and Building Act, according to which undertakings carrying out construction work have to meet specific requirements and must be authorised by local authorities.

The case concerns rules that Norway has later notified as an authorisation scheme under the “Services Directive” (Directive 2006/123/EC; see below) which entered into force in the EEA on 1 May 2010. The Authority has since stated, in its Report on the Implementation of Directive 2006/123/EC in the EFTA States, of 26 January 2011,¹ that it is assessing the proportionality of the measure.

Before the entry into force of the Services Directive, in a letter dated 6 October 2009, the Internal Market Affairs Directorate of the Authority (hereafter “the Directorate”) informed the Norwegian Government that its preliminary view was that the rules in place in Norway were in breach of the principle of the freedom to provide services, as established in Article 36 EEA.

The Norwegian Government replied to the letter of the Authority on 4 November 2009. In the letter, the Norwegian Government stated that it considered the relevant provisions to be justified.

At the package meeting in Oslo on 11 and 12 November 2009, the Authority was informed that a revised version of the Planning and Building Act was being elaborated, and that it would enter into force in the summer of 2010.

At the package meeting in Oslo 11 and 12 November 2010, after the entry into force of the Services Directive, the restrictions under Sections 22-1 and 22-3 of the Planning and Building Act were discussed. In a follow up letter to the package meeting, dated 25 November 2011, the Authority invited the Norwegian Government to provide it with

¹ Event No 572794.

specific reasoning as to how it considers the current rules to be in compliance with the Services Directive, and in particular with Article 16(3).

In a letter dated 3 February 2011 the Norwegian Government replied to the Authority's follow up letter.

2 Relevant national law

Under the Norwegian legislation at issue, described in further detail below, an undertaking must accept the relevant responsibility in connection with construction works. However, the undertaking must be authorised to accept such responsibility, or else it is precluded from doing so and consequently also from carrying out the works. Provision of services in connection with construction works is thus effectively made conditional upon the undertaking obtaining an authorisation to accept the relevant responsibility.

Section 20-1 of *lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling (plan- og bygningsloven 2008)* (hereafter referred to as "the Planning and Building Act"), establishes that all construction works, except for those specifically exempt under Section 20-3, or those falling within the purview of other legislation, must be authorised by the relevant local authorities.

The second paragraph of Section 20-1 states that 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.

Section 22-3 states that "qualified undertakings" are given local approval. Different approval levels exist, depending on the work that is to be carried out by the applicant. Furthermore the Section states that if an undertaking has been centrally approved in accordance with the procedure in Section 22-1, this shall normally be the basis upon which local approval is granted.

Central approval is voluntary in all instances, except with regard to undertakings carrying out controlling functions. In such instances, Section 22-3 states that central approval is mandatory.

Section 9-1 of *forskrift 26. mars 2010 nr. 488 om byggesak (byggesaksforskriften)* (hereinafter referred to as "the Building Regulation") states that undertakings shall be authorised for their respective purposes if they fulfil the relevant requirements of Chapter 3 of the Building Regulation. It furthermore re-states that central authorisation is voluntary for all undertakings, except for those carrying out controlling functions, for which it is mandatory. Finally it states that local approval is mandatory for all undertakings falling within the scope of Section 20-1 of the Planning and Building Act.

Sections 9-3 and 9-4 establish three categories of authorisation, based on the level of complexity involved in the work at issue.

Section 11-1, first paragraph, states that undertakings applying for central authorisation must document that it has an overall competence that is suited to the relevant authorisation category.

Section 11-1, second paragraph, establishes that undertakings applying for local authorisation shall show that they will be using necessary and relevant expertise in order to carry out the relevant works.

3 Relevant EEA law

Paragraph 1 of Article 16 of the Act referred to at point 1 of Annex X to 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*) states that:

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 [...]*

Paragraph 2 of Article 16 of the Services Directive states that:

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;*

Paragraph 3 of Article 16 of the Services Directive states that:

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.

Article 36(1) of the EEA Agreement states that:

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 national 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.

4 The Authority's assessment

4.1 Restrictions under Article 16 of the Services Directive

Sections 20-1, second paragraph, and 22-3 of the Planning and Building Act, read in the light of Sections 9 and 11-1 of the Building Regulation require that undertakings given the task to carry out construction work cannot initiate such works before they have been authorised by local governments. Such authorisation needs to precede every individual construction project. The fact that an undertaking has received central approval, although creating the presumption that local authorisation should be granted, does not absolve the undertaking from the burden of applying for authorisation before every new project is commenced.

In view of the Authority, it is apparent that the Norwegian system constitutes an authorisation scheme within the meaning of Article 16, paragraph 2 (b) of the Services Directive. Such authorisation schemes may not be imposed, unless they can be justified by one of the legitimate objectives explicitly listed in Article 16, paragraph 3, of the Services Directive. Furthermore, they must be non-discriminatory, necessary and proportionate to the objective they seek to achieve, in accordance with Article 16, paragraph 1, section 3 (a) – (c).²

4.2 Justification under Article 16, paragraph 3, of the Services Directive

It appears both from the wording of the provision and the interpretative note issued by the European Commission, that the justification grounds included in Article 16, paragraph 3 of the Services Directive, are exhaustive in nature. In the Handbook on implementation of the Services Directive it is stated that:

“According to Article 16 application of national requirements can only be justified if necessary for the protection of public policy, public security, public health or the environment. This excludes Member States from invoking other public interest objectives.”³

The handbook furthermore states that Article 16(3) must be interpreted narrowly. Such an approach is in conformity with consistent case law from the Court of Justice of the European Union.⁴

In its letter dated 3 February 2011, the Norwegian Government stated that the authorisation schemes under the Planning and Building Act aim to secure the protection of public health and security. In the view of the Norwegian Government these justification

² See also Case C-458/08 *Commission v Portugal*, judgment of 18 November 2010, not yet reported, paragraphs 86-88.

³ Handbook for Implementation of the Services Directive, p. 37 available at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

⁴ See for example, Case C-54/99 *Église de Scientologie* [2000] ECR I-1335; paragraph 17 and Case C-257/05 *Commission v Austria* [2006] ECR I-134, paragraph 25.

grounds include issues relating to “*fundamental aspects of health and security in the building sector, such as construction- and fire safety as well as requirements for an acceptable indoor climate compatible with public health standards.*” Furthermore, the Norwegian Government refers to *Commission v Portugal*, in which the Court of Justice found the soundness and safety of buildings to fall within the scope of the legitimate objectives.

The Authority does not share the interpretation of Article 16 of the Services Directive offered by the Norwegian Government.

As mentioned above, the Authority considers that the wording of Article 16, paragraph 3, of the Services Directive does not aim to incorporate the mandatory requirements which have developed in the case law of the Court of Justice. Instead, it limits the justification grounds to those included in primary law – Article 33 EEA in the EEA context – with the addition of the protection of the environment. Thus, the very intention of Article 16, paragraph 3, is to narrow the possibilities of justifying derogations from the principle of the free movement of services, for services falling within the scope of the Services Directive.

In this connection it must be noted that *Commission v Portugal* concerned the situation in Portugal before the Services Directive had entered into force.⁵ Therefore the recognition of the Court of Justice that the above-mentioned concerns indeed were to be considered legitimate objectives was based on Article 49 EC [now Article 56 TFEU], and, as a logical consequence, the case law based on that Article.

Having thus concluded that the justification possibilities indeed are narrower under the Services Directive than under the case law developed in relation Article 36 EEA, it must be considered whether the Norwegian restrictions can be considered reflected in the legitimate objectives explicitly included in the Services Directive. In this regard, Norway argues that the authorisation schemes are necessary in order ensure effective protection of public health and public security.

With regard to public health, the Court of Justice has held that “*only in case of a genuine and sufficiently serious threat can the concept of public health be invoked.*”⁶ Although the case law is far from exhaustive on this point, it is clear that the threshold for invoking the justification ground is significant. Situations that have been considered acceptable have included risks of a systemic nature, such as the need to maintain a balanced public health system and “*the survival of the population*”.⁷ Moreover, as recently held by the EFTA Court in the context of public policy, which the Authority considers applicable by analogy, “*the reasons which may be invoked by an EEA State in order to justify such a derogation must be accompanied by an appropriate analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated*”.⁸

It is the view of the Authority that the reasons advanced by the Norwegian Government focus on risks of a much more limited magnitude than what has traditionally been

⁵ Case C-458/08 *Commission v Portugal*, cited above, paragraph 81-82.

⁶ Case C-257/05 *Commission v Austria*, cited above, paragraph 25.

⁷ Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 105.

⁸ Case E-12/10 *EFTA Surveillance Authority v Iceland*, judgment of 28 June 2011, not yet reported, paragraph 57.

associated with the protection of public health. Therefore, the Authority considers that the legitimate objective of protection of public health is not met in the present case.

Also with regard to public security, the Court of Justice has stated that the threat has to be genuine and sufficiently serious in order for the objective to be met and that, a threat of great magnitude to the nation as a whole has to be present. For example, in *Campus Oil* the Court of Justice allowed measures aimed at ensuring the availability of crude oil, based on its “*fundamental importance for a county’s existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon [it]*.”⁹ As was concluded above in relation to public health, the Authority does not consider that the threat ensuing as a consequence of the lack of an authorisation system for undertakings in the construction sector is of a magnitude to warrant recourse to this justification ground.

4.3 Suitability, necessity and proportionality under the Services Directive

If it were to be considered that Norway could successfully invoke a legitimate objective, the requirements would nonetheless have to fulfil the requirements on non-discrimination and proportionality established in Article 16, paragraph 1, of the Services Directive. It is the opinion of the Authority that the Norwegian Government has failed to prove so in the present case.

First, the Norwegian Government has failed to substantiate how a case-by-case approval system actually improves the quality of buildings and therefore decreases the risks to human life stemming from faulty construction. In the absence of such information, the Authority is of the opinion that the authorisation procedure does not appear to be suitable to the objective it seeks to achieve.

Second, a wide range of measures designed to improve the quality and safety of buildings is available to the Norwegian Government. Such measures range from rules concerning the quality of construction products, qualitative requirements regarding the buildings themselves and the qualifications of the responsible persons, spot checks in relation to ongoing projects, and *ex post* controls of completed construction works. In its letter dated 3 February 2011, the Norwegian Government stated that other available measures do not ensure the high level of protection sought by the Norwegian Government. In relation to this, the Authority stresses that although EEA States may decide on their own level of health and safety protection, restrictive measures imposed must nevertheless comply with the principle of proportionality.¹⁰ Therefore, and considering the range of alternative and less trade restrictive measures available, the Authority does not consider that the Norwegian authorisation procedure is necessary in order to attain the objective it seeks.

4.4 Article 36 EEA

In the event that the Services Directive would not be applicable in the present case, the matter has to be assessed under the general principle of the free movement of services, as established in Article 36 EEA.

⁹ Case 72/83 *Campus Oil* [1984] ECR 2727, paragraph 34.

¹⁰ Joined Cases C-316/07, C-358/07 to 360/07, C-409/07 and C-410/07 *Markus Stoß and others*, judgment of 8 September 2010, not yet reported, paragraph 77.

With regard to the existence of a restriction under Article 36 EEA, reference is made to the reasoning of the Authority included above under Section 4.1, and in particular to *Commission v Portugal*, where the Court of Justice stated that “[i]t follows unequivocally from the case law” that restrictions such as the ones at issue in the present case infringe upon the freedom to provide services.¹¹ Based on this, the Authority considers that Section 20-1, second paragraph of the Planning and Building Act, read in the light of Sections 9 and 11-1 of the Building Regulation, constitute a restriction on the freedom to provide services.

4.5 Justification of restrictions under Article 36 EEA

As was discussed at length under Section 4.2 above, the Authority is of the opinion that the EEA States have access to a wider set of justification grounds under primary EEA law than is the case for services falling within the scope of the Services Directive. In *Portugal v Commission*, which concerned Portuguese restrictions stemming from before the entry into force of the Services Directive, the Court of Justice held that measures designed to “ensure the soundness and safety of buildings and to protect the environment, the architectural heritage, as well as consumers and users of buildings” are to be considered legitimate objectives which may be invoked to limit the free movement of services.

With regard to the assessment of suitability, necessity and proportionality, the Authority sees no reason to make a different assessment under Article 36 than that which it has accounted for above under Section 4.3. Thus it considers that Norway has failed to substantiate that the authorisation scheme in question leads to an improvement with regard to the safety of constructions. Therefore, the Authority considers that the Norwegian Government has failed to show that the scheme is suitable to the aim it seeks to achieve. Furthermore, the Authority considers that in light of the wide range of alternative and less trade restrictive mechanisms available to the Norwegian Government, the measures here at issue do not appear necessary or proportionate to the aims they seek to achieve.

5. Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force Section 20-1 of *Plan- og bygningsloven 2008, 27.06.2008 nr. 71* and Sections 9-1 to 9-4 and 11-1 of *forskrift om byggesak, FOR 2010-03-26 nr. 488*, that require that undertakings carrying out construction work in Norway have to meet special requirements and obtain authorisation from the local authorities, Norway has failed to fulfil its obligation arising from Article 16 of the Act referred to at point 1 of Annex X to 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 EEA Agreement by Protocol 1 thereto, or Article 36 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Norwegian Government to submit its observations on the content of this letter *within two months* following receipt thereof.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned

¹¹ Case C-458/08 *Commission v Portugal*, cited above, paragraph 88.

opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'S. Monauni-Tömördy', with a stylized flourish at the end.

Sabine Monauni-Tömördy
College Member