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Brussels, 18 September 2023  
Case No: 87300  
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Norwegian Ministry of Justice and Public Security  
Postboks 8005 Dep  
04840 Oslo  
Norway

Dear Sir/Madam,

**Subject: Supplementary request for information concerning own-initiative case concerning Norway's expulsion practice for petty crimes**

By letter dated 20 September 2021 (Doc No 1223984), the Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had opened an own-initiative case in order to examine whether Norway’s legislation and practices, according to which EEA nationals can be expelled for minor criminal offences, is compatible with EEA law. In particular, the Authority has examined the case from the perspective of Article 27 of Directive 2004/38/EC (“Directive 2004/38” or “the Directive”). The case was opened after the Authority received two enquiries concerning the subject, in particular the legitimacy of Circular GI-02/2013. On this basis, the Authority sent a request for information to Norway (Doc No 1223984, as referred to above).

In its letter, the Directorate recalled that the Authority had previously scrutinised Norway’s expulsion practice from the standpoint of Directive 2004/38 in Case 77287. That case was closed in 2019. However, Circular GI-02/2013 was not assessed in the context of that case. Therefore, the Directorate found it necessary to examine again Norway’s practice in this field, in particular concerning the Circular.

The Directorate noted that, according to Circular GI-02/2013, the Directorate of Immigration (“UDI”) is entitled to issue expulsion decisions in accordance with Section 122(1) of the Norwegian Immigration Act when EEA nationals commit acts in breach of Sections 257 and 391a of the Norwegian Criminal Code from 1902 (now, apparently, Sections 321 (theft) and 323 (minor theft) of the 2005 Criminal Code). The Circular also provides for criteria to assess whether there is a risk that the individual might reoffend, for example if they are homeless or lack means of subsistence.

The enquiries received by the Directorate made it clear that the Circular was applied and enforced by the immigration authorities and the national courts. The result seems to be that EEA nationals have been subjected to expulsion decisions accompanied by re-entry bans because they committed a minor criminal offence. According to the enquiries, this has for instance been the case when EEA nationals have stolen a single low valuable food item from a supermarket.

In its letter, the Directorate noted that expulsion is the most restrictive measure which can be taken against EEA nationals who have exercised their free movement and residence rights under Directive 2004/38, as noted by the EFTA Court in Case E-2/20 *The Norwegian Government v L*.<sup>1</sup> Thus, any limitations on EEA nationals who have exercised their right to move and/or reside in the host State must be consistent with Article 27 of the Directive.<sup>2</sup>

<sup>1</sup> Judgment of the EFTA Court from 21 April 2021 in Case E-2/20 *The Norwegian Government v L*, not yet reported, paragraph 30.

<sup>2</sup> *Ibid*, paragraph 30.

The Norwegian Government was asked to clarify the national legal framework and the relevant practices concerning expulsions of EEA nationals for minor criminal offences. Moreover, the Norwegian Government was invited to confirm the Authority's understanding that EEA nationals had been expelled because of a single minor criminal offence and how such practice complied with Article 27 of the Directive.

The Norwegian Government replied by a letter dated 21 October 2021 (Doc No 1228465), in which it was stated that the relevant legal provisions were Section 122 of the Norwegian Immigration Act and Section 19-29 of the Norwegian Immigration Regulation. It was also explained that the main circular concerning rejections and expulsions of EEA nationals and their family members was Circular RS 2010-02. That Circular was further supplemented by Circular GI-02/2013, which was published in 2013 by the Ministry of Justice and Public Security.

It was further noted that Circular GI-02/2013 instructed the Norwegian Directorate of Immigration ("UDI") to consider whether to issue an expulsion decision in the situation when a foreign national had been penalized for theft or minor theft on the basis of Sections 321 and 323 of the Norwegian Criminal Code. As regards how Circular GI-02/2013 was applied in practice, the Government stated, *inter alia*, that EEA nationals had been expelled because they committed a single minor criminal offence, such as stealing food of low value from a grocery store. Since 2016, UNE had issued expulsion decisions in seven such cases from 2016. Due to technical difficulties, it was not possible to provide the same overview of UDI cases during the same period.

The Directorate sent two additional requests for information to Norway on 4 April and on 30 June 2022 (Doc Nos 1275269 and 1298806, respectively). The Norwegian Government sent multiple replies to these letters. In its letter of 11 August 2022 (Doc no 1306586), the Norwegian Government answered questions from the Authority with regard to the status of Circular GI-02/2013. They noted that the Circular was being revised, and that the Ministry would consult with the Authority before publishing a new, revised circular. In a subsequent letter of 6 October 2022 (Doc no 1319445, your ref. 15/1261), the Norwegian Government informed the Authority that, instead of revising the circular, it would inform the Directorate of Immigration (UDI) and the National Police Directorate (POD) that the Circular was to be withdrawn entirely. In the same letter, the Norwegian Government stated that it would leave it *"to the Directorate of Immigration, in cooperation with the National Police Directorate, to develop future practice within the framework of Directive 2004/38, the Norwegian Immigration Act and the latest court jurisprudence,"* in order to develop an alternative *modus operandi* going forward.

According to the Norwegian Government's letter of 6 October 2022, this happened on 4 October 2022.

Later, in the reply to the follow-up letter to the 2022 Package Meeting, received on 30 January 2023, Norway made it clear that UDI had *"requested a report from the Police that account for how these types of crimes are currently affecting the Norwegian society. It is necessary for UDI to await this report from the police to ensure an updated and thorough analysis as a basis for future guidelines. The police are expected to finish their work with the report in March 2023."*

On 1 June 2023 (Doc No 1375531), the Directorate submitted a further Request for Information, and invited the Norwegian Government to submit information, *inter alia*, with respect to the status of the work on providing these new guidelines, including the status of the Circular, which, the Directorate noted, had in its understanding, had constituted a prerequisite for the expulsion of EEA nationals for petty crimes. The Directorate requested information concerning the principal outcomes of the report undertaken by the Police; whether the UDI had begun work on any future guidelines; the plans concerning replacement of the Circular; the measures are presently being employed to deal with

cases involving EEA nationals who commit so-called petty crimes in Norway; whether such measures include a power to expel such individuals; and timelines for future measures (if any).

The Norwegian Government replied to the Directorate's letter on 27 June 2023 (Doc No 1384878, your ref. 15/1261 – LMK). There, the Norwegian Government noted that the relevant legal framework in Norway regarding expulsion with an entry ban of an EEA citizen is Section 122 of the Immigration Act and Section 19-29 of the Immigration Regulation. In addition, Section 121 of the Immigration Act regulates expulsion without an entry ban. The Norwegian Government further noted that no EEA citizens are currently being expelled on the basis of one minor incident of theft/minor theft, but that both EEA-nationals and Norwegian nationals may however be fined by the police in these cases, according to the Penal Code. The Norwegian Government's letter noted that the UDI received a report from the Police on 21 June 2023, regarding how petty crimes are currently affecting the Norwegian society, and that while the report is exempt from public disclosure, UDI is analysing the report, and will summarise the relevant elements thereof with a view to drafting new guidelines, which are likely to be ready to publish in November 2023.

Having analysed the information submitted by the Norwegian Government in its most recent letter of 27 June 2023, the Directorate wishes to submit the following observations to the Norwegian Government:

1. While the Directorate accepts that the report received by the UDI from the Police on 21 June 2023 may not be publicly available, the Directorate observes that this should not represent an impediment to the report or elements thereof being shared with the Authority. In this regard, the Directorate again refers the Norwegian Government to its responsibilities under Article 3 EEA as well as its obligations under Article 2 and 6 of the Surveillance and Court Agreement ("SCA"), pursuant to which, first, the EFTA States shall take all appropriate measures to ensure fulfilment of the obligations arising out of the SCA, and, second, the EFTA Surveillance Authority may, in carrying out the duties assigned to it, request all the necessary information from the Governments and competent authorities of the EFTA States. Moreover, the Directorate further refers the Norwegian Government to the Authority's Rules on Access to Documents, which are available on the Authority's website.<sup>3</sup> There, it is stated that documents originating from the EEA EFTA States may not be disclosed without consultation of the latter, and that generally, the EEA EFTA States may refuse to allow disclosure on public interest grounds. If the Norwegian Government has concerns with respect to data protection, the Directorate observes that the Authority is subject to the European Data Protection Supervisor, and applies equivalent levels of protection to those applicable to the EEA EFTA States, *inter alia*, on the basis of the General Data Protection Regulation. As such, whether a document is to be made publicly available within Norway cannot, of itself, represent grounds for not disclosing such a document, or relevant information from said document, to the Authority. The Directorate notes that, in its letter of 1 June 2023, it requested, *inter alia*, that the Norwegian Government supply, at least, the principal outcomes of the report, and that these have not been supplied. In view of the above, and in the spirit of good and effective cooperation as enshrined in Article 3 EEA and Article 2 SCA, the Directorate repeats this request.
2. The Directorate further observes that certain answers provided by the Norwegian Government in its letter of 27 June 2023 do not provide sufficient clarity with

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<sup>3</sup> <https://www.eftasurv.int/esa-at-a-glance/publications/public-access-to-documents#:~:text=Access%20to%20documents%20held%20by,documents%20should%20be%20publicly%20available.>

respect to the Directorate's questions in its letter of 1 June 2023. The Directorate reminds the Norwegian Government that it is essential that, in order to ensure fruitful and effective co-operation, as well as the fulfilment of the obligations deriving from Article 3 EEA and Article 2 SCA, that questions asked by the Authority are answered in replies received from the governments of the EEA EFTA States. In this regard, the Directorate notes that, while the Directorate's letter enquired as to whether, with the previous revocation of the Circular, there was in fact a legal basis allowing EEA nationals to be expelled from Norway, pending the implementation of a new circular, the Norwegian Government's reply referred the Directorate to the relevant legislative provisions and stated that "*no EEA citizens are currently being expelled on the basis of one minor incident of theft/minor theft.*" The Directorate shall reformulate its previous question for clarity's sake. Namely, can the legislative provisions that are currently in force function as a legal basis to expel EEA nationals for having committed one or more instances of petty crimes (including but not limited to theft/minor theft), in circumstances in which there is no circular in place?

3. The Directorate additionally requests that the Norwegian Government clarify by which date a new circular will be put into place. With respect to the forthcoming circular, the Authority notes that, on the basis of Article 5(2)(b) of the Surveillance and Court Agreement, the Authority is empowered, *inter alia*, to deliver opinions on matters dealt with by the EEA Agreement. In addition, per Article 3 of the EEA Agreement, the Contracting Parties shall facilitate co-operation within the framework of the Agreement. These provisions, read together, provide a basis for the Authority to provide *ex ante* review of legislative and regulatory proposals formulated by the EEA EFTA States in circumstances in which there may be grounds for believing that such proposals may give rise to issues under EEA law. The Directorate has already provided such guidance to Norway in a number of recent cases.<sup>4</sup> In order to ensure that any new guidelines proposed by the Norwegian Government are compatible with EEA law, the Directorate remains available to give its opinion with respect to same before they are published.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *18 October 2023*. Please enclose copies of any relevant national legislation, including English translations if available.

Yours faithfully,

Maria Moustakali  
Deputy Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Maria Moustakali.*

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<sup>4</sup> See, for example, case 78022 concerning authorisation requirements to set up subsidiaries of Norwegian financial institutions in other EEA States.