Brussels, 24 June 2015
Case No: 76155
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EFTA SURVEILLANCE AUTHORITY

Norwegian Ministry of Justice and Public Security
Postboks 8005 Dep
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: **Letter of formal notice to Norway concerning a complaint against Norway on alleged discriminatory treatment before Norwegian courts, i.e. requirement to provide security for costs applicable to residents in other EEA States than Norway**

1 Introduction

By letter dated 5 November 2014 (Document no. 727963), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had received a complaint against Norway concerning discrimination on the basis of residence before Norwegian courts. In the complaint, it is alleged that legal and natural persons resident in other EEA States than Norway, that are plaintiffs in Norwegian courts, are required to provide security for the defendant's legal costs, unlike what is the case for Norwegian residents. The complainant maintains that this is discriminatory and goes against Norway's obligations under the EEA Agreement and the ban therein on discrimination.

In the complaint it is argued that Section 20-11 of the Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act)[1] is discriminatory in favour of Norwegian residents since, in practice, and based on how Norwegian courts interpret the provision, it provides for different conditions depending on whether the plaintiff is resident or established in Norway. The provision thus makes it more cumbersome for residents of other EEA States to bring an action before Norwegian courts than what is the case for Norwegian residents, affecting largely non-Norwegian nationals.

On 7 December 1999, the Authority sent a letter of formal notice to Norway concerning a similar provision,[2] which stipulated that plaintiffs that did not reside in Norway could be bound, if the defendant so requested, to furnish security for costs of legal proceedings, except if other rules had been adopted pursuant to agreement with a foreign state, pursuant to Section 182 (1)-(5) of the former Norwegian Dispute Act of 1915.[3] Following this letter of formal notice, Norway amended Section 182 of the former Dispute Act, which subsequently provided that the plaintiff could not be asked to provide security for legal costs

[1] *Lov om mekling og rettergang i sivile tvister ("Tvisteloven") av 17. Juni 2005 no 90.*
[2] Document No 99-8844-D, Decision No 302/99/COL
[3] *Lov av 13 August 1915 no. 6* (*Tvistemålsloven*), as it read prior to an amendment made to the provision being made by Act of 15 June 2001 no 58.

if the subject at dispute fell within the scope of the EEA Agreement.[4] However, following changes made to the Dispute Act in 2005, the wording concerning the EEA Agreement was removed. The current provision, namely Section 20-11 of the Dispute Act,[5] now provides for a substantially similar rule as under the previous provision of the 1915 Dispute Act (before it was amended). The Section provides that plaintiffs that do not reside in Norway could be bound, if the defendant so requests, to furnish security for costs of legal proceedings, except if it would violate an obligation in international law on equal treatment of parties resident abroad and parties resident in Norway, or if it would seem disproportionate.

The Authority is of the opinion that a national procedural rule, such as Section 20-11 of the Dispute Act, is liable to affect access to justice of a resident of another EEA State, where security may be requested from (natural/legal) persons established in another EEA State, at the same time as such security may not be required from plaintiffs established in Norway. Failure to provide security results in a dismissal of the case. It thus results in indirect discrimination on grounds of nationality, contrary to the general prohibition on discrimination in Article 4 of the EEA Agreement. The provision may also, depending on the circumstances, entail an unjustifiable restriction under Article 28 EEA on the free movement of workers, Article 31 EEA on the freedom of establishment, Article 36 EEA on the freedom to provide services and Article 40 on the free movement of capital.

2 Correspondence

In the above mentioned letter of November 2014, the Authority invited the Norwegian Government to provide information on how Section 20-11 of the Dispute Act is applied in practice and whether the Norwegian Government considers Section 20-11 to be in line with EEA law, in particular with regard to Articles 4 and 36 of the EEA Agreement.

By letter of 19 December 2014, the Norwegian Government provided the requested information (Document no. 734825). In the letter, Norway pointed out that it follows from the second sentence of the first paragraph of Section 20-11 of the Dispute Act that such security shall not be required if it would contravene an obligation under international law relating to equal treatment between parties resident abroad and parties resident in Norway. It was stated that it follows, therefore, from the wording of Section 20-11 first paragraph that security cannot be required if it is not in line with obligations arising from the EEA Agreement.

3 Relevant national law

Section 20-11 of the Dispute Act[6] provides:

(1) The defendant may demand that a claimant who is not habitually resident in Norway shall provide security for his potential liability for costs in the current instance. Security cannot be required if it would violate an obligation in international law on equal treatment of parties resident abroad and parties resident in Norway, or if it would seem disproportionate in view of the nature of the case, the relationship between the parties and other circumstances.

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[4] Act of 15 June 2001 no 58.

[5] *Lov om mekling og rettergang i sivile tvister ("Tvisteloven") av 17. Juni 2005 no 90*

[6] An unofficial translation the Act is available at http://www.ub.uio.no/ujur/ulovdata/lov-20050617-090-eng.pdf.

(2) Security pursuant to subsection (1) cannot be required by the defendant in a claim made pursuant to section 15-1(2), in a derivative appeal pursuant to section 29-7, or in cases where for reasons of public policy the right of disposition of the parties is limited.

(3) A request for security must be submitted within the first time limit for the party to comment on the merits of the case in the relevant instance.

(4) The court shall determine the amount in respect of which security shall be provided. The Enforcement of Claims Act section 3-6(1) applies correspondingly with regard to what can be accepted as security. If security is not provided within the time limit prescribed, the case shall be summarily dismissed, cf. section 16-9(1). Security shall be discharged if there is no longer a basis for maintaining it.

(5) A ruling on a request for security or discharge of security shall be made by interlocutory order. An appeal against an interlocutory order that orders security to be provided or discharged shall have suspensive effect.

4 Relevant EEA law

Article 4 of the EEA Agreement provides, as a general principle, that within the scope of application of the Agreement and without prejudice to any special provision contained therein, any discrimination on the grounds of nationality shall be prohibited.

5 The Authority's assessment

5.1 Introduction

Section 20-11 first paragraph first sentence of the Dispute Act states that a defendant may demand that a plaintiff that does not have his habitual residence in Norway, shall provide security for his potential liability for legal costs before the relevant court.

A national procedural rule, such as Section 20-11 of the Dispute Act, is liable to affect access to justice of a resident of another EEA State, where security may be requested from (natural/legal) persons established in another EEA State to secure the reimbursement of the defendant's costs of proceedings should the plaintiff lose the case, at the same time as such security may not be required from plaintiffs resident in Norway. Failure to provide security results in a dismissal of the case.

5.2 Does Section 20-11 first paragraph first sentence of the Dispute Act fall under the scope of application of the EEA Agreement?

The prohibition on discrimination on grounds of nationality contained in Article 4 EEA applies only to matters which fall within the scope of application of the EEA Agreement.[7] There can be no doubt that, despite the fact that civil judicial cooperation, which is covered by Title V of the Treaty on the functioning of the European Union (TFEU), does not fall within the scope of the EEA Agreement, the question of access to the justice system of the EFTA States does.

[7] See Case E-5/10 *Dr Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraph 19, and case-law cited.

The EFTA Court has referred to access to justice and effective judicial protection as an essential element of the EEA legal framework,[8] and reiterated that this can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement.[9]

As a starting point, the Authority recalls that, whilst it is for each EFTA State's legal system to lay down the detailed procedural rules for legal proceedings intended to fully safeguard the rights which individuals derive from EEA law, EEA law, nevertheless, imposes limits on that competence.[10] Such legislative provisions may not discriminate against persons to whom EEA law provides the right to equal treatment or restrict the fundamental freedoms guaranteed by EEA law.[11]

EEA law guarantees exercise of the fundamental freedoms for which the EEA Agreement provides. It is a corollary of those freedoms that persons who seek to exercise those rights must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of an EEA State in the same way as national of that State.[12]

It has already been decided, in cases relating to facts comparable to the ones in the present proceedings, that rules of domestic procedure, such as the one at issue, fall within the scope of the non-discrimination clause contained in Article 18 TFEU and Article 4 of the EEA Agreement and are subject to the general principle of non-discrimination laid down by that Article in so far as it has an effect, even though indirect, on trade in goods and services between Member States.[13]

In *Kottke*, for example, the EFTA Court dealt with a provision of security in civil litigation under Article 4 EEA. In that case, the Court stated that since the national provision at issue was "*of a general nature*" the case was to be dealt with under Article 4 EEA alone.[14] In the present case, the national provision in Section 20-11 of the Dispute Act is, similarly, of a general nature. Hence, the Authority will examine the mentioned requirement in Section 20-11 of the Dispute Act under Article 4 EEA.

In its letter to the Authority, Norway observed that Section 20-11 of the Dispute Act is in line with EEA law since it follows from the second sentence of the first paragraph that security shall not be required if it would contravene an obligation under international law relating to equal treatment of parties resident abroad and parties resident in Norway. The Norwegian Government maintains that it follows from the above that security cannot be required if it is not in line with obligations arising from the EEA Agreement relating to equal treatment of parties resident abroad and parties resident in Norway, even if this is not explicitly mentioned in the provision.

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[8] Case E-2/02 *Bellona v ESA* [2003] EFTA Ct. Rep. 52, paragraph 36; Case E-5/10 *Dr Kottke*, cited above, paragraph 29. See also Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37.
[9] Case E-11/12 *Beatrix Koch* [2013] EFTA Ct. Rep. 272, paragraph 117.
[10] See Case E-5/10 *Dr Kottke*, cited above, paragraph 27. See also case law of the Court of Justice in, for example, Case C-43/95 *Data Delecta* [1996] ECR I-4661, paragraph 12; Case C-323/95 *Hayes* [1997] ECR I-1711, paragraph 13, and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 19.
[11] See Case E-5/10 *Dr Kottke*, cited above, paragraph 27. See also the case law of the Court of Justice in, for example, Case C-186/87 *Cowan* [1989] ECR 195, paragraph 19; Case C-323/95 *Hayes*, cited above, paragraph 13.
[12] C-43/95 *Data Delecta,* cited above, paragraph 13; C-323/95 *Hayes*, cited above, paragraph 13.
[13] Case E-5/10 Dr *Kottke*, cited above, paragraph 20. See also Cases C-20/92 *Hubbard* [1993] ECR I-3777, C-43/95 *Data Delecta,* cited above; C-323/95 *Hayes*, cited above.
[14] Case E-5/10 *Dr Kottke*, cited above, paragraph 20.

This argument cannot be accepted. It is, for example, not clear whether the Norwegian authorities are of the opinion that the international obligations referred to in the provision prohibit a national rule pursuant to which, upon request, plaintiffs who are resident in another EEA State must provide security for costs.

Moreover, the Authority is of the view that Section 20-11 of the Dispute Act must be regarded contrary to the EEA Agreement as it creates an ambiguous state of affairs as to the possibility of relying on EEA law. In this regard, the Authority points out that the principles of legal certainty and the protection of individuals require, in areas covered by EEA law, that the EEA States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.[15]

In its letter, the Norwegian Government further informed the Authority that it had requested the Attorney General to comment on whether collateral is generally sought in cases where the Norwegian State is the defendant, and that the latter had stated that this is generally not the case. According to the Norwegian Government, such collateral is only demanded upon request by the defendant and only in cases which fall outside the scope of application of the EEA Agreement. As far as the Norwegian Government was aware, collateral had not been sought in any cases, where the Norwegian State was the defendant and the plaintiff resided in another EEA Sate, other than in the actual case in which the complainant was the plaintiff. The Norwegian Government further mentioned several cases in which such security had not been required.[16]

However, the Authority observes that there is case law in Norway regarding Section 20-11 of the Dispute Act which differs from the interpretation of this provision put forth by the Norwegian Government in its letter to the Authority. It is clear from this case law that, according to Section 20-11 of the Dispute Act, a (natural/legal) person resident in another EEA State could be required to provide security for costs when it brings a legal action against another party residing in Norway, at the same time as such security for costs cannot be required from plaintiffs resident in that State.

In this regard, the Authority notes that there are several examples of such security being required in cases where the applicant was resident in another EEA State. The Norwegian Government also admitted this in its letter dated 19 December 2014. Examples include a case in which a Norwegian citizen resident in France had to provide security for costs in relation to his restitution claim against a Norwegian maritime consulting company and an insurance company,[17] and a case in which a Norwegian citizen resident in the UK was required to provide security for costs in relation to his compensation claim against the Norwegian State.[18] In a Supreme Court judgment from 2008, an Icelandic company was required to provide security for costs when bringing a matter concerning a petition for seizure of a specific company's property, following the alleged failure of that company to attend to a pecuniary claim linked to the purchase of fishing equipment. [19] In yet another case from 2013, a British company, which brought a Norwegian company to court over payment for digging works which its Norwegian branch had executed, had to provide

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[15] See to that effect, Case C-478/01 *Commission* v *Luxemburg* [2003] ECR I-2351, paragraph 19; and Joined cases E-10/11 and E-11/11 *Hurtigruten ASA,* [2012] EFTA Ct. Rep. 758, paragraphs 280-281.
[16] LB-2013-19142 and LH-2012-203395.
[17] LF-2010-37631 (Frostating Court of Appeal).
[18] LB-2014-60160 (Borgarting Court of Appeal), cf. TOSLO-2012-40689 (Oslo City Court).
[19] Rt. 2008 p. 1459 (Supreme court's Interlocutory Appeals Committee), LH-2008-96537 (Court of Appeal).

security for costs.[20] Similarly, it appears that a British company was required to provide security for costs in a case concerning the validity of its tax declaration, which it commenced against the Norwegian State.[21]

These judgments must be regarded as relevant legal authority in Norway on the issue at hand.[22]

5.3 Discrimination under Article 4 of the EEA Agreement

The criterion in the national provision at issue is residence, and not nationality. When it comes to natural persons, the national legislation in question does not directly discriminate on grounds of nationality since the obligation to provide security for the defendant's potential liability for costs is imposed on any plaintiff who is not habitually resident in Norway, irrespective of nationality. However, it is settled case-law that rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result.[23]

In Case E-5/10, *Dr Kottke*, the EFTA Court emphasised the importance of equal treatment as regards adequate means of enforcement at judicial level and access to justice in the context of the EEA Agreement. Furthermore, it went on to conclude that the principle of non-discrimination forbids not only overt discrimination but also all covert forms of discrimination.[24]

Moreover, the EFTA Court has concluded that "*a national rule in an EEA State which draws a distinction on basis of residence, in that non-residents are denied certain benefits which, conversely, are granted to persons residing within the national territory, is liable to operate mainly to the detriment of nationals of other EEA States, since non-residents are in the majority of cases foreigners, thus constituting indirect discrimination by reason of nationality*".[25]

On this basis, the Authority considers that Section 20-11 of the Dispute Act is discriminatory in favour of Norwegian nationals since it stipulates different conditions according to whether the plaintiff is resident in Norway.[26] The provision, which makes it more cumbersome for nationals of other EEA States to bring an action before the domestic justice system of Norway than for nationals of Norway, constitutes discrimination based on nationality contrary to Article 4 of the EEA Agreement, unless it is capable of being justified by public interest objectives.[27]

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[20] TOSLO-2013-24530 (Oslo City Court).
[21] See TOSLO-2010-176477 (Oslo City Court, in which the relevant order or the Court of 2 February 2011 is referred to.
[22] Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 39; Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, paragraph 36; Case C-300/95 *Commission v United Kingdom* [1997] ECR U-2649, paragraph 37; Case C-129/00 *Commission v Italy* [2003] ECR I-14637, paragraph 30; and Case C-418/04 *Commission v Ireland*, [2007] ECR I-10947, paragraph 166.
[23] See Case E-5/10 *Dr Kottke*, cited above, paragraph 29, and Case E-8/04 *ESA v Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 16.
[24] Case E-5/10 *Dr Kottke,* cited above, paragraph 29.
[25] Case E-5/10 *Dr Kottke*, cited above, paragraph 30; See also Case E-8/04 *ESA* v *Liechtenstein*, cited above, paragraph 17 and Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 29.
[26] Case E-5/10 *Dr Kottke*, cited above, paragraph 20; Case E-8/04 *ESA* v *Liechtenstein*, cited above, paragraph 17 and Case E-3/98 *Herbert Rainford-Towning*, cited above, paragraph 29.
[27] See e.g. Case C-43/95 *Data Delecta*, cited above, paragraph 22.

The Authority, however, notes that the position is different as regards a legal entity which, if it is not established in Norway, will not be "resident" there and which may, therefore, be called upon to provide security for costs in court proceedings in Norway. If the plaintiff company is Norwegian, it may not be required to do so. The rule is, accordingly, directly linked to the place of establishment of the company and, as a result, discriminates directly on grounds of nationality.

5.4 Possible justifications

As noted above, a national rule, such as the one at issue, discriminates indirectly between EEA nationals. However, with regard to legal entities established in other EEA States, it is directly discriminatory.

The Authority notes that in comparable situations, the EFTA Court has examined whether a discriminatory national rule can be justified on public policy grounds which can only be accepted in the case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[28]

The Norwegian Government has not raised any objectives by which Section 20-11 of the Dispute Act could be objectively justified.

The Authority recalls that, being an exception to a basic principle of the EEA Agreement, any objective circumstances justifying a discriminatory national rule would have to be construed narrowly.

Furthermore, it should be recalled that the encouragement of cross-border activity is a fundamental objective of the EEA Agreement. When such an activity gives rise to civil litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State.[29] The situation in Norway is, therefore, not exceptional. In such circumstances, the fundamental rights for which the EEA Agreement provides may only be compromised for reasons that are justifiable and not excessive in its discriminatory effects having regard to the objective sought.[30]

In light of the above, the Authority takes the view that the requirement at issue laid down in Section 20-11 of the Dispute Act cannot be objectively justified and, in any event, that it is not limited to what is necessary to obtain the objective pursued.

5.5 An alternative breach

Having regard to the fact that the national provision at issue is of a general nature, the Authority's conclusions are based on Article 4 EEA in line with the judgment of the EFTA Court in the *Kottke* case.[31] The Authority, however, notes that in the event that Section 20-11 of the Dispute Act would be assessed under Article 28 EEA on the free movement of

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[28] Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 42.
[29] Case E-5/10 *Dr Kottke*, cited above, paragraph 40; Case E-2/01 *Dr. Franz Pucher* [2002] EFTA Ct. Rep. 44, paragraph 39.
[30] Case E-5/10 *Dr Kottke*, cited above, paragraph 40; Cases C-398/92 *Mund & Fester* [1994] ECR I-467, paragraphs 16 and 17; and C-43/95 *Data Delecta*, cited above, paragraph 19.
[31] Case E-5/10 *Dr Kottke*, cited above.

workers, Article 31 EEA on the freedom of establishment, Article 36 EEA on the freedom to provide services and Article 40 on the free movement of capital, this would lead to the same legal conclusion, insofar as the provision entails an unjustifiable restriction on these freedoms.[32]

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force Section 20-11 of the Dispute Act, which states that a defendant may demand that a plaintiff that does not have his habitual residence in Norway, shall provide security for his potential liability for legal costs before the relevant court, Norway has failed to fulfil its obligations arising from Article 4 of the EEA Agreement.

Alternatively, the Authority concludes that, by maintaining in force Section 20-11 of the Dispute Act, which states that a defendant may demand that a plaintiff that does not have his habitual residence in Norway, shall provide security for his potential liability for legal costs before the relevant court, Norway has failed to fulfil its obligations arising from Articles 28, 31, 36 and 40 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 requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

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 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.

For the EFTA Surveillance Authority

Frank Büchel
College Member

[32] See, for example, EFTA Court Case E-13/11 *Granville* [2012] EFTA Ct. Rep 400, paragraph 36.