

REPORT FOR THE HEARING
in Case E-5/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Høyesteretts kjæremålsutvalg (the Interlocutory Appeal Committee of the Supreme Court, Norway) for an advisory opinion in the case pending before it between

European Navigation Inc

and

Star Forsikring AS (u. o. a.)

on the interpretation of Article 4 of the EEA Agreement

I. Introduction

1. By an order dated 16 September 1997, registered at the Court on 19 September 1997, Høyesteretts kjæremålsutvalg, the Interlocutory Appeal Committee of the Supreme Court of Norway, made a request for an advisory opinion in a case pending before it between European Navigation Inc (hereinafter "European Navigation"), appellant, and Star Forsikring AS under offentlig administrasjon (under public administration) (hereinafter "Star Forsikring"), respondent.

II. Legal background

2. The questions submitted by the national court concern the interpretation of Article 4 of the EEA Agreement ("EEA"). The provision, which corresponds to Article 6 (1) of the EC Treaty ("EC"), reads:

“Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

III. Facts and procedure

3. The case before the national court concerns an appeal against the order of Borgarting lagmannsrett (Borgarting Court of Appeal) of 22 April 1997, which requires a foreign plaintiff to provide security for costs of legal proceedings pursuant to section 182, first paragraph, of Act No. 6 of 13 August 1915 relating to judicial procedure in civil cases – *tvistemålsloven* (the "Civil Procedure Act" or the "Dispute Act").

4. Section 182 of the Civil Procedure Act reads:

“A plaintiff who does not reside in the Kingdom is bound, if the defendant so requests, to furnish such security as the court stipulates by ruling, for such processual costs as may be enjoined on him. Security may not be claimed, however, in the Board of Conciliation, in case of counter-suit, in suit respecting bills of exchange or in matrimonial suits.

The petition for this must be put forward at latest in the first court sitting to which the defendant is summoned, or, if a time-limit has been stipulated for counter-plea, before the time-limit has expired. Against a plaintiff who has lodged an appeal it must be put forward at latest before the expiry of the time-limit mentioned in section 370. If security is not furnished in due time, the case shall be dismissed.

When the reason for the furnishing of security no longer exists, the court can, on petition, order the security to be returned.

Challenge of a ruling which enjoins the furnishing of security or which orders to security to be returned, has postponing effect.

This section is no impediment to the adoption of other rules by agreement with a foreign state.”

5. It is stated in the request for an advisory opinion that the rationale for the provision is mainly that it is often difficult to enforce a claim for legal costs abroad. According to the provision, the courts cannot, as a starting proposition, preclude a defendant's right to demand provision of security when a plaintiff is not a resident of Norway. If the plaintiff does not provide security, the courts must dismiss the case.

6. The dispute has its background in the fact that the insurance company, Star Forsikring, was placed under public administration on 2 April 1993, by order of the Ministry of Finance in Norway. On the same day, an administration committee was appointed. On 8 September 1993, the decision was taken to wind up the company. As part of the process of winding up Star Forsikring, Oslo skifterett (the Probate and Liquidation Court of Oslo) must conduct a claims review.

7. On 27 July 1993 European Navigation, which has its address of business in Greece, filed a claim for USD 314 005.11 with the administration committee. The claim arose from an insurance claim in which Star Forsikring was listed as the main insurer.

8. During the review in Oslo skifterett on 10 June 1996, the claim was not approved for any amount. The claims dispute was notified to Oslo skifterett on 18 September 1996, pursuant to section 114, second paragraph of the Bankruptcy Act.

9. The parties agree that the case should be dealt with in legal proceedings, but Star Forsikring has demanded that European Navigation provide security for costs connected with the proceedings, pursuant to section 182, first paragraph, of the Civil Procedure Act.

10. On 12 November 1996 Oslo skifterett rejected Star Forsikring's claim for security for costs. Following an appeal from Star Forsikring, Borgarting lagmannsrett granted the claim on 22 April 1997. The latter decision was subsequently appealed by European Navigation to Norges Høyesterett (the Supreme Court of Norway).

IV. Questions

11. The following questions were referred to the EFTA Court:

1. **Is it incompatible with Article 4 EEA for a national procedural rule to empower a Norwegian court to decide, at the request of a defendant, that a company with its place of business (domicile) in another EEA country than Norway must provide security for costs when it brings an action against a company with its place of business (domicile) in Norway, when such provision of security cannot be required from legal persons with their place of business (domicile) in Norway?**
2. **If such a requirement is not, as a starting proposition, compatible with the EEA Agreement, is Article 4 EEA nonetheless to be interpreted to the effect that a requirement for provision of security for costs can be justified (proportional) on the basis of the intended purposes and objective foundation?**

V. Written observations

12. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the appellant, European Navigation, represented by Advocate Nils H Thommesen, Counsel, assisted by Advocates Anders Chr. Stray Ryssdal and Jan Magne Langseth, Wiersholm, Mellbye & Bech ANS MNA;
- the respondent, Star Forsikring, represented by Advocate Einar Amundsen, Counsel, Simonsen Musæus Advokatfirma DA;
- the Government of Liechtenstein, represented by Christoph Büchel, EEA Coordination Unit, acting as Agent;
- the Government of Norway, represented by Anders Eide, Royal Ministry of Foreign Affairs, acting as Agent;
- the Government of the United Kingdom, represented by Stephanie Ridley, Treasury Solicitor's Department, acting as Agent;
- the EFTA Surveillance Authority, represented by Helga Óttarsdóttir, Officer, Legal and Executive Affairs Department, acting as Agent;
- the Commission of the European Communities, represented by Christina Tufveson and John Forman, both Legal Advisers in its Legal Service, acting as Agents.

European Navigation

13. With regard to the first question submitted to the EFTA Court, European Navigation states in a preliminary remark that it seems to be common ground that Article 4 EEA may be applicable to provisions of national procedural law in cases where the basis for the legal action is derived from substantive provisions of the EEA Agreement. To support this view, reference is made to several judgments of the Court of Justice of the European Communities ("ECJ"): *Data Delecta and Forsberg*,¹ in particular paragraphs 13-15, *Hayes v Kronenberger*,² paragraph 17, *Pastors and Trans-Cap v Belgian State*³ and *Hubbard v Hamburger*.⁴

¹ Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661.

² Case C-323/95 *Hayes v Kronenberger* [1997] ECR I-1711.

³ Case C-29/95 *Pastors and Trans-Cap v Belgian State* [1997] ECR I-285.

⁴ Case C-20/92 *Hubbard v Hamburger* [1993] ECR I-3777.

14. As regards the question of discrimination, European Navigation submits that although section 182 of the Civil Procedure Act is not based on nationality, and is therefore not discriminatory *de jure*, the provision will in most cases imply that foreign nationals are required to provide security for costs as they are normally domiciled outside Norway. By contrast, most Norwegian nationals are domiciled in Norway and will therefore escape the obligation. Consequently, the provision is *de facto* discriminatory and it follows clearly from several judgments of the ECJ that even *de facto* discrimination is prohibited by Article 4 EEA. Reference is made to judgments of the ECJ in *Schumacker*,⁵ in particular paragraphs 27-29, and *Cowan v Trésor public*,⁶ in particular paragraph 10.

15. It is further submitted that with regard to legal persons the provision is discriminatory even *de jure*. As it is in such cases not possible to make a distinction between nationality and domicile, the provision will only require foreign companies to provide security for costs; Norwegian companies will never be subject to the same obligation.

16. With regard to the second question, the principal view of European Navigation is that the limitations imposed by the national provision in question on EEA citizens' free access to national courts are disproportionate to the purpose of the national provision, which is to ensure recovery of costs.

17. In the opinion of European Navigation, the above conclusion follows directly from the ECJ's judgment in *Data Delecta and Forsberg*,⁷ in particular paragraphs 18-20, which must be understood to mean that a requirement to provide security for costs as a condition for access to national courts can never be proportional, when such security is not, as a rule, required from domestic plaintiffs.

18. Further reference is made to the judgments of the ECJ in *Saldanha*,⁸ in particular paragraphs 19, 20 and 24, and *Hayes v Kronenberger*,⁹ paragraphs 20-22. From these judgments it follows that equal access to the courts must be considered a fundamental freedom of Community law which goes "hand in hand" with the rights that may be derived from Community law. Since limitations on the freedom to provide services in another EEA State are not allowed, limitations on the opportunity to invoke rights deriving from such sales before the national courts in the country where the service provider has its legal domicile should also be prohibited.

⁵ Case C-279/93 *Schumacker* [1995] ECR I-225.

⁶ Case 186/87 *Cowan v Trésor public* [1989] ECR 195.

⁷ See footnote 1.

⁸ Case C-122/96 *Saldanha v Hirros*, judgment of 2 October 1997, not yet reported.

⁹ See footnote 2.

19. Particularly as regards the relationship between the EEA Agreement and other bilateral or multilateral agreements, in the opinion of European Navigation, it follows from the case law of the ECJ that the application of the principle of non-discrimination may not be made dependent on the existence of other international agreements concluded between the Member States, see the judgment of the ECJ in *Data Delecta and Forsberg*,¹⁰ paragraphs 21-22, with further reference to the judgment in *Hubbard v Hamburger*.¹¹ Further reference is made to the judgment of the ECJ in *Hayes v Kronenberger*,¹² paragraphs 20 *et seq.*, where the principle of proportionality is discussed particularly in relation to the Brussels and Lugano Conventions.

20. In the alternative, European Navigation submits that even if the EFTA Court should reach the conclusion that the need for ensuring recovery of costs may set aside the unambiguous rule in Article 4 EEA, this purpose is no longer relevant following Greece's signature and ratification of the Lugano Convention. The need for ensuring efficient recovery of costs is now taken care of through the provisions of that Convention.

21. The fact that Greek ratification of the Lugano Convention took place only on 1 September 1997 is not of decisive importance, although European Navigation's claim was brought before Oslo skifterett earlier, on 18 September 1996. It follows from the judgment of the ECJ in *Saldanha*,¹³ paragraph 14, that the principle of non-discrimination is directly applicable as of the date of accession, with the result that it applies to the future effects of situations arising prior to the entry into force of the treaty.

22. It is not for the EFTA Court to determine the temporal applicability of the Lugano Convention. Should the Lugano Convention nevertheless be taken into account by the EFTA Court when considering the question of proportionality, the principal view of European Navigation is that it follows from the primacy of EEA law that the Convention may not deprive it of its rights under Article 4 EEA. In the alternative, it is submitted that the question is in any case not of interest following Greece's ratification of the Lugano Convention.

23. European Navigation proposes the following answer to the first question submitted to the EFTA Court:

¹⁰ See footnote 1.

¹¹ See footnote 4.

¹² See footnote 2. Note: In the written observations the reference is erroneously made to *Hubbard v Hamburger*.

¹³ See footnote 8.

“It is incompatible with the non-discrimination principle in Article 4 EEA for a national procedural rule to give a court in the EEA the opportunity to require a plaintiff to provide security for costs, when the plaintiff is a company with its domicile in a country covered by the scope of application of the EEA Agreement and the defendant company is registered in the country of the court in question.”

24. In the view of European Navigation, it is not necessary to decide on the second question. If the EFTA Court is of the opposite view, European Navigation suggests principally that the second question be answered as follows:

“It is not compatible with the proportionality principle of the EEA Agreement to require such provision of security from a plaintiff, even though the stated aim and objective basis of the law are based on considerations of collection.”

25. If the EFTA Court concludes that considerations of proportionality can be invoked in connection with provision of security, European Navigation suggests subsidiarily the following answer to the second question:

“A requirement of provision of security justified in national law on considerations of collection can only be proportional up to the time the considerations of collection are no longer present. If an EEA State later accedes to a convention which ensures the collection in the country where the plaintiff has its domicile, there is no longer proportionality as of the time the convention may be invoked by the defendant in the plaintiff’s home country as a basis for collection of the claim. A requirement to provide security for costs will, after that time, be incompatible with Article 4 EEA.”

Star Forsikring

26. Star Forsikring submits, primarily, that there is no conflict between the relevant national provision and Article 4 EEA. This follows from the fact that the national provision, as opposed to Article 4 EEA, is based on domicile and not on nationality. This means that Norwegians and foreign nationals are treated in exactly the same manner, the only decisive criterion being where they are domiciled.

27. Most of the judgments of the ECJ dealing with requirements to furnish security for costs, such as the judgments in *Data Delecta and Forsberg*,¹⁴ *Hayes v Kronenberger*,¹⁵ *Hubbard v Hamburger*¹⁶ and *Saldanha*,¹⁷ are concerned with national provisions based on nationality and not on domicile. By contrast, in cases where the national rule in question has been based on objective criteria and

¹⁴ See footnote 1.

¹⁵ See footnote 2.

¹⁶ See footnote 4.

¹⁷ See footnote 8.

has been applicable regardless of nationality, the ECJ has on several occasions stated that such rules fall outside the scope of Article 4 EEA, see the judgments in *Perfili*¹⁸ and *Boussac v Gerstenmeier*.¹⁹ Since the national provision in question is based solely on the purely objective criterion of domicile, and not on nationality, it must be concluded that the rule in question does not conflict with Article 4 EEA.

28. In the alternative and, in the event that the national rule in question should be considered indirectly discriminatory, it is submitted that the provision is nevertheless in conformity with Article 4 EEA. This is due to the fact that the national provision has a legitimate objective, *viz.* to ensure payment of costs in cases where the parties are not residents of the same State, and that the provision is not disproportionate to this objective.

29. In the opinion of Star Forsikring, the Lugano Convention does not ensure payment of costs in the present case, which means that the requirement to provide security for costs serves a legitimate purpose. It follows from the case law of the ECJ that in such circumstances the provision falls outside the scope of Article 4 EEA even if it is considered to be indirectly discriminatory, see the judgment in *Mund & Fester v Hatrex Internationaal Transport*.²⁰

30. As regards the question of proportionality, it is submitted that the provision in question is clearly capable of pursuing its objective, *viz.* to ensure payment of costs in cases where this would otherwise be difficult to achieve, and that it only takes into account factors that are relevant to this objective, *i.e.* the parties' domicile. It would seem to follow from the judgment of the ECJ in *Hayes v Kronenberger*,²¹ paragraph 24, where the contested provision was based on nationality, that a provision based on domicile is compatible with Article 4 EEA.

31. Finally, it is submitted that if the provision in question is considered to be contrary to Article 4 EEA, this would mean a preferential treatment of plaintiffs from Greece, as they would be able to initiate legal proceedings without having to worry about costs. That would be unreasonable and not based on the main principles of the EEA Agreement.

32. Star Forsikring has not submitted any concrete proposals as to how the EFTA Court should answer the questions referred to it.

¹⁸ Case C-177/94 *Perfili* [1996] ECR I-161.

¹⁹ Case 22/80 *Boussac v Gerstenmeier* [1980] ECR 3427.

²⁰ Case C-398/92 *Mund & Fester v Hatrex Internationaal Transport* [1994] ECR I-467.

²¹ See footnote 2.

The Government of Liechtenstein

33. The Government of Liechtenstein supposes that the insurance claim made by European Navigation falls within the scope of the EEA Agreement and, more precisely, the freedom to provide services under Articles 36 *et seq.* EEA. It then follows from the case law of the ECJ that the alleged discrimination falls to be examined under Article 4 EEA, see judgments of the ECJ in *Saldanha*²² and *Cowan v Trésor public*.²³

34. In the opinion of Liechtenstein, it is clear from the facts submitted by the national court that the discrimination in dispute is not direct or overt. However, it follows from the case law of the ECJ that also indirect or covert discrimination falls within the scope of Article 4 EEA if the national provision leads in fact to the same result as discrimination based on nationality, see judgments by the ECJ in *Boussac v Gerstenmeier*,²⁴ paragraphs 9 and 10, *Mund & Fester v Hatrex Internationaal Transport*,²⁵ paragraphs 16 *et seq.*, and *Pastors and Trans-Cap v Belgian State*,²⁶ paragraphs 15 *et seq.* In such cases, a discriminatory provision is, however, only incompatible with Article 4 EEA if it cannot be justified by objective circumstances and does not comply with the principle of proportionality.

35. The objective of a provision which requires a plaintiff to provide security for costs, *i.e.* to guarantee the enforcement of the defendant's claim for legal costs, is not in principle incompatible with Article 4 EEA, see the judgment of the ECJ in *Saldanha*,²⁷ at paragraph 29.

36. Moreover, in the judgment in *Reisebüro Broede v Sandker*,²⁸ the ECJ acknowledged as justified in the general interest, *i.e.* as objective grounds for indirect discrimination, a procedural rule with the object of safeguarding the sound administration of justice in relation to the provision of litigation services on a professional basis. In the opinion of Liechtenstein, a provision such as the one at issue in the present case satisfies this criterion; it lies within the general interest since it guarantees the proper functioning of justice.

37. It is open to each EEA/EFTA Member State to lay down such rules, to accede to international conventions or to conclude bilateral agreements which guarantee the enforcement of claims for legal costs. Such provisions do not fall within the *acquis communautaire*; nor may they encroach upon it. The latter is

²² See footnote 8.

²³ See footnote 6.

²⁴ See footnote 19.

²⁵ See footnote 20.

²⁶ See footnote 3.

²⁷ See footnote 8.

²⁸ Case C-3/95 *Reisebüro Broede v Sandker* [1996] ECR I-6511.

guaranteed when these provisions are based on objective grounds and on the general interest.

38. As regards the principle of proportionality, reference is made to the judgment of the ECJ in *Saldanha*,²⁹ where a national provision requiring security for costs based on the nationality of the parties was found to be incompatible with Article 6 EC, which corresponds to Article 4 EEA. The reasons which led the ECJ to consider that provision disproportionate would seem to support a conclusion that a provision such as the present, which is based on domicile and not on nationality, is proportional to the aim pursued.

39. In the opinion of Liechtenstein, it might be appropriate, in the assessment of the proportionality of the provision at hand, to make a distinction between natural and legal persons. This is *inter alia* due to the fact that while natural persons may be located according to nationality or domicile, which does not necessarily relate just to one State, the situation is different for legal persons where nationality and domicile usually fall together as being attributable to just one State. However, the facts available do not provide a sufficient basis for elaborating on this issue.

40. The Government of Liechtenstein proposes the following answer to the questions submitted to the EFTA Court:

"Art. 4 of the EEA Agreement is to be interpreted as not precluding an EFTA-EEA State from requiring security for costs to be furnished by a plaintiff as a natural or legal person not residing in that State where it has brought an action in one of its civil courts against a resident natural or legal person, where that requirement may not be imposed on resident natural or legal persons, in a situation where that action is connected with the exercise of fundamental freedoms guaranteed by EEA law."

The Government of Norway

41. The Government of Norway points out that, in so far as natural persons are concerned, the provision at hand is distinguishable from the provisions on security for costs previously dealt with by ECJ in *Hubbard v Hamburger*,³⁰ *Hayes v Kronenberger*³¹ and *Saldanha*,³² in that section 182 of the Norwegian Civil Procedure Act does not distinguish between Norwegian and foreign nationals. The defendant may request security from all plaintiffs residing abroad, both Norwegian and foreign nationals, and may not request security from a domestic or foreign plaintiff residing in Norway. The nationality or residence of the defendant is in any case of no relevance.

²⁹ See footnote 8.

³⁰ See footnote 4.

³¹ See footnote 2.

³² See footnote 8.

42. For legal persons, there is in general no distinction between nationality and residence. The wording of the answer given by the ECJ in its judgment in *Data Delecta and Forsberg*,³³ would seem to suggest that provisions that protect foreign companies as defendants to the same extent as they protect companies established on the State's own territory might be compatible with Article 6 EC and thus Article 4 EEA.

43. The Government of Norway has not submitted any concrete proposals as to how the EFTA Court should answer the questions referred to it.

The Government of the United Kingdom

44. As regards the scope of application of Article 4 EEA, the Government of the United Kingdom submits that procedural rules such as the one in the present case fall within the scope of application of the Agreement within the meaning of Article 4 EEA, as the proceedings relate to the exercise of the fundamental freedoms guaranteed by Community law, see the judgments in *Data Delecta and Forsberg*,³⁴ paragraph 15, *Hayes v Kronenberger*,³⁵ paragraph 17, and *Saldanha*,³⁶ paragraph 24.

45. With this starting point and with further reference to the case law of the ECJ, the United Kingdom submits, first, that a provision of national law that directly discriminates against nationals of other EEA States as regards requirements to provide security for costs is incompatible with Article 4 EEA and incapable of objective justification, see, for example, *Saldanha*,³⁷ paragraphs 24 and 25.

46. Secondly, it is submitted that a provision of national law which indirectly discriminates on grounds of nationality because, for example, it affords unfavourable treatment to persons resident in other EEA States, will only be compatible with Article 4 EEA if, *inter alia*, it is objectively justified, see *Mund & Fester v Hatrex Internationaal Transport*,³⁸ paragraph 16. In the opinion of the United Kingdom, section 182 of the Norwegian Civil Procedure Act falls within this category.

47. As regards the question of justification, and with reference to the judgment of the ECJ in *Mund & Fester v Hatrex Internationaal Transport*,³⁹

³³ See footnote 1.

³⁴ See footnote 1.

³⁵ See footnote 2.

³⁶ See footnote 8.

³⁷ See footnote 8.

³⁸ See footnote 20.

³⁹ See footnote 20.

paragraph 19, it is submitted that justification will not normally exist where both the State in which the security for costs order is made and the State in which such order would be enforced are EEA States *and* party to either the Brussels or the Lugano Convention. However, there may be circumstances in which a rule allowing national courts to make security for costs orders against plaintiffs established in another EEA State which is party to either the Brussels or the Lugano Convention on grounds of difficulty of enforcement is objectively justified, for example, if the scheme of enforcement under those Conventions were to break down in respect of a particular part of the EEA.

48. The Government of the United Kingdom has not submitted any concrete proposals as to how the EFTA Court should answer the questions referred to it.

The EFTA Surveillance Authority

49. In line with the submissions of European Navigation, Liechtenstein and the United Kingdom, the EFTA Surveillance Authority submits that provisions of national procedural law fall within the scope of Article 4 EEA in so far as the proceedings concern the exercise of one of the fundamental freedoms guaranteed by the EEA Agreement, see the judgments of the ECJ in *Data Delecta and Forsberg*,⁴⁰ *Hayes v Kronenberger*,⁴¹ *Saldanha*⁴² and *Cowan v Trésor public*.⁴³ This condition would seem to be satisfied in the present case, the main claim being related to the provision of insurance services as regulated in Article 36 EEA and Section I of Annex IX EEA.

50. The EFTA Surveillance Authority notes that it is well-established case law of the ECJ that Article 6 EC prohibits not only overt discrimination by reasons of nationality but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result, see the judgments in *Boussac v Gerstenmeier*⁴⁴ and *Pastors and Trans-Cap v Belgian State*.⁴⁵ The ECJ has also held that national rules which make certain rights subject to the requirement of residence in that particular State are liable to operate mainly to the detriment of nationals of other States, see the judgments in *Mund & Fester v Hatrex Internationaal Transport*,⁴⁶ paragraph 16, *Schumacker*,⁴⁷ paragraphs 28 and 29, and *Pastors and Trans-Cap v Belgian State*,⁴⁸ paragraph 17.

⁴⁰ See footnote 1.

⁴¹ See footnote 2.

⁴² See footnote 8.

⁴³ See footnote 6.

⁴⁴ See footnote 19.

⁴⁵ See footnote 3.

⁴⁶ See footnote 20.

⁴⁷ See footnote 5.

⁴⁸ See footnote 3.

51. It is further noted that for legal persons it is their seat that serves as the connecting factor with the legal system of a particular State, as nationality does for natural persons, see the judgment of the ECJ in *The Queen v IRC, ex parte Commerzbank*,⁴⁹ paragraph 13. According to the case law of the ECJ, legal persons also enjoy the rights provided for by Article 6 EC, see the judgment of the ECJ in *Data Delecta and Forsberg*.⁵⁰

52. Based on this, the EFTA Surveillance Authority submits that a national procedural rule such as the present constitutes discrimination based on nationality within the meaning of Article 4 EEA, and can only be accepted if justified by objective reasons, see the judgments of the ECJ in *Mund & Fester v Hatrex Internationaal Transport*,⁵¹ paragraphs 16 and 17, and *Pastors and Trans-Cap v Belgian State*,⁵² paragraphs 18 and 19.

53. With regard to the question of possible justification, it is submitted that the ECJ has in fact recognized that an objective of the present kind, *i.e.* to ensure recovery of costs, is not as such contrary to Article 6 EC, see the judgment of the ECJ in *Saldanha*,⁵³ paragraph 29. Nevertheless, the ECJ has not to date found a procedural provision of the kind at hand to be justified. On the contrary, the ECJ has on several occasions found similar provisions to be either unjustified or disproportionate, see the judgments in *Mund & Fester v Hatrex Internationaal Transport*,⁵⁴ *Hayes v Kronenberger*⁵⁵ and *Data Delecta and Forsberg*.⁵⁶ With reference to this case law and, in particular, *Data Delecta and Forsberg*, paragraph 22, the EFTA Surveillance Authority submits that the Norwegian provision must be considered unjustified and therefore contrary to Article 4 EEA.

54. The EFTA Surveillance Authority proposes that the questions submitted to the EFTA Court be answered as follows:

"Article 4 of the EEA Agreement precludes Norway from requiring a legal person established in another EEA State (Greece) to provide security for costs when bringing proceedings against a company with its place of business (domicile) in Norway, where no such requirement can be imposed on a legal person established in Norway, in a situation where the action brought is related to the exercise of the freedom to provide services guaranteed by the EEA Agreement."

⁴⁹ Case C-330/91 *The Queen v Inland Revenue Commissioners* [1993] ECR I-4017.

⁵⁰ See footnote 1.

⁵¹ See footnote 20.

⁵² See footnote 3.

⁵³ See footnote 8.

⁵⁴ See footnote 20.

⁵⁵ See footnote 2.

⁵⁶ See footnote 1.

The Commission of the European Communities

55. The Commission of the European Communities addresses, first, the fact that the issue which underlines the bringing of the claim, namely the winding up of the Respondent, occurred in 1993, *i.e.* before the entry into force of the EEA Agreement. In the opinion of the Commission, it follows from the judgment of the ECJ in *Saldanha*,⁵⁷ paragraph 14, that Article 4 EEA applies to future effects of situations arising prior to the entry into force of the Agreement, and that, after that time, nationals of other EEA States can no longer be made subject to a procedural rule which discriminates on grounds of nationality.

56. With reference to the judgment of the ECJ in *Saldanha*,⁵⁸ paragraphs 19-21, the Commission of the European Communities submits that provisions of national procedural law fall within the scope of Article 4 EEA in so far as the proceedings concern the exercise of one of the fundamental freedoms guaranteed by the EEA Agreement. This condition would seem to be satisfied in the present case, the main claim being related to the provision of insurance services as regulated in Article 36 EEA and Section I of Annex IX EEA.

57. As regards the main question, whether the national rule or its application represent a form of discrimination contrary to Article 4 EEA, the Commission of the European Communities does not find it necessary in the present case to examine in any detail the issues neither of indirect or covert discrimination nor of a possible and acceptable justification of any discrimination, see the judgments of the ECJ in *Mund & Fester v Hatrex Internationaal Transport*⁵⁹ and *Pastors and Trans-Cap v Belgian State*.⁶⁰ Notwithstanding the fact that the national rule is based on domicile and not on nationality, and the fact that non-Norwegian citizens would undoubtedly be treated in the same manner as Norwegian citizens, the position is different for companies, which is what the present case is about. A company which is not established in Norway will not be "resident" there and may therefore be called upon to provide security for costs in proceedings in Norway against another company or citizen; if the plaintiff company is Norwegian, it may not be called upon to do so. The rule is, accordingly, patently discriminatory (even if not overtly based on nationality) as against a potentially much larger number of non-Norwegian, Community and EFTA-EEA companies and may not be justified on grounds such as difficulties of cross-border enforcement.

58. The Commission of the European Communities proposes the following reply to be given to the two questions submitted by Høyesteretts kjæremålsutvalg:

⁵⁷ See footnote 8.

⁵⁸ See footnote 8.

⁵⁹ See footnote 20.

⁶⁰ See footnote 3.

"Article 4 of the EEA Agreement is to be construed as precluding an EFTA-EEA State from requiring a legal person established in another EEA State which has brought before one of its own courts an action against a company established on its own territory to provide security for costs of those proceedings where no such requirement can be imposed on legal persons established in the first mentioned state and where the action is concerned with the exercise of fundamental freedoms (such as the provision of services) enshrined in the EEA Agreement."

Bjørn Haug
Judge Rapporteur