Brussels, 20 March 2013
Case No: 68052, 71203
Event No: 653746
Dec. No: 124/13/COL

EFTA SURVEILLANCE AUTHORITY

Ministry of Finance
Akersgata 40
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the conditions to obtain customs credit in Norway by non-resident companies

1 Introduction

1. On 19 March 2010, the Authority received a complaint against Norway. The complainant alleges that it is the standard practice of the Norwegian authorities to require a security in the form of a bank guarantee as a condition for obtaining access to the customs credit from companies established abroad and which import goods into Norway. Companies established in Norway are only required to provide security when this is considered necessary in specific circumstances. On 26 January 2012, the Authority received another complaint against Norway concerning, *inter alia,* the same issue of bank guarantees required from foreign established companies applying for customs credit.

2. Following the receipt of the complaints, the EFTA Surveillance Authority ("the Authority") has assessed the compatibility of the Norwegian rules and practice with the free movement of goods and with the principle of non-discrimination on grounds of nationality laid down, respectively, in Articles 11 and 4 of the Agreement on the European Economic Area ("the EEA Agreement").

2 Correspondence

3. By letter of 14 July 2010 (Event No 552725), the Authority informed the Norwegian Government of the receipt of the first complaint and invited the Norwegian Government to provide information about the national rules and the administrative practice regarding the granting of custom credit licences in Norway. In particular, the Authority requested statistical information regarding such licences granted to resident and non-resident companies.

4. By letter of 28 September 2010 (Event No 571134), the Norwegian Government provided information on the legislation and administrative practice. It explained, however, that it does not collect statistical information which would allow it to provide precise information requested by the Authority. In the absence of such precise statistical information a random sampling was carried out and the results sent to the Authority.

5. By letter of 9 December 2010 (Event No 578943), the Authority requested further information from the Norwegian Government, in particular statistical information and an overview of international agreements on the enforcement of claims to which Norway is a party.

6. By letter of 10 February 2011 (Event No 586919), the Norwegian Government provided an overview of agreements on enforcement between Norway and EEA/EFTA States. However, no precise statistical information was provided for the reasons stated above. Instead, the Norwegian Government provided information about the internal guidelines and administrative practice of Norwegian Customs regarding security required from foreign companies when granting customs credit.

7. By letter of 27 January 2012 (Event No 622791), the Authority informed the Norwegian Government about the receipt of the second complaint.

8. The issue was discussed at the package meeting in Norway on 25 October 2012, where the representatives of the Norwegian Government acknowledged that it is a standard practice by the competent Norwegian authorities to require foreign-established companies to provide a bank guarantee in order to get access to customs credit, while Norwegian companies are only required to provide such a guarantee when this is considered appropriate in specific circumstances. Moreover, the representatives of the Norwegian Government stated that it was not possible for foreign companies to demonstrate their creditworthiness by other means than the provision of a bank guarantee. A copy of the internal guidelines on customs credit by the Norwegian Customs Directorate was handed over to the Authority's representatives. The representatives of the Norwegian Government stated that they were looking into the matter and considering amending the practice by the competent authorities.

3 Relevant national law and practice

3.1 Act No. 67 of 17 June 2005 on Tax Payment and Regulation No. 1766 of 21 December 2007 on Tax Payment

9. Pursuant to section 10-41-1 of the Act No. 67 of 17 June 2005 on Tax Payment (*Lov nr. 67 av 17. juni 2005 om betaling og innkreving av skatte- og avgiftskrav (skattebetalingsloven)*), hereafter ("the Tax Payment Act") customs duties and charges as a result of import of goods to Norway, such as VAT, are in principle due at the time of import.

10. Pursuant to section 14-20 subsection 1 of the Tax Payment Act and section 14-20-1 subsection 1 of Regulation No. 1766 of 21 December 2007 on Tax Payment (*Forskrift 21. desember 2007 nr. 1766 til utfylling og gjennomføring mv. av skattebetalingsloven*) (hereafter "the Tax Payment Regulation"), the Regional Customs Office ("Tollregionen") may, upon application, grant a company a credit for claims arising from import of goods. The customs credit allows importers to pay the customs duties, charges and VAT as a result of the import, on the 18th day of the month following that in which the goods were imported to Norway (section 10-41 subsection 2 of the Tax Payment Act).

11. It seems that any company, both resident and non-resident, can apply for a customs credit. Pursuant to section 14-20-1 subsection 2 and 3 of the Tax Payment Regulation, a company applying for a customs credit must, in principle, be registered in (1) the Norwegian Register of Business Enterprises and (2) the VAT Register and is obliged to provide the

necessary information to allow the Regional Customs Office to assess its creditworthiness. The Regional Customs Office may allow for exemptions to the double registration requirement, in which case security in the form of a bank guarantee will, in principle, be required. The Regional Customs Office may, however, allow for an exemption to the requirement to provide collateral if it considers the requirement to be inappropriate.

12. Pursuant to section 14-20-1 subsection 4 and section 14-20-3 subsection 1(f) of the Tax Payment Regulation, the Regional Customs Office may refuse to grant the customs credit if it does not consider the company to be creditworthy. According to section 14-20-3 subsection 2 of the Tax Payment Regulation, this assessment implies a consideration of the Regional Customs Administration's general confidence in the company, including the company's solvency, its previous compliance with the tax, customs, and duty regulations and the prospect of tax recovery in case of lack of payment.

13. Pursuant to section 14-20-4 of the Tax Payment Regulation, the Regional Customs Office may request collateral as a condition for granting and maintaining the customs credit.

3.2. Agreements on enforcement of claims

14. By letter of 10 February 2011, Norway provided the Authority with an overview of agreements with some EEA Contracting Parties regarding mutual assistance in customs matters which contain provisions on assistance with the cross-border enforcement of claims. According to the information, such agreements have been concluded with the Nordic countries, Germany, Hungary and Italy.

3.3. Administrative practice

15. The instructions on how the rules on customs credit must be applied in practice are laid down in the Internal Guidelines of the Norwegian Customs Directorate of 9 January 2008, as last amended on 10 July 2012 (*Rutinebeskrivelser: Tollkredit*) (hereafter "the Guidelines"). According to the Guidelines and the explanations by the Norwegian Government, there is a creditworthiness requirement and a creditworthiness verification by the Regional Customs Office prior to each decision on an application for customs credit.

16. The instructions as regards the creditworthiness requirement and the verification thereof are provided in point 3 of the Guidelines. It appears from these instructions that the possibilities for tax recovery by the Norwegian Customs Administration ("Tollvesenet") is an important element in the creditworthiness evaluation of the company concerned (point 3.4 of the Guidelines). In that regard, it is stated in the Guidelines that tax recovery abroad as such is much more difficult than domestic tax recovery and the fact that the company is non-resident in itself weakens its creditworthiness, even if there is an agreement on mutual assistance between Norway and the State in which the applicant is established.

17. The evaluation of the company's creditworthiness is subject to the Regional Customs Office's discretionary assessment. As stated above, this assessment implies a consideration of the Regional Customs Office's general confidence in the company which is determined, *inter alia*, by the prospect of tax recovery in case of lack of payment. In its letter of 28 September 2010, the Norwegian Government explained that in the event of any uncertainty relating to one of the elements for evaluation, such as the prospect of tax recovery, the Regional Customs Office will normally require collateral as a condition for granting the customs credit.

18. Furthermore, in its letter of 10 February 2011, the Norwegian Government stated that, as regards non-resident companies, the Customs Authorities are confronted with special challenges due to problems of tax recovery and that it is standard practice to require collateral in such cases.

19. Based on the above, it appears that it is standard administrative practice by the Norwegian authorities to require security from companies established in other EEA States in order to have access to the customs credit, while this is not the case for companies established in Norway. The existence of such practice has been acknowledged by the Norwegian Government during the discussions at the package meeting in Oslo on 25 October 2012 and, in light thereof, the representatives of the Norwegian Government stated that they could not provide any examples of foreign companies that were allowed a customs credit without providing security.

4 Relevant EEA law

20. Article 4 of the EEA Agreement:

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.

21. Article 11 of the EEA Agreement:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.

22. Article 13 of the EEA Agreement:

The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.

5 The Authority's assessment

5.1 Introduction

23. Although, as a general rule, the tax system of an EEA State is not covered by the EEA Agreement, EEA States are bound to exercise that competence consistently with the general principles of EEA law.[1]

24. The Norwegian legislation governing the customs credit as such does not seem to contain any provisions discriminating against non-resident companies with regard to access to

[1] Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 30; Case E-1/01 *Hörður Einarsson* [2002] EFTA Ct. Rep. 1, paragraph 17; E-1/03 *EFTA Surveillance Authority v Iceland* [2003] EFTA Ct. Rep. 143, paragraph 26.

customs credit and the assessment of creditworthiness. It appears, however, that in practice, a systematic, discriminatory treatment is applied by the Norwegian competent authorities. The Authority observes that an administrative practice can amount to a restriction on the freedoms guaranteed by the EEA Agreement provided that this practice is, to some degree, of a consistent and general nature.[2]

25. The Authority observes that, in the present case, it is not the level of taxation that is discriminatory, but the conditions of access to the customs credit, which allows an importer a deferred payment of VAT. The administrative practice with regard to the customs credit does not differentiate between domestic and foreign products but between resident and non-resident importers of products. It follows from established case law that requirements based on the place of establishment of traders may have an effect, even if indirect, on trade in goods and services between EEA States.[3] Therefore, the practice will be assessed in light of free movement of goods, as laid down in Article 11 EEA.

26. Alternatively, and to the extent that Article 11 would not be applicable, the issue will be assessed in light of the principle of non-discrimination on grounds of nationality laid down in Article 4 of the EEA Agreement.

5.2 Restriction on the free movement of goods

27. Article 11 of the EEA Agreement prohibits quantitative restrictions on imports and all measures having equivalent effect. It is settled case law of the Court of Justice of the European Union ("the Court of Justice") that all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect and thus are in breach of the principle of free movement of goods.[4]

28. Since the standard practice of Norwegian authorities to require bank guarantees from foreign-established companies when granting customs credit applies only to claims arising from the import of goods, it obviously solely affects imported products. However, not all imported products are caught by this practice, but only those imported by foreign-established companies. In the view of the Authority, the Norwegian practice as described above is liable to hinder or make less attractive the free movement of goods. This practice may discourage foreign companies from importing goods into Norway, given the additional costs and consequently the reduced competitiveness of the goods in comparison with similar goods manufactured in Norway.

29. In light of the above, it must be concluded that the practice of the Norwegian Customs Administration constitutes a measure having equivalent effect to quantitative restrictions on import and thus is in breach of Article 11 of the EEA Agreement.

5.3 The justification of the restriction by Norway: the effectiveness of tax supervision

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[2] Case C-387/99 *Commission v Germany* [2004] ECR I-3751, paragraph 42; Case C-88/07 *Commission v Spain* [2009] ECR I-1353, paragraph 54.

[3] Case C-43/95 *Data Delekta* [1996] ECR I-4661, paragraphs 13 and 15; see also Case C-323/95 *Hayes* [1997] ECR I-1711, paragraphs 14 and 17.

[4] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5; Case E-5/98 *Fagtun* [1999] EFTA Ct. Rep. 51, paragraph 29; Case C-110/05 *Commission v Italy* [2009] ECR I-0519, paragraph 33.

30. It follows from the established case law that a restriction on the free movement of goods can be maintained if justified by the reasons of public interest referred to in Article 13 of the EEA Agreement or by mandatory requirements developed in the case law of the EFTA Court and the Court of Justice. Moreover, restrictions can only be justified if they are suitable, necessary and proportionate to the aim pursued.[5]

31. In its letter of 28 September 2010, the Norwegian Government explained that the situation of the resident companies is different than that of non-resident companies in terms of proving their creditworthiness. When considering a company's creditworthiness, the Directorate of Customs and Excise receives information from domestic credit rating agencies and relevant public entities such as annual accounts, debt collection data, etc. However, for non-resident companies or branch offices of non-resident companies, it considers that there is generally insufficient access to such information in those countries where the company is established. Furthermore, enforcement of claims in foreign countries requires a basis for enforcement of debt in that country. The Norwegian Government maintains that, despite the existence of these agreements facilitating enforcement, the cross-border enforcement of claims is considered to be lengthy and substantially more difficult compared to the national enforcement of claims.

5.4 The Authority's assessment of the justification

32. It follows from the case law of the Court of Justice that the effectiveness of fiscal supervision and the prevention of tax evasion may constitute an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the EEA Agreement.[6] However, a general presumption of tax evasion cannot justify a fiscal measure which compromises the exercise of a fundamental freedom guaranteed by the EEA Agreement.[7] The Authority acknowledges that Norway has a legitimate interest in ensuring the payment of VAT by non-resident companies that import goods to Norway but at the same time, there should be no general presumption of tax evasion or reduced creditworthiness for non-resident companies.

33. As to the need to protect the effectiveness of fiscal supervision, it is established case law that the taxpayer should not be precluded, *a priori,* from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes.[8] The Authority notes that in the present case, a foreign-established trader does not seem to have the opportunity to provide evidence regarding his creditworthiness, which seems to be required for the purpose of collecting taxes.

34. In *A Oy*, however, the Court of Justice considered that the aforementioned case-law, concerning restrictions on the exercise of the freedoms of movement within the European Union, could not be transposed in its entirety to the freedoms guaranteed by the EEA Agreement since the exercise of the latter takes place in a different legal context.

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[5] Case 120/78 *REWE-Zentral v Bundelmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8; Case E-6/00 *Dr Jürgen Tschannett* [2000-2001] EFTA Ct. Rep. 203, paragraph 28; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 29; Case C-110/05 *Commission v Italy*, cited above, paragraph 59.

[6] Case C-451/05 *Elisa* [2007] ECR I-8251, paragraph 81; C-101/05 *A* [2007] ECR I-11531, paragraph 55.

[7] Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, paragraph 81; Case C-72/09 *Établissements Rimbaud*, cited above, paragraph 34 and the case-law cited therein.

[8] Case C-48/11 *Ceronsaajien oikeudenvalvontayksikkö v A Oy*, judgment of 19 July 2012, not yet reported, paragraph 33 and the case law cited therein.

Apparently, the different legal context considered by the Court of Justice related to the fact that in the EU, secondary legislation (i.e. Directive 77/799/EEC[9]) is applicable providing a legal framework for cooperation between the competent authorities of Member States that allows the host State to obtain information from the State where the applicant for a tax advantage is established in order to verify whether the conditions for the advantage are fulfilled.

35. The Court concluded that if an EEA State makes the granting of a tax advantage dependent on satisfying certain requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country that is a party to the EEA Agreement, it is in principle legitimate for that State to refuse to grant that advantage if that EEA State is not bound under an agreement to provide the information.[10] Consequently, if no agreement exists on the exchange of information and/or the recovery of taxes, the EEA State is under no EEA law obligation to grant the tax advantage.[11] On the contrary, in case such agreements providing sufficient mechanisms for administrative cooperation do exist, an EEA State should not discriminate against non-resident EEA enterprises.

36. It should be noted that there is currently a new legal framework in place in the EU governing the mutual assistance for the recovery of claims as well as the administrative cooperation and combating fraud in relation to indirect taxes.[12] The new framework was introduced as the EU Member States considered the previous arrangements to be insufficient. The fact that there is now such a framework does not, however, change the fact that the case-law referred to above remains relevant to the present case.

37. The Authority observes that Norway has concluded several international agreements that include provisions on exchange of information and recovery of taxes. Norway is *inter alia* a party to the OECD Convention on Mutual Administrative Assistance in Tax matters of 1988, which covers a wide range of taxes (including VAT, but excluding customs duties) and not only administrative assistance in exchange of information but also recovery assistance, service of documents and initiation of criminal prosecution of tax offences. The Agreement entered into force on 1 April 1995, and its amended version, containing more efficient assistance mechanisms, on 1 June 2011. 13 EEA States have ratified the OECD Council Convention on Mutual Assistance in Tax Matters of 1988.[13]

38. The Nordic Countries (Denmark, the Faroe Islands, Greenland, Iceland, Norway, Finland and Sweden) concluded, in 1989, a special agreement on administrative assistance in tax matters. That agreement covers both exchange of information and recovery of taxes. It covers a wide range of taxes including VAT.

39. Furthermore, Norway has concluded bilateral agreements which provide for sufficient mechanisms on administrative cooperation and recovery of taxes such as:

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[9] Directive 77/799/EEC has been repealed and replaced by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation.

[10] Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 44; Case C-48/11 *A Oy*, cited above, paragraph 36.

[11] Case C-88/07 *Commission v Spain*, cited above, paragraph 98.

[12] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

[13] Belgium, Denmark, Finland, France, Iceland, Italy, Netherlands, Norway, Poland, Slovenia, Spain, Sweden and the UK.

- Convention between Norway and Germany regarding mutual assistance in customs matters of 11 July 1974 (covers customs and other import and export charges; provisions on enforcement of claims are laid down in Article 16)
- Agreement between Norway and Hungary regarding mutual assistance in customs matters 20 June 1997 (covers customs duties and other similar claims including taxes, supplementary duties, fees, interests thereof, as well as fines and inspection fees levied by the Customs Authorities; provisions on assistance in recovery of claims are laid down in Article 16)
- Agreement between Norway and Italy regarding mutual administrative assistance for the prevention, investigation and repression of customs offences 16 June 2004 (in force January 2011) (covers import and export duties, taxes, costs and interests claims; provisions on debt recovery are laid down in Article 11)

40. The fact that agreements on mutual assistance, which seem to provide sufficient mechanisms for administrative cooperation, exist between Norway and a number of other EEA States leads to the conclusion that at least there would be some situations in which the necessary information proving the creditworthiness of foreign-established traders can be obtained. In such cases, it is no longer justified to require collateral from a non-resident trader for granting customs credit. Hence, the mere fact that a company is non-resident and that cross-border recovery of claims may be more difficult than the domestic recovery, should not lead to the conclusion that such company is by definition not creditworthy and, therefore, should not get access to the customs credit without providing security.

41. Therefore, in the view of the Authority, the Norwegian practice whereby non-resident companies are considered not to be creditworthy without assessing their actual creditworthiness, and notwithstanding the existence of international agreements with the country of establishment of that company providing for sufficient administrative cooperation, cannot be justified by the aim of safeguarding the effectiveness of tax supervision.

5.5 Discrimination under Article 4 of the EEA Agreement

42. Article 4 EEA provides that any discrimination on grounds of nationality shall, in principle, be prohibited. That prohibition applies only to those matters which fall within the scope of application of the EEA Agreement. As stated above, it follows from established case law that conditions imposed on traders on the basis of establishment may have an effect on trade in goods and services. The Authority takes the view that a practice of systematically requiring security for customs credit only from foreign-established traders negatively affects the access to the Norwegian market for such traders, and discourages the exercise of the freedoms guaranteed by the EEA Agreement. Therefore, the issue in the present case must be considered to fall within the scope of application of the EEA Agreement.

43. Once it is established that a situation falls within the scope of application of the EEA Agreement, the general principle of non-discrimination requires that a national of another EEA State shall be placed on a completely equal footing with nationals of the EEA State in which that person finds himself.[14]

[14] Case C-186/87 *Cowan* [1989] ECR I-195, paragraph 10; see also Case C-43/95 *Data Delekta*, cited above, paragraph 16.

44. It follows from established case law that not only direct discrimination on the grounds of nationality is forbidden, but also all indirect forms of discrimination which, by the application of criteria other than nationality, lead in fact to the same result.[15] The EFTA Court has, in particular, held that national rules which make certain rights subject to the requirement of residence in a particular State, so that only residents in that State may enjoy these rights, are liable to operate mainly to the detriment of nationals of other States. Non-residents are, in the majority of cases, foreigners and national rules which draw a distinction on the basis of residence so that non-residents are deprived of certain rights enjoyed by residents, constitute an indirect discrimination on the grounds of nationality.[16]

45. Once it has been determined that Article 4 EEA is applicable and that a difference in treatment exists, it has to be assessed whether such different treatment can be objectively justified in the light of the EEA Agreement.[17] As stated above under point 5.4, the Authority is of the opinion that the difference in treatment cannot be objectively justified for the reasons stated therein.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining the administrative practice to require security in the form of a bank guarantee from non-resident companies that apply for customs credit in Norway, notwithstanding their actual creditworthiness, while Norwegian companies are required to provide bank guarantees only when it is considered appropriate in specific circumstances, Norway has failed to fulfil its obligation arising from Article 11 or, alternatively, Article 4 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 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

Sverrir Haukur Gunnlaugsson
College Member

[15] Case E-3/98 *Herbert Rainford-Towning* [1998] EFTA Ct. Rep. 205, paragraph 27; Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 44, paragraph 18; Case E-5/10 *Kottke* [2009-2010] EFTA Ct. Rep. 320, paragraphs 29-30.

[16] See, for example, Case E-3/98 *Herbert Rainford-Towning*, cited above, paragraph 29; Case E-2/01 *Pucher*, cited above, paragraph 19 and Case E-5/10 *Kottke*, cited above, paragraph 30.

[17] See, for example, Case E-5/10 *Kottke*, cited above, paragraph 40.