



REPORT  
OF THE  
**EFTA**  
COURT  
**2019**



# REPORT OF THE EFTA COURT 2019

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EFTA Court  
1 rue du Fort Thüngen  
L-1499 Luxembourg

[www.eftacourt.int](http://www.eftacourt.int)

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Looking back on the year 2019, it has been a successful one for the Court and the EEA Agreement as a whole. I am pleased to observe that we witnessed an increase in the caseload of the Court, with 13 new cases being registered, of which 12 were requests for an advisory opinion. Of these cases, five stem from quasi-judicial and administrative bodies outside the regular Court system. This represents an interesting development, which I believe is reflective of the important role these bodies play in the application of EEA law in the EFTA States. We also witnessed first requests from both the Icelandic and Norwegian Public Procurement Complaints Boards.

The request from the Icelandic Tribunal was the first request for an advisory opinion received from Iceland in well over two years, and it is now more than two-and-a-half years since a request has been received from an Icelandic court. This represents a considerable cause for concern, and we can only hope that this tendency will not continue for much longer.

As regards judgments handed down in 2019, *Fosen-Linjen II* is the most noteworthy. The Norwegian Supreme Court decided to request a second advisory opinion from the EFTA Court, seeking clarification concerning

the applicable standard of liability for the “positive contract interest” (loss of profits). The EFTA Court found that “Article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules”. Another significant judgment was rendered in the case of *D and E*, E-2/19. This case concerned the relationship between the Residence Directive and the sectoral adaptations applicable to Liechtenstein in the field of free movement of persons, which are of great importance to Liechtenstein. The conclusion was that the sectoral adaptations could not have the effect of depriving EEA nationals, to whom Liechtenstein has granted a residence permit, of rights provided for under the Directive even if that permit was granted without Liechtenstein being under an EEA law obligation to grant it.

Lastly, in the so-called parental benefits case, E-1/18, the Court dismissed the EFTA Surveillance Authority’s (ESA) plea that held that the parental benefit scheme established by the Norwegian National Insurance Act was in breach of the Equal Treatment Directive. The Court held that the scheme did not concern “employment and working conditions” within the meaning of Article 14(1)(c) of the Equal Treatment Directive, and

thus fell outside its scope. Accordingly, the Court’s conclusion was that Norway was not in breach of the Directive.

Turning to the cases that are presently pending, I am pleased to see that we have already received the first questions concerning the interpretation of the General Data Protection Regulation, probably the most significant piece of legislation recently incorporated into the EEA Agreement.

In other developments, the European Court of Human Rights dismissed a case against Norway, in its Decision in Application no. 47341/15, in which the applicant alleged that the EFTA Court declaring his challenge against ESA’s decision inadmissible, amounted to an infringement of his right to a fair trial. The Court of Human Rights noted, in particular, that the EFTA Court was set up to operate as a judicial body similar to the CJEU, with the same essential procedural principles. The alleged violation could, therefore, not be attributed to structural shortcomings of the EFTA Court regime. Furthermore, the Court of Human Rights noted that the application in the case did not disclose any appearance of manifest deficiencies in the protection of the applicant’s Convention rights.

The EEA Agreement celebrated its 25th anniversary last year. Amongst the events held to celebrate this important milestone in the life of the



EEA was an anniversary conference held jointly by the Court and the EFTA Surveillance Authority in Brussels last spring. The conference was a great success, with over 300 people in attendance and a host of distinguished speakers.

An occasion such as this anniversary represents a good opportunity to reflect upon the future as well as the past. I am an optimist when it comes to the future of EEA law. The reason is that I see a clear willingness on the part of the EFTA States to make it work. They have shown themselves to be responsible and solution oriented with regard to the incorporation of legal acts in the Agreement, and when it comes to the subsequent implementation in the national legal systems, the findings of ESA's last Internal Market Scoreboard showed that the EFTA States have all improved upon their performance in transposing EEA directives into national law. The contribution of national judges should also be acknowledged, as their awareness and dedication to their role as EEA law judges is instrumental in the effectiveness of the Agreement. I would like to end with these words, which I believe both aptly describe the past of the EEA and which should also guide us for the future.

Páll Hreinsson  
President

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# Case Summaries

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## Concordia Schweizerische Kranken- und Unfall- versicherung AG, Landesvertretung Liechtenstein

### Case E-2/18

*(Regulation (EC) No 883/2004 – Article 24 – Pensioner residing outside competent State – Benefits in kind in the place of residence – Reimbursement procedure)*

#### Judgment of the Court of 14 May 2019

The Princely Court of Liechtenstein (Fürstliches Landgericht) referred questions to the Court which sought to clarify the interpretation of Regulation (EC) 883/2004 (the Regulation) of the European Parliament. The Princely Court questioned whether Article 24 of the Regulation provides a mandatory procedure for the provision of benefits in kind to an insured pensioner who receives a pension from one EEA State

but resides in another EEA State, where the State of residence has refused benefits in kind to the pensioner because those benefits fall outside the scope of its social security system.

The Court held that when a pensioner is not entitled to benefits in kind in the EEA State of residence, because the benefits fall outside the scope of its social security system, the pensioner is entitled, pursuant to Article 24(1) of the Regulation, to receive the benefits in kind provided at the expense of the institutions referred to in Article 24(2) of the Regulation. This means that when a pensioner is entitled to benefits in kind under the legislation of a single EEA State, the cost shall be

borne by the competent institution of that EEA State, in accordance with the reimbursement procedure set out in Article 35 of the Regulation and Regulation (EC) No 987/2009.

For pensioners to be permitted to make a claim directly to the competent institution in the EEA State under whose legislation the pension is paid, they must be able to demonstrate that they are not entitled to receive the benefits from the State of residence, in accordance with Article 24(1) of the Regulation. Moreover, in accordance with Article 76 of the Regulation, the pensioner has a right to submit claims for reimbursement directly to the competent institution in the EEA State under whose legislation the pension is paid, in particular, but not only, if they have been refused reimbursement by

the State of residence. The Court also held on the basis of both the Implementing Regulation and the Regulation that if the competent institution does not provide the pensioner with information as to the reimbursement procedure to be followed, that must not adversely affect the pensioner's rights vis-à-vis the institution.

It would be contrary to the purpose of protecting people residing in an EEA State other than the competent EEA State, to prohibit an EEA State from granting better protection than that arising from the application of Article 24, which applies to situations where the pensioner is not entitled to benefits in kind under the legislation of the EEA State of residence. «

[eftacourt.int/cases/e-02-18/](http://eftacourt.int/cases/e-02-18/)

# EFTA Surveillance Authority

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## Iceland

### Case E-3/18

*(Failure by a Member State to fulfil its obligations – Failure to implement – Regulation (EU) 2015/1051)*

#### Judgment of the Court of 14 May 2019

The EFTA Surveillance Authority initiated proceedings against Iceland for failing to fulfil its obligations under the Act referred to at point 7ja of Annex XIX to the EEA Agreement (Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the online dispute resolution platform, on

the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/20143 of the European Parliament and of the Council on online dispute resolution for consumer disputes), as adapted to the Agreement under its Protocol 1, and under Article 7 EEA, by failing to adopt the measures necessary to implement the Act within the time prescribed.

Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether gen-



eral or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. The lack of direct legal effect of those acts makes timely implementation crucial for the proper functioning of the EEA Agreement.

The question whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion. Thus it was ruled that Iceland failed to implement the Regulation in the time prescribed. «

[eftacourt.int/cases/e-03-18/](http://eftacourt.int/cases/e-03-18/)



# EFTA Surveillance Authority

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## Iceland

### Case E-4/18

*(Failure by a Member State to fulfil its obligations – Failure to implement – Regulation (EU) No 524/2013)*

#### Judgment of the Court of 14 May 2019

The EFTA Surveillance Authority initiated proceedings against Iceland for failing to fulfil its obligations under Act referred to at point 7d, 7f and 7j of Annex XIX to the EEA Agreement (Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and

Directive 2009/22/EC (Regulation on consumer ODR), as adapted to the Agreement under its Protocol 1, and under Article 7 EEA, by failing to adopt the measures necessary to implement the Act within the time prescribed.

Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

The lack of direct legal effect of those acts makes timely implementation crucial for the proper functioning of the EEA Agreement.

The question whether an EFTA State has failed to fulfil its obligations must be determined by reference to the

situation as it stood at the end of the period laid down in the reasoned opinion. Thus it was ruled that Iceland failed to implement the Regulation in the time prescribed. «

[eftacourt.int/cases/e-04-18/](http://eftacourt.int/cases/e-04-18/)



# EFTA Surveillance Authority



## Iceland

### Case E-5/18

*(Failure by a Member State to fulfil its obligations – Failure to implement – Directive 2013/11/EU)*

#### Judgment of the Court of 14 May 2019

The EFTA Surveillance Authority initiated proceedings against Iceland for failing to fulfil its obligations under Act referred to at point 7d, 7f and 7k of Annex XIX to the EEA Agreement (Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive

2009/22 (EC)) as adapted to the Agreement under its Protocol 1, and under Article 7 EEA, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event, by failing to inform the EFTA Surveillance Authority thereof.

Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by



decisions of the EEA Joint Committee. The lack of direct legal effect of those acts makes timely implementation crucial for the proper functioning of the EEA Agreement.

The question whether an EFTA State has failed to fulfil its obligations must

be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion. Thus it was ruled that Iceland failed to implement the Regulation in the time prescribed. «

[eftacourt.int/cases/e-05-18/](https://eftacourt.int/cases/e-05-18/)

# EFTA Surveillance Authority

-- V --

## Iceland

### Case E-6/18

*(Failure by a Member State to fulfil its obligations – Failure to implement – Directive 2014/52/EU)*

#### Judgment of the Court of 14 May 2019

The EFTA Surveillance Authority initiated proceedings against Iceland for failing to fulfil its obligations under Act referred to at point 1a of Annex XX to the EEA Agreement (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on

the environment), as adapted to the Agreement under its Protocol 1, and under Article 7 EEA, by failing to adopt the measures necessary to implement the Act within the time prescribed, or in any event, by failing to inform the EFTA Surveillance Authority thereof.

Article 3 EEA imposes upon the EFTA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EFTA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by



decisions of the EEA Joint Committee. The lack of direct legal effect of those acts makes timely implementation crucial for the proper functioning of the EEA Agreement.

The question whether an EFTA State has failed to fulfil its obligations must

be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion. Thus it was ruled that Iceland failed to fulfil its obligations under Act referred to at point. «

[eftacourt.int/cases/e-06-18/](https://eftacourt.int/cases/e-06-18/)



# Nettbuss AS

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# Konkurrenten.no AS



## Case E-1/17 COSTS

*(Taxation of costs – Recoverable costs – Default interest)*

### Order of the Court of 26 July 2019

The case concerned an application for the taxation of costs awarded by the Court to Nettbuss AS (“Nettbuss”) in its order of 22 December 2017 in Case E-1/17 *Konkurrenten.no v EFTA Surveillance Authority*, where Konkurrenten.no’s application for the annulment of a decision by ESA was dismissed as inadmissible.

Article 70(1) of the Court’s Rules of Procedure provides that if there is a

dispute concerning the costs to be recovered, the Court shall, on application by the party concerned and after hearing the opposite party, make an order.

Expenses necessarily incurred by the parties for the purpose of the proceedings, including the remuneration of lawyers, shall be regarded as costs which are recoverable from the party ordered to pay the costs, pursuant to Article 69(b) RoP. Thus, recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose. While a party to a case before the Court is free to make use of

the services of more than one lawyer, to the extent that this results in duplication of work and thus higher legal fees in total, those extra costs are not recoverable, since they cannot be considered necessarily incurred for the purpose of the proceedings.

The costs claimed must be substantiated by evidence that is sufficiently precise and detailed so as to enable an assessment by the Court. The only requirement in that regard is that the evidence presented must substantiate the claims made by an applicant and be sufficiently precise and detailed so as to enable an assessment by the Court.

There are no further requirements as to the manner in which the evidence shall be presented. In particular, there are no conditions for when the account of the hours should have been drafted.

The Court found that the evidence submitted by Nettbuss in the case was, in principle, sufficient to substantiate the cost claims made and lacked neither such an appropriate level of detail nor such a level of precision which would prevent the Court from carrying out its assessment.

When taxing recoverable costs, the Court, in the absence of EEA provisions



laying down fee scales, makes an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings; their significance from the point of view of EEA law as well as the difficulties presented by the case; the amount of work generated by the proceedings for the lawyers involved; and the financial interests which the parties had in the proceedings.

As to the hourly rate claimed by Nettbuss, the Court found that the claimed hourly rate, which presupposed that the work was carried out by an experienced lawyer in the relevant field, was justified. The fact that remuneration at this rate was taken into account required a strict assessment of the total number of hours' work essential for the purposes of the proceedings. Having regard to the hourly rate and the various stages of the proceedings in the case, the Court found that the claimed total of hours was somewhat excessive and, accordingly, lowered the amount.

Having regard to the fact that both parties to the case were Norwegian companies, the Court saw no need to convert the costs claimed to euro, pursuant to Article 71 RoP.

Under Article 70(1) RoP, the obligation to pay default interest and the fixing of the applicable rate fall within the jurisdiction of the Court. As Nettbuss had claimed default interest, default interest could be granted for the period between the date of notification of the order of taxation of costs and the date of actual recovery of the costs. The Court found that the applicable rate of default interest should be calculated on the basis of the Norwegian Central Bank's policy rate in force on the first calendar day of the month in which payment was due, increased by three and a half percentage points. «

[eftacourt.int/cases/e-01-17-costs/](http://eftacourt.int/cases/e-01-17-costs/)

# The County of Aust-Agder

-- V --

## Konkurrenten.no AS

### Case E-1/17 COSTS II

*(Taxation of costs – Recoverable costs – Default interest)*

#### Order of the Court of 26 July 2019

The case concerned an application for the taxation of costs awarded by the Court to the County of Aust-Agder ("the County") in its order of 22 December 2017 in Case E-1/17 *Konkurrenten.no v EFTA Surveillance Authority*, where Konkurrenten.no's application for the annulment of a decision by ESA was dismissed as inadmissible.

Article 70(1) of the Court's Rules of Procedure provides that if there is a dispute concerning the costs to be recovered, the Court shall, on application by the party concerned and after hearing the opposite party, make an order.

Expenses necessarily incurred by the parties for the purpose of the proceedings, including the remuneration of lawyers, shall be regarded as costs which are recoverable from the party ordered to pay the costs, pursuant to Article 69(b) RoP. Thus, recoverable



costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose. While a party to a case before the Court is free to make use of the services of more than one lawyer, to the extent that this results in duplication of work and thus higher legal fees in total, those extra costs are not recoverable, since they cannot be considered necessarily incurred for the purpose of the proceedings.

The costs claimed must be substantiated by evidence that is sufficiently precise and detailed so as to enable an assessment by the Court. The County provided partially redacted invoices of the law firm that represented it. Those invoices set out an overview of the hours worked at the different stages of the proceedings, and of the hourly rate charged by counsel. The Court found that the evidence submitted by the County in the case was, in principle, sufficient to substantiate the cost claims made and lacked neither such an appropriate level of detail nor such a level of precision which would prevent the Court from carrying out its assessment.

When taxing recoverable costs, the Court, in the absence of EEA provisions laying down fee scales, makes an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings; their significance from the point of view of EEA law as well as the difficulties presented by the case; the amount of work generated by the proceedings for the lawyers involved; and the financial interests which the parties had in the proceedings.

As to the hourly rate claimed by the County, the Court noted that Konkurrenten.no had accepted that the recoverable lawyers' fees in the case could reasonably be assessed on the basis of the hourly rate claimed by the County. Taking into account that Article 66(5) RoP provides that a decision on costs shall be in accordance with the agreements of the parties, where the parties come to such an agreement, the Court considered it equitable to accept the hourly rate in question for the purposes of the case.

Having regard to the facts of the case, the Court found that the number of

hours claimed was excessive in view of the limited scope of the proceedings. The Court noted that a reasonable number of hours indicated in the invoices were listed as being for the purpose of discussions amongst the County's counsel. In light of these factors, the Court lowered the amount of hours that could be claimed as it considered that not all of the hours could be deemed necessary for the purpose of the proceedings in Case E-1/17.

Having regard to the fact that both parties to the case were Norwegian companies, the Court saw no need to convert the costs claimed to euro, pursuant to Article 71 RoP.

Under Article 70(1) RoP, the obligation to pay default interest and the fixing of the applicable rate fall within the jurisdiction of the Court. As the County had claimed default interest, default interest could be granted for the period between the date of notification of the order of taxation of costs and the date of actual recovery of the costs. The Court found that the applicable rate of default interest should be calculated on the basis of the Norwegian Central Bank's policy rate in force on the first calendar day of the month in which payment was due, increased by three and a half percentage points. «

[eftacourt.int/cases/e-01-17-costs-2/](https://eftacourt.int/cases/e-01-17-costs-2/)



# Fosen-Linjen AS

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## AtB AS

### Case E-7/18

(Public procurement – Directive 89/665/EEC – Claim for compensation for the loss of profit – Gravity of the breach – Principles of equivalence and effectiveness)

#### Judgment of the Court of 1 August 2019

The case concerned a request from the Supreme Court of Norway (*Norges Høyesterett*) for an advisory opinion concerning the interpretation of Council Directive 89/665/EEC ("the Remedies Directive"). The case before the referring court concerned an appeal against a judgment of the Frostating Court of Appeal (*Frostating lagmannsrett*), which dealt with a claim for damages brought by Fosen-Linjen against AtB for errors

made in a tender procedure. The dispute in the case had already been subject to a request for an advisory opinion to the Court in Case E-16/16 *Fosen-Linjen AS v AtB AS* ("*Fosen-Linjen I*").

In its request for an advisory opinion, citing the importance of dialogue between the EFTA Court and national courts, the Supreme Court of Norway sought a clarification of the Court's judgment in *Fosen-Linjen I*.

As to the admissibility of the request for an advisory opinion, the Court recalled that Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing

national courts with the necessary interpretation of elements of EEA law to decide the cases before them. Under this system of cooperation, which is intended as a means of ensuring homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an advisory opinion on the interpretation of the EEA Agreement. The Court therefore emphasised that it is important that questions on the interpretation of the EEA Agreement are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity.

The Court found that, pursuant to Article 34 SCA, a further request in the same case may be justified, *inter alia*, when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier. However, the Court noted that it is not permissible to use the right to refer questions as a means of contesting the validity of an earlier judgment.

As it was evident that the Supreme Court of Norway was not seeking to contest the validity of *Fosen-Linjen I*, but merely seeking clarification as to whether Article 2(1)(c) of the Remedies Directive required that any breach of the rules governing public procurement in itself was sufficient for there to be a basis of liability for a head of damage which concerned the "positive contract interest", the Court found that the request was admissible.

As to the substance of the case, the Court recalled that, in the absence of EEA rules governing the matter, it is for the legal order of each EEA State, in accordance with the principle of the procedural autonomy of the EEA States, to determine the criteria on the basis of which harm caused by an infringement of EEA law in the award of public contracts must be assessed. As such, EEA States enjoy discretion in determining the criteria on the basis of which damage for loss of profit arising from an infringement of EEA law on the award of public contracts is determined and estimated, provided that the principles of equivalence and effectiveness are respected. In order to ensure the

effectiveness of Article 2(1)(c) of the Remedies Directive, a person harmed by an infringement of public procurement law should, in principle, be able to seek compensation for loss of profit.

The Court noted that the standard of liability is not harmonised by the Remedies Directive. However, according to the principle of State liability, an EEA State may be held responsible for breaches of its obligations under EEA law when three conditions are met: firstly, the rule of law infringed must be intended to confer rights on individuals and economic operators; secondly, the breach must be sufficiently serious; and, thirdly, there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured party.

Further, the Court held that compliance with the principle of effectiveness requires, in particular, that national rules cannot subject the award of damages to a finding and proof of fault or fraud. This does not mean that certain objective and subjective factors connected with the concept of fault under a national legal system cannot

be relevant in the assessment of whether a particular breach is sufficiently serious. However, the obligation to make reparation for loss or damage caused to individuals cannot depend on a condition based on any concept of fault going beyond that of a sufficiently serious breach of EEA law. Accordingly, the Court considered that the requirement of a sufficiently serious breach as a minimum standard is sufficient for the purposes of safeguarding the rights of individuals, since it is the threshold applied for the award of damages for injuries caused by failure to act on the part of the EEA States, and where it is the result of the adoption of a legislative or administrative act in breach of EEA law.

The Court therefore found that the answer to the question referred must be that Article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules. «





# D and E

## Case E-2/19

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*(Free movement of persons – Sectoral adaptations for Liechtenstein – Right of residence – Derived right of residence for family members – Directive 2004/38/EC)*

### Judgment of the Court of 13 November 2019

The case concerned the right to family reunification under Directive 2004/38/EC (the Residence Directive) for D, an EEA national, who had been granted a residence permit under national law in her capacity as the spouse of a third country national resident in Liechtenstein. A request by D to have her daughter E,

also an EEA national, join her in Liechtenstein within the framework of family reunification had been rejected by the Liechtenstein authorities.

It was not disputed in the case that D was an EEA national that satisfied the conditions in Article 7(1)(a) of Directive 2004/38/EC as a worker, and that she was residing in Liechtenstein on the basis of a valid residence permit. Therefore, based on the wording of Directive 2004/38/EC alone, E would have a right of residence in Liechtenstein pursuant to Article 7(1)(d) of that directive in her capacity as D's family member.

In its findings, the Court recalled that due to its specific geographical situation, under the sectoral adaptations to Annexes V and VIII to the EEA Agreement, Liechtenstein is entitled to maintain a system of prior authorisation for the taking up of residence in Liechtenstein, as well as annual quantitative limits. This exemption was originally laid down in Protocol 15 to the EEA Agreement, which lapsed on 1 January 1998. The current exemption follows from sectoral adaptations to Annexes V and VIII to the EEA Agreement, which were provisionally introduced by Decision No 191/1999 of the

EEA Joint Committee and made indefinite by the 2004 EEA Enlargement Agreement, subject only to a review every five years.

It was undisputed between the parties to the proceedings that D was not subject to the system established under the sectoral adaptations, nor was the residence permit which was granted to D counted towards the number of permits available under that system.

While Liechtenstein is not under any obligation to grant a residence permit to an EEA national outside of the

system provided for in the sectoral adaptations, the sectoral adaptations cannot be interpreted as precluding the EEA rights of EEA nationals to whom Liechtenstein has granted residence permits on other grounds and who reside there. The Court found that the sectoral adaptations cannot serve as a basis for undermining rights, which are granted to EEA nationals by virtue of EEA law and concern the exercise of their residence in Liechtenstein. Accepting the use of the quantitative limit system to create two separate classes of EEA nationals residing in Liechtenstein based on the nature of their residence permits would require a clear legal basis in the sectoral adaptations, which is not present.

Accordingly, the Court held that the sectoral adaptations to Annexes V and VIII to the EEA Agreement, in particular Point III thereof, do not deprive the family member of an EEA national, who has a valid residence permit and is residing in Liechtenstein, of the right to accompany or join the EEA national in Liechtenstein on the basis of Article 7(1)(d) of Directive 2004/38/EC, even though the residence permit that the EEA national in Liechtenstein holds is not granted on the basis of the system provided for in the sectoral adaptations. «

[eftacourt.int/cases/e-02-19/](https://eftacourt.int/cases/e-02-19/)

# EFTA Surveillance Authority

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## The Kingdom of Norway

### Case E-1/18

*(Directive 2006/54/EC – employment and working conditions – parental benefits)*

#### Judgment of the Court of 13 December 2019

The EFTA Surveillance Authority (“ESA”) sought a declaration that by maintaining in force provisions such as Section 14-13, second and third paragraphs, and Section 14-14, first paragraph, of the Norwegian National Insurance Act, Norway had failed to fulfil its obligations under Article 14(1)(c) of Directive 2006/54/EC (“Equal Treatment Directive”). These provisions concern benefits granted primar-

ily during periods of parental leave after the birth or adoption of a child. This parental benefit scheme renders a father’s entitlement to parental benefits during a shared period of leave dependent on the mother’s situation, whereas a mother’s entitlement to parental benefits is not similarly dependent on the father’s situation.

A scheme of parental benefits may come within the scope of the Equal Treatment Directive Article 14(1)(c) if its subject matter is employment and working conditions, including dismissals and pay. This is the case when the scheme is necessarily linked to an



employment relationship by its aim and function and the conditions for obtaining benefits under the scheme. However, the Equal Treatment Directive is not rendered applicable merely because the conditions of entitlement to receive benefits may affect employment and working conditions.

If the purpose of parental benefits is to provide income support, then the parental benefits at issue do not directly affect the employment relationship of parents. Income support is in and of itself unrelated to an employment relationship, and does not directly affect the parents' right to parental leave.

Where benefits may be obtained independently of an employment relationship, they are not necessarily linked to an employment relationship. Additionally, according to Section 14-6 of the Norwegian National Insurance Act, benefits do not purely have employment and working conditions as their subject matter. The amount of benefits paid under the Norwegian National Insurance Act can be calculated not only from the income of an employed parent, but also from other sources such as the income of self-employed persons, benefits received from the social security scheme, or remuneration obtained during military service.

EEA States must afford the right to parental leave to both parents on equal grounds except for a specific period of protection granted to the mother. However, it is optional for EEA States to provide for continued entitlements to relevant social security benefits.

The concept of "pay" under the Equal Treatment Directive cannot be extended to encompass social security benefits which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector

concerned, and which are obligatorily applicable to general categories of employees as well as to other beneficiaries. Such schemes give employees and other beneficiaries benefits that are determined not by the employment relationship between the employer and the worker, but by considerations of social policy.

Consequently, ESA's application was dismissed. «

*[eftacourt.int/cases/e-01-18/](https://eftacourt.int/cases/e-01-18/)*







**Andreas Gyrre**

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**The Norwegian  
Government,  
represented by the  
Ministry of Children  
and Equality**

## **Case E-1/19**

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*(Directive 2005/29/EC – Unfair business-to-consumer commercial practices – Annex I – Point 9 – Stating or otherwise creating the impression that a product can legally be sold when it cannot)*

### **Judgment of the Court of 14 December 2019**

The Court answered a question referred by Borgarting Court of Appeal (*Borgarting lagmannsrett*) regarding the interpretation of Directive 2005/29/EC concerning unfair business to consumer commercial practices in the

internal market (“the Directive”), and in particular its point 9 of Annex I.

The referred question arose following an action brought by Mr Andreas Gyrre, who was the chairman and sole owner of Euroteam AS, whereby a partial review of a decision taken by the Norwegian Market Council to impose a fine of NOK 200,000 on Mr. Gyrre was requested. Euroteam AS had engaged in the marketing and resale of tickets to the London 2012 Olympic and Paralympic Games. The unauthorised resale of tickets for the London 2012

Games was prohibited under criminal law in the UK. Any tickets sold by unauthorised dealers were void and subject to seizure or cancellation without refund or entry to a session.

The Directive provides that “[s]tating or otherwise creating the impression that a product can legally be sold when it cannot” falls within the category of misleading commercial practices which are in all circumstances considered unfair. This includes situations in which a trader states or otherwise creates the impression, based on the overall impression conveyed to the average consumer at the time of the transactional decision that a product can legally be sold when it cannot. It does not have a bearing on that assessment whether such a national legislative prohibition, as in the present case, applies in either the EEA State of sale or the EEA State of performance or in both.

The fine imposed on Mr. Gyrre was based on an alleged violation of the Norwegian legislative provisions implementing Article 5 and point 9 of Annex I to the Directive.

Under Article 5(2)(b) of the Directive, the term “consumer” is understood as the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.

Point 9 of Annex I prohibits a trader from marketing a good or a service by omitting to clearly inform the consumer of the existence of legal provisions which may restrict the sale, possession or use of that given product. As a result, point 9 encompasses a commercial practice involving the sale of a product, which is subject to legal restrictions as to its use, irrespective of whether those legal restrictions apply either at the place of sale or at the place of use.

The Court considered that the term ‘legally’ in point 9 of Annex I, read in conjunction with Article 2(k) of the Directive, must be interpreted as referring to the law in force at the point in time that a consumer makes a transactional decision. It is immaterial that a trader may consider certain legislative provisions to be contrary to EEA

law. It is also immaterial if the national legislative prohibition in question is subsequently found to be contrary to EEA law.

Therefore the Court ruled that giving the impression that tickets may legally

be sold where there is a national legislative prohibition in either the EEA State of sale, the EEA State of performance, or both, is considered an unfair commercial practice. «

[eftacourt.int/cases/e-01-19/](https://eftacourt.int/cases/e-01-19/)





2019

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# News and Events

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## Visit to the Icelandic Court of Appeals

25 January 2019



On 25 January 2019, Dr Páll Hreinsson, President of the EFTA Court, and Ólafur Jóhannes Einarsson, Registrar, along with two legal secretaries, Ólafur Ísberg Hannesson and Sindri M. Stephensen, visited the Icelandic Court of Appeals (Landsréttur) which was established on 1 January 2018. They met with the 15 judges of the Court of Appeals and their legal secretaries. The Registrar gave a lecture on how and when national courts request advisory opinions from the EFTA Court. The President spoke about current legal issues with regard to the EEA Agreement and the Icelandic legal system. «

## Visit to the European Court of Human Rights

7 February 2019



On 7 February 2019, all three EFTA Court judges, along with the Registrar, and the six legal secretaries of the Court, visited the European Court of Human Rights. They were greeted by Guido Raimondi, President of the European Court of Human Rights, Vice-Presidents Linos-Alexandre Sicilianos and Angelika Nussberger, as well as Róbert Spanó, Carlo Ranzoni

and Arnfinn Bårdsen, judges at the European Court of Human Rights, and Registrar Roderick Liddell. The Presidents, judges and registrars of both Courts spoke about current legal issues regarding human rights and EEA law, inter alia about the legal status of human rights in EEA law and the new Protocol 16 to the European Convention on Human Rights. «

## Lunchtime talk with Dr. Andrea Jelinek

26 March 2019



On 26 March 2019, Dr. Andrea Jelinek, Director of the Austrian Data Protection Authority, gave a lunchtime talk entitled "The General Data Protection Regulation – a new mode of cooperation among European Data Protection Authorities". In her talk, Dr. Jelinek gave an inside perspective on the current and ever evolving field of data protection. «



## Judge Hammermann speaks at the University of Innsbruck 4 and 5 April 2019



On 4 and 5 April 2019, Judge Bernd Hammermann spoke at the University of Innsbruck at a conference entitled "25 Jahre Europäischer Wirtschaftsraum – Ein Integrationsszenarium auf dem Prüfstand," marking the EEA Agreement's 25th anniversary. Judge Hammermann provided a view from the EFTA Court on the panel "Gerichte und Kontrolle". The other speakers on this panel were Bente Angel-Hansen, President of the EFTA Surveillance Authority, and Univ.-Prof. Dr. Peter Bußjäger, Judge of the Liechtenstein Constitutional Court and Professor at the University of Innsbruck. «

## 25 years of the EEA Agreement – Conference

14 June 2019

On Friday 14 June 2019, the EFTA Court and the EFTA Surveillance Authority held a conference, celebrating the 25<sup>th</sup> Anniversary of the EEA Agreement, at Concert Noble in the heart of Brussels' European District.

The conference was well attended, with over 300 registered participants, including members of the EFTA States' supreme courts, the EU institutions, representatives from governments, business associations and trade unions, practitioners and academics.

After a short opening ceremony, the conference was divided into three panels. The first panel, titled "the EEA Agreement – 25 years and still going

strong", took a closer look at the past, the present and the future of the EEA Agreement, what makes the EEA a success, and how it compares to other models of integration. The second panel focused on competition and consumers in the EEA, elaborating on what 25 years of EEA competition rules have delivered to consumers, and the continued role of the EEA institutions in this regard. The final panel, "People at work in the EEA", examined how EEA law affects and reflects the changing work environment, what challenges and opportunities have arisen for EEA citizens in the workplace over the last 25 years, and what part EEA law plays in the changes we have seen and those to come. «



## Lunchtime talk with Dr. Thomas Dünser

19 June 2019



On 19 June 2019, Dr. Thomas Dünser, Director of the Office for Financial Market Innovation of the Liechtenstein Government, gave a lunchtime talk entitled "Blockchain, Token Economy and Regulation in Liechtenstein."

In his insightful exposé, based on his experiences leading the "Blockchain Act" project in Liechtenstein, Dr. Dünser emphasised that the term "Token Economy" summarises a very important development in the digitalisation of our economy and society, driven by Blockchain technology. Dr. Dünser discussed the first comprehensive proposal for a regulation of the "Token Economy" which has recently been published by Liechtenstein. «

## Lunchtime talk with Ms Thérèse Blanchet

8 October 2019



lunchtime talk entitled "Could using the EFTA pillar help the Schengen Associates deepen their cooperation with the EU in JHA matters?"

In her talk, Ms Blanchet presented the audience with her unique insight into the two-pillar structure, which characterises the EEA Agreement and the relationship between the pillars. Furthermore, Ms Blanchet discussed whether the EFTA pillar could prove useful in terms of helping the EEA/EFTA States and Switzerland, as members of the Schengen Agreement, to deepen their cooperation in matters relating to justice and home affairs policy, such as the Dublin Regulation. «





## Visit to the Icelandic Judicial Administration 1 November 2019

On 1 November, President Hreinsson and Registrar Einarsson visited the Icelandic Judicial Administration. They met with Icelandic district court judges and gave presentations on the EFTA Court's function and procedure, with a special emphasis on requests for an advisory opinion, as well as discussing ongoing developments regarding the rule of law and judicial independence at European level. «



## Lunchtime talk with Dr Matthew Broad 20 November 2019



On 20 November 2019, Dr Matthew Broad, Lecturer in the History of International Relations at Leiden University, gave a lunchtime talk entitled "EFTA as a promoter and guarantor of democracy". The talk took place on the 60th anniversary of the day on which representatives of Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom adopted the text of the Convention establishing the European Free Trade Association (EFTA), and declared their willingness

to open negotiations with the then so-called "Inner Six" members of the European Economic Communities in order to establish new foundations for their economic relations.

In his talk, Dr Broad shed light on how the EFTA States, acting through EFTA, have played an important and active role in promoting and guaranteeing democracy in Europe in the period since EFTA's foundation, facilitated by its ostensibly apolitical nature. «

## Visit of the Deputy Prime Minister of the Principality of Liechtenstein to the EFTA Court 21 November 2019



On 21 November 2019, Dr Daniel Risch, Deputy Prime Minister of the Principality of Liechtenstein, and Gerlinde Gassner, Secretary General of the Ministry for Infrastructure, Economic Affairs and Sport of the Principality of Liechtenstein, paid a visit to the EFTA Court. They were welcomed and hosted by Judge Bernd Hammermann. «





2019

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# Judges and Staff

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## Judges and Staff

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The members of the Court in 2019 were as follows:

Mr Per CHRISTIANSEN (nominated by Norway)  
 Mr Bernd HAMMERMANN (nominated by Liechtenstein)  
 Mr Páll HREINSSON, President (nominated by Iceland)

The judges are appointed by common accord of the Governments of the EFTA States.

Mr Ólafur Jóhannes Einarsson is the Registrar of the Court.

*Ad hoc* Judges of the Court are:

*Nominated by Iceland:*

Mr Benedikt Bogason, hæstaréttardómari (Supreme Court Judge)  
 Ms Ása Ólafsdóttir, University of Iceland (Professor)

*Nominated by Liechtenstein:*

Ms Nicole Kaiser, Rechtsanwältin (lawyer)  
 Mr Martin Ospelt, Rechtsanwalt (lawyer)

*Nominated by Norway:*

Mr Ola Mestad, University of Oslo (Professor)  
 Ms Siri Teigum, Advokat (lawyer)

In addition to the Judges, the following persons were employed by the Court in 2019:

Ms Candy BISCHOFF, Administrative Assistant  
 Ms Harriet BRUHN, Senior Administrative and Financial Officer  
 Mr Birgir Hrafn BÚASON, Senior Lawyer Administrator  
 Mr Thierry CARUSO, Caretaker/Driver  
 Mr Michael-James CLIFTON, Legal Secretary  
 Mr Ólafur Jóhannes EINARSSON, Registrar  
 Ms Hrafnhildur EYJÓLFSDÓTTIR, Personal Assistant  
 Mr Gjermund FREDRIKSEN, Financial Officer  
 Ms Ingeborg Maria GUNDEM, Legal Secretary  
 Mr Ólafur Ísberg HANNESSON, Legal Secretary  
 Ms Theresa HAAS, Legal Secretary  
 Ms Annette LEMMER, Receptionist/Administrative Assistant  
 Mr Sindri MAGNÚSSON STEPHENSEN, Legal Secretary  
 Mr Tomasz MAZUR, Administrative and Financial Officer  
 Ms Katie NSANZE, Administrative Assistant  
 Ms Silje NÆSHEIM, Personal Assistant  
 Mr Håvard ORMBERG, Legal Secretary  
 Mr Jørgen REINHOLDTSEN, Legal Secretary  
 Ms Kerstin SCHWIESOW, Personal Assistant  
 Ms Sharon WORTELBOER, Administrative Assistant  
 Ms Lisa Josephine ZERMANN, Legal Secretary