DET KONGELIGE
MILJØVERNDEPARTEMENT

Royal Ministry of the Environment

EFTA Surveillance Authority
Rue Belliard 35
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Belgium

Your ref	Our ref	Date
	200703169	9 NOV 2007

Norwegian legislation regarding hunting activities

Dear Sir/Madam,

Reference is made to your letter dated 22 August 2007 concerning seven complaints against Norway received by the EFTA Surveillance Authority (hereinafter ESA). The complaints concern requirements for small game hunting in state owned land.

1. Introduction

There are mainly two sets of legislation that regulate the public access to hunting; Act No. 31 of 6 June 1975 Relating to State owned Common Land (The Mountain Act) and Act No. 38 of 29 May 1981 Relating to wildlife and wildlife habitats (The Wildlife Act).

About 3/4 of Norway's mainland (tot 324 000 km^2) is privately owned land. As a principal rule, the hunting right in these areas belongs to the landowner. The landowner decides for him self whether he wants to let out his hunting or not. Approximately 44.000 km2 of the land which is privately owned, belongs to Finnmarkseiendommen, ("the Finnmark Estate"). This is an independent legal entity which administers the land and natural resources etc. that it owns in compliance with the Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark.

The rest (1/4) of Norway is government property (approx. 39 000 km^2) and state owned common land. State commons (approx. 26 000 km^2) is basically situated in the highlands and mountain areas in the southern parts of Norway.

It should be mentioned that a committee (Samerettsutvalget II) has been established to consider the use and management of land and natural resources in areas used by the Sami people outside the county of Finnmark. It is expected that the committee will present its report

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December this year. The report is expected to include a thorough analysis as regards various rights within large parts of the geographical area which constitutes government property and state common land. The report could, consequently, be of relevance to this case.

2. Legislation

2.1 Act No. 31 of 6 June 1975 Relating to State owned Common Land (The Mountain Act)

Access to hunting on state owned common land is regulated by Act No. 31 of 6 June 1975 Relating to State owned Commons, Chapter XI. According to Section 23, any person who is permanently resident in Norway and has been resident for the past year has the right to engage in small game hunting without a dog on state owned common land.

With respect to the rights to hunt on State common land, it is of importance to be aware of the legal basis for these rights.

Historically, the population at large was entitled to use forest and mountainous areas, e.g. for grazing, collecting wood, hunting and fishing. Naturally, such use was exercised primarily by the population adjacent to the land, and gradually the local population, by means of its use, obtained special rights in those areas. These commoners rights has thus been exercised for many hundred years by the local society adjacent to the common land, especially for the benefit of local farmers, but certain of these rights of use are also held by the population at large. The rights, though the subject of subsequent codifications, has remained intact over the past centuries, but the management of the areas has developed with time.

According to the legislation, the local population has precedence for certain forms of hunting (small game hunting with a dog) and at a lower fee (the Mountain act chapter XI).

The rights to hunt on state owned commons has been secured and formalized in the Mountain Act.

Finally, we would like to point out that the legal basis for hunting rights on government property in Sweden is somewhat different from the one in Norway.

2.2 Act No. 38 of 29 May 1981 relating to wildlife and wildlife habitats (The Wildlife Act)

Access to hunting on government property is regulated by Act No. 38 of 29 May 1981 relating to wildlife and wildlife habitats (The Wildlife Act). The objectives of the regulations applicable to hunting on government property are set out in section 1 which reads:

> *"Wildlife and the habitats of wildlife shall be managed in such a way that the productivity of nature and the diversity of species be preserved. Within this framework, wildlife may be harvested for the benefit of agriculture and outdoor recreation."*

According to section 31, hunting of small game species and trapping are permitted for all Norwegian nationals and all persons who for the last year have been, and still are, resident in Norway.

The provision is supplemented by Regulation No. 987 of 20 August 2007 relating to hunting and trapping on government property. According to this regulation, the state owned management agency Statskog may grant permission to hunt also to foreign nationals who have not been resident in Norway for the last year.

3. Game licence

According to section 25 in the Mountain Act, hunting on state common land is only permitted after procurement of a game licence and payment of a fee. Regulation No. 515 of 3 August 2004 relating to hunting, trapping and fishing on state common land contains provisions on maximum prize levels. The fees for hunting on state common land are considerably lower than the similar fees for hunting on private land.

According to section 31 in the Wildlife Act, hunting on government property is likewise only permitted after procurement of a game licence and payment of a fee. Statskog decides the size of the fees. According to Regulation No. 987 of 20 August 2007 relating to hunting and trapping on government property, the Directorate of Nature Management may stipulate maximum prize levels. The fees for hunting on government property are lower than the similar fees for hunting on private land.

On state common land local Councils administer the fishing and hunting activities. On government property Statskog has been given the responsibility for administering the fishing and hunting activities. These tasks involve considerable expenses including, i.e., employment of staff for administration and control, assessment of the game stocks and various information activities.

As a general rule, the income is more or less balanced by the annual expenses.

4. Assessment

4.1 The delivery of game licences and the scope of Article 36

We will argue that the contested regulations do not breach Article 36 of the Agreement. This is because the issuing of a game licence does not fall within the scope of "services" under the EEA Agreement.

The relevant criterion is whether the local councils/Statskog provides something for remuneration. This requires a discussion of two elements: Firstly whether a service is actually provided, and secondly whether that service is provided against remuneration.

It is important to note that the local councils/Statskog are not in reality "providing" anything with the issuance of these licences. As stated in point 2.1 above such privileges are a result of acquired rights, and not by the delivery of game licences. As explained in point 2.1 above, the rights holders are already the population. This is at least the case as regards state common land. As regards government property, the legal aspects have not yet been subject to a thorough national assessment.

In our view, the delivery of game licences cannot be regarded as a commercial activity where the right to hunt is traded against ordinary payment which reflects a market prize. In C-

263/86 Humbel and C-109/92 Wirth, the European Court of Justice held that the typical characteristics of a remuneration for a service is that the remuneration is normally agreed upon by both parties, and that the remuneration is regarded as payment for the service. This description is not very apt as regards the delivery of game licences. As regards the game licenses delivered by the local councils on state common land, these should not be regarded as remuneration for the right to hunt but as a compensation for the expenses of the local councils, as described in point 3. There is no commercial goal or aim to make profit for the councils or those who the hunting rights belong to.

To a large extent, this also applies to the delivery of game licences by Statskog. On both state common land and on government property the income is more or less balanced by the annual expenses related to management activities and employment of staff.

If ESA should choose to regard the issuing of a game licence as falling within the scope of "services" in Article 36, it is our opinion that the contested restrictions must still be allowed because of mandatory requirements ("allmenne hensyn"). As mentioned, our legislation reflects a general practice to give special consideration to the common usage rights of the local people and the population at large, rights that have been practised for centuries with regard to fishing and hunting opportunities. In some communities in Norway, the outcome of fishing, hunting and trapping is still of vital importance for the existence of the people living there.

4.2 The principle of non-discrimination

As regards the principle of non-discrimination, it is clear that objective reasons ("saklige grunner") may, according to jurisprudence by the EC Court, in some cases justify differential treatment.

Again, we would like to point at the legal and historical background to the provisions in question. Historically, people living in rural municipalities and the population at large, have had rights and access to the resources on state common land. In our view this justifies the differentiation between those who are residents in Norway and those who are not.

4.3 Access to hunting and the EEA Agreement

Furthermore, it is the opinion of the Norwegian Government that the Norwegian legislation on hunting is not in breach of the EEA Agreement for the following reasons.

First, that access to hunting is not part of the EEA Agreement. This is to be regarded as management of natural resources, which falls outside the scope of the agreement.

Norwegian policy with respect to hunting is mainly based on the following objectives:

- The preservation and conservation of the productivity of nature and the diversity of species.
- The protection of acquired rights
- Access to hunting for the benefit of agriculture and outdoor recreation for the population at large.

It is our view that the contested Norwegian legislation does not fall within the scope of the EEA Agreement, as nature conservation is not part of the EEA Agreement.

Furthermore, according to Article 125 EEA the Agreement shall "*in no way prejudice the rules of the Contracting Parties governing the system of property ownership*". As explained in point 2.1 above, the right of the population to hunt are deeply rooted in Norwegian history and founded on national traditions. Such rights are therefore not established by the Norwegian regulations as such. In the opinion of the Norwegian Government both the existence and the operation of such rights is linked to our national system of property ownership. Consequently, other provisions of the EEA Agreement cannot prejudice such rights.

4.5 Conclusion

Based on the above, it is our opinion that the contested legislation is not in breach with the EEA Agreement.

Yours sincerely,

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Deputy Director General

Solveig Paulsen
Senior Adviser

Enclosure:
Act No. 31 of 6 June 1975 relating to State Common Land (text only available in Norwegian)
Act No. 38 of 29 May 1981 relating to wildlife and wildlife habitats.