REPORT FOR THE HEARING
in Case E-1/00

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 Héraðsdómur Reykjavíkur (Reykjavik City Court) for an Advisory Opinion in the case pending before it between

The State Debt Management Agency (Lánasýsla ríkisins)

and

The Icelandic Investment Bank Ltd. (Fjárfestingarbanka atvinnulífsins hf.)

on the interpretation of Articles 4, 40, 42 and 61 of the EEA Agreement.

I. Introduction

1. By an order dated 1 February 2000, registered at the Court 7 February 2000, the Reykjavik City Court made a Request for an Advisory Opinion in a case pending before it between the State Debt Management Agency (hereinafter, the "Plaintiff") and the Icelandic Investment Bank Ltd. (hereinafter, the "Defendant").

2. The dispute before the Reykjavik City Court concerns a claim by the Plaintiff for payment of guarantee fees related to state guarantees issued on loans obtained by the Industrial Loan Fund from the Nordic Investment Bank and later assumed by the Defendant.

II. Legal background

3. The questions submitted by the national court concern the interpretation of Articles 4, 40, 42 and 61 EEA.

4. Article 4 EEA reads as follows:

"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."

5. Article 40 EEA reads as follows:

"Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

6. Article 40 refers to Annex XII of the EEA Agreement. Section 1 of Annex XII contains Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[1]. Article 1(1) of Council Directive 88/361/EEC reads as follows:

"Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."

7. Article 42 EEA reads as follows:

"1. Where domestic rules governing the capital market and the credit system are applied to the movements of capital liberalized in accordance with the provisions of this Agreement, this shall be done in a non-discriminatory manner.

2. Loans for the direct or indirect financing of an EC Member State or an EFTA State or its regional or local authorities shall not be issued or placed in other EC Member States or EFTA States unless the States concerned have reached agreement thereon."

8. Article 61(1) EEA reads as follows:

"1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement."

9. In the written observations, additional questions are raised concerning Article 36(1) EEA. Article 36(1) EEA reads as follows:

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1 OJ No L 178, 8.7.1988, p. 5.

"Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

10. The contested Icelandic legislation in the case before the Reykjavik City Court is the guarantee fee provisions of the former Act on State Guarantees No. 37/1961, as amended by Act No. 65/1988, and the new Act on State Guarantees No. 121/1997, which entered into force 1 January 1998.

11. Article 8 of the former Act on State Guarantees No. 37/1961, as amended by Act No. 65/1988, reads as follows:

"Banks, credit funds, financial institutions, enterprises and others who, by law, are entitled to a state guarantee, regardless of whether entitlement is based on state ownership or on other grounds, shall pay a guarantee fee to the State Treasury on loans from foreign entities, including guarantees, see also Article 9.

This fee shall be paid every three months and shall comprise 0.0625% of the average outstanding principal of assessable credits, for the relevant period, see also Article 10."

12. Article 6 of the new Act on State Guarantees No. 121/1997 reads as follows:

"Banks, credit funds, financial institutions, enterprises and others who, by law, are or have been entitled to a state guarantee, regardless of whether entitlement is based on state ownership or on other grounds, shall pay a guarantee fee to the State Treasury on loans secured by state guarantees. General trade obligations and pension obligations shall be exempted from this fee.

The fee, referred to in paragraph 1 shall be paid to the State Treasury every three months and shall be calculated as 0.0625% of the average outstanding principal of assessable foreign obligations and 0.0375% on domestic obligations, for the relevant period." [2]

III. Facts and procedure

13. The Industrial Loan Fund had obtained loans from the Nordic Investment Bank, a joint financial institution established pursuant to an agreement between the Nordic countries.[3] Article 17 of Act No. 76/1987 provided that the State

[2] The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Reykjavik City Court.

[3] Agreement between Denmark, Finland, Iceland, Norway and Sweden concerning the Nordic Investment Bank, signed in Copenhagen 4 December 1975.

Treasury was to guarantee all loans granted to the Industrial Loan Fund and accordingly, the State Treasury had issued state guarantees on the loans granted by the Nordic Investment Bank.

14. The Defendant, the Icelandic Investment Bank Ltd., was established pursuant to Act No. 60/1997 and has operated since 1 January 1998. In accordance with Article 9 of said Act, the Defendant assumed all then existing obligations of the Industrial Loan Fund, including the loans from the Nordic Investment Bank. Article 9 provides furthermore that the State Treasury shall continue to guarantee all the obligations of the Industrial Loan Fund, which existed at the time of the establishment of the Defendant, until such time as the underlying obligations are fulfilled.

15. The Plaintiff, the State Debt Management Agency, is responsible for the State Guarantee Fund, which is the body set up to administer the state guarantees. The State Guarantee Fund is, among other things, responsible for the calculation, levying and collection of the state guarantee fees.

16. By a letter dated 17 April 1998, the Defendant informed the Plaintiff that the Industrial Loan Fund had not paid guarantee fees to the State Guarantee Fund on its obligations to the Nordic Investment Bank since the middle of the year 1995. In the letter the Defendant expressed the view that the Nordic Investment Bank is not a foreign entity within the meaning of Article 6 of Act No. 121/1997 and that the guarantee fees payable should be those applicable to domestic loans.

17. On 23 January 1998 the Plaintiff requested the Ministry of Finance to decide upon whether obligations to the Nordic Investment Bank were obligations to a foreign entity for the purpose of calculating the guarantee fees. In its letter dated 9 March 1998, the Ministry of Finance confirmed that the Nordic Investment Bank should be considered a foreign entity and that the state guarantee should be subject to the guarantee fees payable on loans from foreign entities.

18. The Defendant has not accepted the decision by the Ministry of Finance, and since 1 January 1998 the Defendant has paid the guarantee fees on the obligations to the Nordic Investment Bank as if the obligations were in favour of a domestic entity.

19. The Plaintiff does not accept the Defendant’s interpretation and has accordingly initiated proceedings before the Reykjavik City Court. The Plaintiff claims the payment of the guarantee fees on the assumption that the Nordic Investment Bank is a foreign entity.

20. In the proceedings before the Reykjavik City Court, the Defendant raised several issues concerning the compatibility with the provisions of the EEA Agreement, in particular Articles 4, 40, 42 and 61 EEA, of the system imposing

different guarantee fees depending on whether the lender is a foreign or a domestic entity. On 14 December 1999, the Reykjavik City Court decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

21. The following question was referred to the EFTA Court:

> **"Is it compatible with the EEA Agreement, in particular Articles 4, 40, 42 and 61, when the national law of a Contracting Party provides:**
>
> **a. that a borrower, who is entitled to a state guarantee, shall pay a guarantee fee on loans from entities in other Contracting Parties to the EEA but not on domestic loans?**
>
> **b. that a borrower, who is entitled to a state guarantee, shall be subject to the payment of a higher guarantee fee on loans from entities in other Contracting Parties to the EEA compared to loans from domestic entities?"**[4]

V. Written Observations

22. 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 Plaintiff, the State Debt Management Agency, represented by Sveinn Sveinsson, Supreme Court Attorney;

– the Defendant, the Icelandic Investment Bank Ltd., represented by Baldur Guðlaugsson, Supreme Court Attorney;

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs, acting as Agent;

[4] The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Reykjavik City Court.

– the Commission of the European Communities, represented by Christina Tufvesson and John Forman, Legal Advisors, Legal Service, acting as Agents.

The State Debt Management Agency

23. The Plaintiff begins by observing that the issuance of a guarantee by the State Treasury may be authorized in different ways. The State Treasury may issue a guarantee on behalf of certain entities based on specific legislation relating particularly thereto. Furthermore, the State Treasury may issue a guarantee on behalf of state institutions merely on the basis of its ownership thereof.

24. The Plaintiff goes on to state that the disputed guarantee fee relates only to guarantees of the State Treasury in respect of obligations of state institutions and companies owned by the State. Thus, the guarantee fee is only paid to the State Treasury on loans provided to state entities. According to Article 6 of Act No. 121/1997 on State Guarantees, the guarantee fee is never paid to the State Guarantee Fund by anyone other than state entities.

25. The Plaintiff also asserts that the change in the guarantee fee provisions made during the parliamentary process to the bill that later became Act No. 121/1997, was made in response to a suggestion from the Defendant.

26. The Plaintiff submits that Articles 4, 40, 42 and 61 EEA are not applicable to the present dispute.

27. The Plaintiff points out that Article 4 EEA only applies where entities of different nationalities are treated differently. According to the Plaintiff, this is not the case in the present dispute, since only state entities are entitled to state guarantees and subject to the payment of the guarantee fees referred to in Article 8 of Act No. 37/1961 and Article 6 of Act No. 121/1997.

28. The Plaintiff states that Article 40 EEA concerns discrimination or restrictions on the free movement of capital, which are based on residence or nationality. The Plaintiff asserts that this does not cover the levying of different state guarantee fees depending on whether the lender is domestic or foreign. Only Icelandic State institutions can be subject to the payment of a state guarantee fee. Foreign residents will never be subject to the payment of different guarantee fees.

29. According to the Plaintiff, Article 42 EEA is not applicable to this dispute. To substantiate this, the Plaintiff first proclaims that Article 42 EEA provides that the principle of non-discrimination shall apply when the capital market and the credit system are liberalized in accordance with the EEA Agreement. Furthermore, the Plaintiff states that all citizens of EEA States shall enjoy this

liberalization. On this basis, the Plaintiff argues that Article 42 does not apply to the disputed state guarantee fee, which has been provided for by Icelandic legislation since 1987.

30. In relation to Article 61 EEA, the Plaintiff states that it does not see how this provision can apply to a state guarantee fee. According to the Plaintiff, the differing guarantee fees at issue cannot be considered the granting of state aid within the meaning of that provision.

31. The Plaintiff submits that, if the argument of incompatibility with Article 61 EEA relates to the fact that the guarantee fees on domestic loans are lower than the guarantee fees on loans from the Nordic Investment Bank, the state guarantee fee cannot be considered in isolation. An overall assessment of the relevant operating conditions must be made as to whether there has been discrimination against the relevant entities. According to the Plaintiff, the Nordic Investment Bank is favoured in many ways. The Plaintiff observes that the agreement establishing the Nordic Investment Bank provides that it shall be exempted from all direct taxation and certain other duties and charges. Icelandic banks are, however, subject to such taxes, duties and charges. The Plaintiff states that the advantages afforded the Nordic Investment Bank outweigh the minimal and immeasurable discrimination that may follow from the differing guarantee fees.

32. However, if the argument of incompatibility with Article 61 EEA is based on the view that foreign credit institutions in general, are treated in a less favourable manner than domestic credit institutions in so far as concerns the conditions for lending to Icelandic State entities, the Plaintiff contends that nothing indicates that this is the case and no proof has been submitted in support thereof. The Plaintiff asserts that, on the contrary, both Icelandic State institutions and companies have found it very easy to obtain favourable loans abroad, notwithstanding the system of differing state guarantee fees, and until recently, state institutions and companies have fulfilled all their loan requirements by borrowing from foreign lenders. Therefore, the Plaintiff submits that the differing guarantee fees do not have substantial significance when assessing the overall credit terms. According to the Plaintiff, an overall assessment must be made as to whether the business opportunities of foreign lenders are less favourable than those of domestic lenders. The Plaintiff asserts that the relevant provisions do not, in any way, discriminate against foreign lenders.

33. In the event that the Court concludes that the disputed guarantee fees are discriminatory, the Plaintiff declares that the Defendant has no direct interest in having this discrimination abolished, since it has in no manner suffered therefrom.

34. On the basis of the above mentioned arguments, The Plaintiff is of the opinion that the Icelandic system of differing state guarantee fees is compatible with the EEA Agreement, in particular Articles 4, 40, 42 and 61.

The Icelandic Investment Bank Ltd.

35. The Defendant begins by observing the objectives and fundamental principles of the EEA Agreement, as laid down in Article 1 EEA. According to the Defendant, the Icelandic rules laying down different guarantee fees depending on whether a loan is provided by a foreign or a domestic entity, are clearly contrary to the aim of homogeneity inherent in the EEA Agreement. A lending institution of another EEA State wishing to provide loans to Icelandic entities enjoying state guarantees, is in a less favourable competitive position than Icelandic lending institutions.

36. The Defendant submits that the Icelandic legislation at issue is contrary to the general prohibition against discrimination on grounds of nationality, laid down in Article 4 EEA. According to the legislative history of Act No. 121/1997, the state guarantee fee is paid to the State Treasury to offset the general risk of the State Treasury deriving from the guarantees. This is not reflected in the provisions concerning the guarantee fees, which are based entirely on whether the lender is a domestic entity or a foreign entity. Neither the Act nor the legislative history explains or justifies this difference.

37. The Defendant argues that, prior to the adoption of the contested legislation, the Icelandic authorities had already realized that it was incompatible with the EEA Agreement to provide for different state guarantee fees depending on whether domestic or foreign lenders were involved. To support this argument, the Defendant refers to the official comments on Article 6 in the explanatory report of the bill that later became Act No. 121/1997, wherein it is stated:

> *"This provision proposes a change to the effect that the special 0.0625% quarterly guarantee fee levied on state entities shall also be applicable to their domestic obligations, other than deposits. The credit market has undergone comprehensive changes since this provision was originally implemented through Act No. 65/1988 amending Act No. 37/1961 on State Guarantees, as amended. Funds are now borrowed either from domestic or foreign entities depending on who has the best obtainable terms each time. The discrimination provided for in the present rules between domestic and foreign creditors is questionable in light of the obligations Iceland has undertaken by the EEA Agreement."*

38. The Defendant adds that the discrimination inherent in the Icelandic legislation, laying down the amount of guarantee fee payable on state guarantees, is not based on any provision of the EEA Agreement allowing for a derogation from the basic rule of Article 4 EEA. The Defendant therefore concludes that the

Icelandic rules in question give rise to discrimination on grounds of nationality, contrary to Article 4 EEA.

39. The Defendant goes on to observe that the principle of freedom to provide services embodied in Article 36 EEA also applies in respect of service providers established in an EEA State other than that of the person for whom the services are intended. The Defendant submits that the Icelandic legislation in question must be viewed as a restriction on the freedom to provide services in the financial sector. It is incompatible with Article 36 EEA to subject those who enjoy state guarantees to the payment of different guarantee fees, depending on whether the lenders are established in Iceland or in other EEA States.

40. Furthermore, the Defendant considers that the contested Icelandic legislation on state guarantees is incompatible with the principle of free movement of capital laid down in Article 40 EEA. According to the Defendant, the system of differentiated guarantee fees on state guarantees constitutes a restriction on the free movement of capital and discrimination based on nationality and place of residence.

41. In the Defendant's view, the contested rules are also incompatible with Article 42(1) EEA, inasmuch as they constitute discrimination on grounds of nationality.

42. As regards Article 61 EEA, the Defendant contends that the lower fee payable on state guarantees issued on domestic loans must be considered as aid through state resources, which distorts or threatens to distort competition by favouring domestic lenders and affects trade between EEA States. This aid is therefore incompatible with the functioning of the EEA Agreement.

43. Finally, the Defendant suggests that by not harmonizing the guarantee fees on loans from domestic lenders and lenders from other EEA States, the Icelandic State is in breach of its obligations under Article 3 EEA.

44. On the basis of the above mentioned arguments, The Defendant is of the opinion that the Icelandic system of differing state guarantee fees is incompatible with the EEA Agreement, in particular Articles 3, 4, 36, 40, 42 and 61.

The Government of Iceland

45. The Government of Iceland supports the submissions of the Plaintiff.

The Government of Norway

46. Referring in particular to Sections V and VIII of Annex I to Council Directive 88/361/EEC, the Government of Norway begins by stating that the inflow of capital through a loan from a foreign financial institution must be considered as "movement of capital" for the purposes of Article 40 EEA.

47. In assessing whether the differentiated guarantee premiums at issue constitute a restriction on the movement of capital within the meaning of Article 40 EEA, the Government of Norway first states that a guarantee fee may constitute a restriction on the granting of loans from foreign entities. However, the Government of Norway emphasizes that there must be a connection between the restriction and the movement of capital. In considering whether there is such a connection in the present case, the Government of Norway submits that the main purpose of Article 40 is to address restrictions that relate to the acquisition of assets and to the transfer of the capital itself. The Government of Norway claims that this follows both from Council Directive 88/361/EEC and the judgment of the European Court of Justice in *Bordessa*.[5] Differing guarantee premiums do not fall into either of these categories, but function as an indirect restriction on the free movement of capital, by restricting the freedom to provide cross-border financial services. Referring to the judgments by the European Court of Justice in *Bachmann*[6] and *Safir*[7], the Government of Norway argues that Article 40 EEA does not apply to indirect restrictions which at the same time constitute a direct restriction on one of the other fundamental freedoms. Consequently, the Government of Norway concludes that Article 40 is not applicable in the present case.

48. As regards Article 42 EEA, the Government of Norway is of the opinion that the contested system of state guarantees can be seen as part of the Icelandic domestic rules governing the capital market and the credit system. However, the Government of Norway maintains that since Article 40 EEA is not applicable, the same is true for Article 42 EEA.

49. The Government of Norway considers that the Icelandic system of differentiated guarantee premiums must be assessed in the context of possible restrictions on the freedom to provide services within the meaning of Article 36 EEA.

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5 Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others* [1995] ECR I-361.

6 Case C-204/90 *Hanns-Martin Bachmann* v *Belgian State* [1992] ECR I-249.

7 Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897.

50. The Government of Norway takes the view that the provision of a loan constitutes a service within the meaning of Article 36. To support this view, it refers *inter alia* to Council Regulation 73/183/EEC.

51. The Government of Norway states that one must take a very broad view of what constitutes a measure that may hinder or restrict trade within the internal market. The Government of Norway suggests that the principles laid down by the European Court of Justice in relation to the free movement of goods, *inter alia* in *Dassonville*[8], apply equally to the freedom to provide services.

52. Referring to the judgments by the European Court of Justice in *Safir*[9] and *Commission* v *France*[10], the Government of Norway states that Article 59 of the EC Treaty (now, after amendment, Article 49 EC), which corresponds to Article 36 EEA, precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State.

53. Referring to the judgement by the European Court of Justice in *Van Binsbergen*[11], the Government of Norway observes that distinguishing service providers based on their place of residence is prohibited unless there is an objective justification. On that basis, the Government of Norway concludes that provisions requiring a financial institution to be established in a Member State as a condition for the borrower to benefit from certain fee reductions in that State, operate to deter those seeking a loan from financial institutions established in another Member State, and thus constitute a restriction on the latter's freedom to provide services. The Icelandic system thus constitutes a restriction on the freedom to provide financial services within the meaning of Article 36.

54. The Government of Norway adds that no *de minimis* doctrine is available under Article 36. Even a very small restriction is still a restriction prohibited by the provisions on the freedom to provide services. The principles laid down by the European Court of Justice on the free movement of goods, *inter alia* in *Prantl*[12], should be equally valid in respect of the freedom to provide services.

55. The Government of Norway further adds that it does not exclude the possibility that there may be objective justifications for having a system of

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8 Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837.

9 Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897.

10 Case C-381/93 *Commission of the European Communities* v *French Republic* [1994] ECR I-5145.

11 Case 33/74 *Johannes Henricus Maria van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

12 Case 16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299.

differentiated guarantee premiums, but maintains that no such justification has been presented in the dispute at hand.

56. Referring to the judgments by the European Court of Justice in *Mora Romero*[13] and *Commission* v *Greece*[14], the Government of Norway submits that it is not necessary for the Court to address the question of whether the Icelandic system of differentiated guarantee premiums constitutes a breach of Article 4 EEA, since Article 4 EEA applies independently only to situations where no specific provision prohibiting discrimination is found.

57. As regards Article 61 EEA, the Government of Norway, in substance, contends that there are not enough facts available to assess the compatibility of the system of differentiated guarantee premiums with the state aid provisions.

58. However, the Government of Norway questions whether the disputing parties have any legal interest in the answer to such a question, since it has no bearing on the outcome of the proceedings before the national court. The recipients of any subsidy would be Icelandic lenders, which gain an advantage not accorded to foreign lenders. Neither Icelandic lenders nor foreign lenders are parties to the dispute before the Reykjavik City Court. The Government of Norway therefore submits that the Court should decline to answer the question regarding Article 61 EEA.

59. The Government of Norway, referring *inter alia* to the judgment by the European Court of Justice in *FNCE*[15], adds that a national court cannot rule on the compatibility of the subsidy with the internal market, this being a matter only for the EFTA Surveillance Authority or the Commission of the European Communities.

60. The Government of Norway proposes the following answer to the question:

> *"A system of state guarantees which provides that a borrower, who is entitled to a state guarantee, shall pay a guarantee fee on foreign loans that differs from the guarantee fee payable on domestic loans is not compatible with Article 36 of the EEA Agreement."*

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13 Case C-131/96 *Carlos Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3680.

14 Case 305/87 *Commission of the European Communities* v *Hellenic Republic* [1989] ECR 1461.

15 Case C-354/90 *Féderation Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505.

The EFTA Surveillance Authority

61. The EFTA Surveillance Authority begins by observing that Article 40 EEA corresponds largely to Article 67 of the EC Treaty as it stood before the Treaty on European Union, and that the content of Council Directive 88/361/EEC was reproduced in substance in the new provisions on capital movement inserted into the EC Treaty by the Treaty on European Union as Articles 73b-g.[16] Referring to the importance of homogeneity within the EEA, the EFTA Surveillance Authority submits that the Court must pay due account to the case law of the European Court of Justice relating to Articles 73b-g of the EC Treaty (now Articles 56-60 EC).

62. In relation to Article 40 EEA, the EFTA Surveillance Authority points out that the Annex of Council Directive 88/361/EEC explicitly states that the capital movements listed in the Annex cover operations carried out by any natural or legal person, including operations in respect of the assets or liabilities of Member States or of other public administrations and agencies. Heading VIII of the Annex covers financial loans and credits.

63. Referring to the judgment by the European Court of Justice in *Svensson*[17], the EFTA Surveillance Authority takes the view that the relevant Icelandic rules are liable to dissuade those concerned from approaching credit institutions in other EEA States, since they impose a higher fee on state guarantees in respect of foreign loans than in respect of loans considered to be domestic.

64. The EFTA Surveillance Authority concludes that the Icelandic system of differentiated state guarantee fees constitutes an obstacle to capital movements and is incompatible with Article 40 EEA.

65. The EFTA Surveillance Authority also submits that the differentiation of state guarantee fees is contrary to Article 36. The EFTA Surveillance Authority points out that it is not aware of any grounds for justification. Consequently, it concludes that these rules are incompatible with Article 36 EEA.

66. According to the EFTA Surveillance Authority, Article 42 EEA is not relevant in the present case, since Article 42(1) EEA concerns legislation on the capital market and the credit system, such as rules relating to the liquidity of banks, control of prudential requirements and the organisation of financial markets, and Article 42(2) EEA concerns the public raising of capital, for instance through the issuance of bonds.

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16 Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661; and Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others* [1995] ECR I-361.

17 Case C-484/93 *Peter Svensson and Lena Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.

67. In relation to Article 4 EEA, the EFTA Surveillance Authority, referring to the judgment by the European Court of Justice in *Commission* v *Greece*[18], contends that if a discriminatory state measure is caught by one of the specific provisions of the EC Treaty, there is no need to examine whether the same measure may be caught by the general prohibition against discrimination on grounds of nationality. Consequently, the EFTA Surveillance Authority submits that there is no need to deal with the referred question in so far as it concerns Article 4 EEA.

68. As regards Article 61 EEA, the EFTA Surveillance Authority's principal submission is that there is no need to answer the question regarding this provision, since state aid may not, in any case, be contrary to the specific provisions of the EEA Agreement, hereunder Article 40 EEA. To support this view, the EFTA Surveillance Authority refers to the judgment by the European Court of Justice in *Commission* v *Italy*[19].

69. The EFTA Surveillance Authority adds that an evaluation of whether the Icelandic measures in question constitute aid, is hardly possible, as the reference is short on information, for instance, on the question of whether the relevant measure threatens to distort competition and affects trade between EEA States. However, the EFTA Surveillance Authority states that if the absence of a fee constitutes aid, then the subsequent imposition of a fee, albeit at a lower level than the fee applicable in respect of foreign loans, constitutes a reduction of aid.

70. Alternatively, in the event that the Court considers it relevant to deal with Article 61 EEA, the EFTA Surveillance Authority contends that, under Article 61 EEA, a national judge has no jurisdiction to decide an action for a declaration that aid is incompatible with the EEA Agreement. National courts may establish whether or not a given measure is state aid. However, referring to the judgment by the European Court of Justice in *Steinike*[20], the EFTA Surveillance Authority submits that, if the measure is qualified as state aid, national courts cannot assess the question of whether the aid is in conformity with the EEA Agreement.

71. The EFTA Surveillance Authority proposes the following answer to the question:

> *"Article 40 of the EEA Agreement must be interpreted so as to preclude national measures that provide that a borrower, who is entitled to a State guarantee for loans taken, shall pay a guarantee fee on loans from entities established in another EEA State but not on loans from domestic entities, as well as national*

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18 Case C-305/87 *Commission of the European Communities* v *Hellenic Republic* [1989] ECR 1461.

19 Case 73/79 *Commission of the European Communities* v Italian Republic [1980] 1533.

20 Case 78/76 *Firma Steinike und Weinlig* v *Federal Republic of Germany* [1977] ECR 595.

measures that provide that a borrower, who is entitled to a State guarantee for loans taken, shall pay a higher guarantee fee on loans from entities established in another EEA State than on loans taken from domestic entities."

The Commission of the European Communities

72. Referring to Sections I, VII, VIII and XI of Annex I to Council Directive 88/361/EEC, the Commission of the European Communities considers that the taking of loans by Icelandic residents from residents of other States that are Contracting Parties to the EEA Agreement, is a capital movement for the purposes of Article 40 EEA.

73. The Commission submits that the costs for issuing a bank guarantee such as that at issue, are calculated mainly on the basis of the credit risk and the market risk involved, and will generally not depend on whether the lender is domestic or foreign.

74. The Commission contends that the Icelandic legislation providing for higher fees for state guarantees issued in relation to loans obtained from foreign lenders than loans obtained from domestic lenders, will most likely render the former loans more expensive than the latter loans. Referring to the judgments by the European Court of Justice in *Svensson*[21] and *Trummer*[22], the Commission argues that the Icelandic legislation may dissuade domestic institutions from obtaining loans in other EEA States.

75. The Commission concludes that the Icelandic legislation in question is contrary to Article 40 EEA, since the difference in guarantee fees, depending on whether the lender is domestic or foreign, would constitute a restriction on the free movement of capital between Icelandic residents and residents of other EEA States.

76. The Commission contends that neither Articles 4, 42 or 61 EEA are relevant in this case.

77. The Commission, referring to Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and related case law[23] of the European Court of

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21 Case C-484/93 *Peter Svensson and Lena Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.

22 Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661.

23 Case C-179/90, *Merci convenzionali porto di Genova Spa* v *Siderurgica Gabrielli SpA* [1991] ECR I-5889; Opinion of Mr. Advocate General Tesauro delivered on 23 September 1997 in Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897; Case E-5/98 *Fagtún efh* v *Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær*, Advisory Opinion of 12 May 1999 (not yet published).

Justice and the EFTA Court, takes the view that Article 4 EEA applies only in the absence of provisions prohibiting discriminatory treatment in specific sectors. Consequently, the Commission considers that the relevant Icelandic provision must be dealt with under the specific provisions of Article 40 EEA.

78. According to the Commission, Article 42 is not applicable in this case, since it is concerned with the non-discriminatory application of general rules governing the financial system and capital markets, and not with specific requirements on how fees are charged for credit guarantees. To support this argument, the Commission refers to Articles 2 and 4 of Council Directive 88/361/EEC.

79. In relation to Article 61(1) EEA, the Commission points out that the question of whether the measures at issue involve state aid, depends, *inter alia*, on whether the fees paid in respect of the guarantees represent market premiums. The Commission is of the opinion that the facts available are insufficient to determine that question.

80. The Commission of the European Communities proposes the following answer to the question:

> *"Article 40 of the EEA Agreement precludes the application of national rules such as those at issue in the main proceedings and which provide:*
>
> - *that a borrower, who is entitled to a state guarantee on loans, is required to pay a guarantee fee on a loan from an entity in another Contracting Party to the EEA Agreement but not on a loan from a domestic entity, or ;*
>
> - *that such a borrower is required to pay a guarantee fee which is higher on the former than on the latter."*

Per Tresselt
Judge-Rapporteur