JUDGMENT OF THE COURT

22 February 2002[*]

(Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products)

In Case E-1/01

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 (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

Hörður Einarsson

and

The Icelandic State

on the interpretation of Articles 4, 10 and 14 of the EEA Agreement.

THE COURT,

composed of: Thór Vilhjálmsson, President, Carl Baudenbacher and Per Tresselt (Judge-Rapporteur), Judges,

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

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[*] Language of the Request for an Advisory Opinion: Icelandic.

– the Plaintiff, Hörður Einarsson, hæstaréttarlögmaður (Supreme Court Advocate), representing himself;

– the Defendant, the Icelandic State, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), acting as Agent, assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, 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 Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Richard Lyal, member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

having heard the oral observations of the Plaintiff representing himself, and of the Defendant, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, all represented by their Agents, at the hearing on 25 October 2001,

gives the following

Judgment

I Facts and procedure

1 By a communication dated 4 January 2001, registered at the Court on 11 January 2001, the Héraðsdómur Reykjavíkur referred to the Court, for an Advisory Opinion, several questions on the interpretation of Articles 4, 10 and 14 of the EEA Agreement, in order to enable it to assess the compatibility with those provisions, of a system of differentiated value-added tax (hereinafter VAT) applied under Icelandic law to books in the Icelandic language and books in foreign languages.

2 Those questions were raised in proceedings between Hörður Einarsson and the Government of Iceland, concerning the former's claim for a refund of the difference in VAT paid on the importation of books in foreign languages and the

VAT that would have been applicable if the books had been in the Icelandic language.

3 The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Lög nr. 50/1988 um virðisaukaskatt* (Act No. 50/1988 on Value Added Tax), as amended (hereinafter the "VAT Act").

4 Section 1 of the VAT Act provides that VAT is to be paid to the State Treasury on all domestic transactions, and upon the importation of goods and services, as further provided for therein. Section 2 provides that the duty to pay VAT applies, in principle, to all goods, both new and used.

5 The first paragraph of section 14 of the VAT Act provides that VAT is to be levied at a general rate of 24.5 per cent. The second paragraph provides that VAT on the sale of certain goods and services is to be levied at the lower rate of 14 per cent. The sale of books written in or translated into Icelandic is subject to the lower VAT rate.

6 Section 14 of the VAT Act currently reads:

> "Value Added Tax shall be levied at a rate of 24.5 per cent, and shall accrue to the State Treasury.
>
> Notwithstanding the provision of the first paragraph, Value Added Tax on the sale of the following goods and services shall be levied at a rate of 14 per cent:
>
> 1. ...
> 2. Lease of tourist accommodation and hotel rooms, and other temporary accommodation service.
> 3. ...
> 4. Radio station listener charges.
> 5. Sale of periodicals, daily papers, and national and regional newspapers.
> 6. Sale of books in the Icelandic language, original publications as well as translations.
> 7. Sale of warm water, electricity and fuel oil for heating of buildings, and of water for bathing.
> 8. Sale of food and other goods for human consumption as laid down in further detail by administrative regulation, except sale of sweets, beverages and other goods subject to the Customs Tariff Numbers enumerated in an Appendix to this Act; sale of alcoholic beverages, and sale of milk not pasteurised. Sale and service by restaurants, canteens and similar establishments of prepared food shall however be taxable under the first paragraph of this Section.
> 9. Access to road constructions."

7 Since the VAT Act was first enacted, several amendments have been made regarding the levying of VAT on the sale of books in the Icelandic language. By the adoption of Act No. 119/1989, amending the VAT Act, all books in Icelandic were made exempt from VAT altogether, as was already the case for other printed material in Icelandic.

8 The current rate of VAT applicable to books in Icelandic was introduced pursuant to Act No. 111/1992. Thus, VAT on the sale of all books in Icelandic,

whether original publications or translations, is 14 per cent. Books in foreign languages continue to be subject to the general VAT rate of 24.5 per cent.

9 The Plaintiff, Hörður Einarsson, has on several occasions purchased books from abroad for his personal use. These books have been sent to him by post, with VAT payable on receipt. VAT has been charged at the rate of 24.5 per cent, in accordance with the first paragraph of section 14 of the VAT Act.

10 The case pending before Héraðsdómur Reykjavíkur concerns VAT levied on books imported from the United Kingdom and Germany. Upon importation of the books, and in accordance with two customs declarations of 26 July 1999 and one of 11 August 1999, the Plaintiff paid a total of ISK 3 735 VAT, representing 24.5 per cent of the purchase price.

11 In a letter dated 21 May 1999 to the Minister of Finance, the Plaintiff objected to the application of different rates of VAT on books in foreign languages and books in Icelandic. In a letter dated 16 July 1999, the Ministry of Finance informed the Plaintiff that it did not accept the objections raised.

12 Thereafter, the Plaintiff made a complaint to the Commissioner of Customs in Reykjavík and, subsequently, to the State Customs Board. The Plaintiff's complaints were rejected in both instances. The State Customs Board rendered its decision on 22 December 1999.

13 The Plaintiff then brought proceedings against the Icelandic State before the Héraðsdómur Reykjavíkur. In the proceedings, the Plaintiff has questioned whether the Icelandic VAT system for books is compatible with the EEA Agreement.

14 By judgment rendered on 27 November 2000, Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

> *1. Is it compatible with EEA law, in particular Articles 14 and 10 EEA, or, as the case may be, Article 4 EEA, that a value-added tax (VAT) on books, imposed in accordance with Icelandic law, is higher (24.5 per cent) on books in foreign languages than on books in the Icelandic language (14 per cent), when books in Icelandic are generally published in Iceland, while books in other languages are generally published in other countries, including other EEA countries?*
>
> *2. In particular, is (a) Article 14 EEA to be understood in the sense that books in Icelandic and books in other languages are similar products within the meaning of that provision, or (b) different taxation on books according to language, in the manner described above, likely to afford indirect protection to domestic book publishing?*

3. Can the difference in the VAT percentage levied be justified by the aim of the Icelandic authorities to enhance the position of the Icelandic language through a lower rate of VAT charged on books in Icelandic?

4. Does Iceland's power to levy VAT prevent the application of EEA rules, in particular Articles 14 and 10 EEA, in the present case?

5. If, following the answers to the above questions, the rules regulating value-added tax on books are deemed incompatible with the EEA Agreement, do the EEA Agreement or the rules deriving therefrom contain any provisions as to what rules are to be applied in cases of conflict between national law and rules deriving from the EEA Agreement? [1]

15 Reference is made to the Report for the Hearing for an account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

II Findings of the Court

The fourth question

16 By its fourth question, which the Court finds must be examined first, the Héraðsdómur Reykjavíkur seeks to ascertain whether the power of an EEA State to levy VAT prevents the application of EEA rules.

17 The Court notes that, as a general rule, the tax system of an EEA State is not covered by the EEA Agreement. EEA law does not restrict the freedom of each EEA State to establish a tax system that differentiates between products on the basis of objective criteria (see Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report 74, at paragraph 34). However, such differentiation is only compatible with EEA law if it pursues objectives which are themselves compatible with the requirements of the EEA Agreement, and if the particular rules are such as to avoid any form of discrimination, direct or indirect, against products imported from other EEA States or any form of protection of competing domestic products (see Case C-213/96 *Outokumpu* [1998] ECR I-1777, at paragraph 30).

18 The answer to the fourth question must therefore be that the power of an EEA State to levy VAT does not exclude the application of EEA rules.

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[1] The translation has been adjusted from the text that appears in the Report for the Hearing.

The first and second questions

19 By its first and second questions, the Héraðsdómur Reykjavíkur is essentially asking whether Articles 4, 10 and 14 EEA preclude an EEA State from levying VAT on books in the language of that EEA State at a lower rate than on books in other languages.

20 The first question relates to both Articles 10 and 14 EEA. It follows from the case-law of the Court of Justice of the European Communities that the provisions of the EC Treaty corresponding thereto are mutually exclusive (see, inter alia, Case C-28/96 *Fazenda Pública* v *Fricarnes* [1997] ECR I-4939). The same must apply with regard to Articles 10 and 14 EEA. A charge that forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, falls within the scope of Article 14 EEA (see Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085, at paragraph 20). Consequently, the contested provisions of the VAT Act must be dealt with under Article 14 EEA.

21 Article 14 EEA provides:

> "No Contracting Party shall impose, directly or indirectly, on the products of other Contracting Parties any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Contracting Party shall impose on the products of other Contracting Parties any internal taxation of such a nature as to afford indirect protection to other products."

22 The general purpose of Article 14 EEA is to guarantee the free movement of goods between the EEA States under normal conditions of competition by eliminating all forms of protection which may result in the application of internal taxation in a manner which discriminates against products from other EEA States, and to guarantee that internal taxation is neutral for the purposes of competition between domestic and imported products (see Case C-166/98 *Socridis* v *Receveur Principal des Douanes* [1999] ECR I-3791, at paragraph 16).

23 The Court finds it appropriate first to consider whether the contested provision of the VAT Act is contrary to the second paragraph of Article 14 EEA.

24 As the Court of Justice of the European Communities stated in its judgment in Case 184/85 *Commission* v *Italy* [1987] ECR 2013, at paragraph 11, with regard to the corresponding provision of the EC Treaty, the function of that provision is to cover all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph of Article 14, are nevertheless in competition with each other, even if only partial, indirect or potential.

25 In determining whether products are in competition for the purposes of the prohibition laid down in the second paragraph of Article 14, the Court observes that it is not disputed that many of those who read Icelandic are also able to read certain other languages. At least for some groups of readers, books in different languages constitute alternatives. This observation applies generally, but will be particularly pertinent as regards certain specialised categories of books.

26 Moreover, there are important categories of books in which the textual contents may be a minor element compared with other content matter, such as illustrations, art reproductions, maps and tables. Even non-bilingual members of the public may have use of and benefit from such books in a foreign language.

27 The Court concludes from the foregoing that books in Icelandic and books in foreign languages are at least in partial competition with each other.

28 That being so, it is necessary to consider whether tax rules such as those at issue in the main proceedings afford indirect protection to domestic products within the meaning of the second paragraph of Article 14 EEA.

29 The contested national rule providing for a preferential VAT rate on books in Icelandic does not distinguish between books produced in Iceland and books produced abroad. It applies equally to all books written in Icelandic or translated into that language, regardless of where they are produced and published, and regardless of the nationality or seat of the producer and publisher.

30 Moreover, the Court notes that general trends in economic globalisation and technological developments are making it increasingly difficult to determine whether a product is wholly domestic. Publishers regularly produce books for different markets in different languages. The mere translation of the text into a different language may constitute a minor contribution to the final product. The foreign element may, in value, be equal to, or even greater than, the domestic element. To that extent, any protective effect of the differential VAT rates would also work in favour of foreign publishers, producers and other holders of rights to the original material.

31 The Court notes from the documents forwarded to it by the Héraðsdómur Reykjavíkur and from the written and oral observations presented by the parties, that most of the books in Icelandic that are subject to the preferential VAT rate, are produced in Iceland, and that books in foreign languages that are subject to the higher, regular, VAT rate, are chiefly imports.

32 From the observations of the Defendant, it appears that the primary objective of the contested VAT rule is to provide a basis for reduced prices on books in Icelandic in order to support the national book industry, by making books in Icelandic more affordable and competitive, and thus enhance the ability of the market to sustain a literary culture in the Icelandic language. This indicates that the rule is intended to have protective effect, and confirms the incompatibility

with the second paragraph of Article 14 EEA (see Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, at paragraph 22).

33 The Defendant has submitted that, since books in Icelandic are considerably more expensive than books in other languages, the difference in VAT rates does not significantly affect the difference in prices and, therefore, does not, in fact, have any protective effect. In support of that contention, the Defendant has referred to the judgment in Case 356/85 *Commission* v *Belgium* [1987] ECR 3299.

34 The Court notes that a 10.5 per cent difference in VAT rates is likely to affect the competitive relationship between books in Icelandic and books in other languages. Consideration must be given to the various segments of the book market. Indirect protection with regard to one segment of the book market is sufficient for the prohibition in the second paragraph of Article 14 EEA to apply.

35 From the above considerations, and on the basis of the information before it, the Court finds that the application of different VAT rates for books will imply that there is a protective effect within the meaning of the second paragraph of Article 14 EEA when the rate applied for books in the national language is lower than that applied for books in foreign languages.

36 The Court, therefore, concludes that a national provision of an EEA State providing that books in the language of that EEA State is subject to a lower value-added tax than books in foreign languages, is incompatible with the second paragraph of Article 14 EEA.

37 Based on the abovementioned finding, it is not necessary to consider whether the preferential tax treatment of books in Icelandic is contrary to the first paragraph of Article 14 EEA.

38 Moreover, it is not necessary to examine whether a national provision such as that contested in the main proceedings, is contrary to the general prohibition of discrimination on grounds of nationality set out in Article 4 EEA, as that provision applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 *Íslandsbanki-FBA*, judgment of 14 July 2000, not yet reported, at paragraphs 35 and 36).

The third question

39 By its third question, the Héraðsdómur Reykjavíkur is essentially asking whether the preferential tax treatment of books in Icelandic may be justified on grounds relating to the public interest in enhancing the position of the national language.

40 The Defendant and the Government of Norway have argued that under EEA law, there is a basis for objective justification of the Icelandic application of different

rates of VAT on books. The objective is to sustain and protect the Icelandic language, which forms an essential part of Iceland's cultural heritage and contributes materially to the formation of the Icelandic identity. It has been argued that this objective must be regarded as permitting derogation from Article 14 EEA.

41 The Court acknowledges that support for the national language may be a cultural goal of high priority. However, the Court must examine whether, under EEA law, the pursuit of that objective would provide sufficient grounds for justification of a national tax rule that would otherwise fall under the prohibition contained in Article 14 EEA.

42 Article 13 EEA has been invoked as a possible legal basis for such justification. That argument must, however, be rejected. The Court recalls that the EEA rules on the free movement of goods are stricter than those on internal taxation. It follows from the wording and from the purpose of Article 13 EEA that it is only applicable as justification for derogations from Articles 11 and 12 EEA, relating to quantitative restrictions on imports and exports and measures having equivalent effect.

43 It has further been suggested that Article 6(3) TEU might offer a basis for derogation, since language is central to the maintenance of the national identity of a State. The Court notes that the EEA Agreement contains no corresponding provision. Since the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it must be assumed that this discrepancy is intentional. The Court cannot base its reasoning on the analogous application of Article 6(3) TEU in the instant case.

44 The Joint Declaration on Cultural Affairs, annexed to the Final Act to the EEA Agreement, has also been invoked in this regard. The Court notes that this Joint Declaration states that the Contracting Parties are mindful that the establishment of the fundamental freedoms will have a significant impact in the field of culture. On that basis, the Contracting Parties declare their intention to strengthen and broaden cooperation in the area of cultural affairs in order to contribute to a better understanding among the peoples of a multicultural Europe, and to safeguard and further develop the national and regional heritage that enriches European culture by its diversity. The Court cannot see that these formulations can provide a concrete basis for national derogations from the important provisions of Article 14 EEA.

45 Finally, it has been suggested that the intentions reflected in the Joint Declaration correspond to the objectives of Article 151(4) EC, and that, by analogy, this provision of the EC Treaty, introduced by the Treaty of Amsterdam, may be relied upon by the EFTA Court in the present case. The Court considers that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis.

46 Based on the above considerations, the answer to the third question must therefore be that a national provision of an EEA State providing that books in the language of that EEA State is subject to a lower value-added tax than books in foreign languages, cannot be justified on grounds relating to the public interest of enhancing the position of the national language.

The fifth question

47 By its fifth question, the Héraðsdómur Reykjavíkur essentially seeks to ascertain whether, under EEA law, a provision of the main part of the EEA Agreement is to prevail over a conflicting provision of national legislation.

48 As a preliminary point, the Court notes that, in proceedings brought under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, it is not for the EFTA Court to rule on the interpretation of provisions of national legislation (see Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraph 78).

49 The Court recalls first its findings in Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Court Report 95, at paragraphs 58 and 59, with regard to the protection of rights for individuals and economic operators foreseen by the EEA Agreement. The concerns underlying the findings in that case are also germane for the consideration of the present issue.

50 The Court observes that the main part of the EEA Agreement, including Article 14 EEA, has been made part of Icelandic law by the adoption of *Lög nr. 2/1993 um Evrópska efnahagssvæðið* (Act No. 2/1993 on the European Economic Area, hereinafter the "EEA Act"). Section 3 of the Icelandic EEA Act provides that "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon". In presenting the Bill for this Act to Parliament, the Government stated that this was intended as a special rule of interpretation, and that it would be limited by the provisions of the Icelandic Constitution.

51 Protocol 35 to the EEA Agreement provides direction for the resolution of conflicts between rules of EEA law and rules of national law. In adopting that Protocol, the EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflict between implemented EEA rules and other statutory provisions. The Court understands that Section 3 of the Icelandic EEA Act has been enacted to fulfil that undertaking. In the present proceedings, the Court has heard argument by the Plaintiff raising doubt about the sufficiency of Section 3 in that respect. In keeping with what was stated in paragraph 48 above, consideration and interpretation of that provision fall to the national court.

52 The preamble to Protocol 35 to the EEA Agreement makes clear that the Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA, and that the homogeneity of the EEA will have to be achieved through national procedures. It follows from that preamble and from the wording of Protocol 35, that the undertaking assumed under that Protocol relates only to EEA rules that have already been implemented in national law. As noted above, the main part of the EEA Agreement has been made part of national law. It is therefore implemented within the meaning of Protocol 35.

53 The undertaking assumed under Protocol 35 cannot, however, extend to every provision of the main part of the EEA Agreement. It relates only to those provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. As the Court has previously held, such is the case when the provision in question is unconditional and sufficiently precise (see *Restamark*, cited above, paragraph 77).

54 Article 14 EEA is identical in substance to Article 90 EC. The latter Article has been considered to be unconditional and sufficiently precise (see Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205). In view of the homogeneity objective and in order to ensure equal treatment of individuals throughout the EEA, Article 14 EEA must be held to fulfil the criteria of being unconditional and sufficiently precise.

55 The answer to the fifth question must therefore be that where a provision of national law is incompatible with Article 14 EEA, and that Article has been implemented in national law, a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail.

III Costs

56 The costs incurred by the Government of Liechtenstein, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Héraðsdómur Reykjavíkur by a judgment of 27 November 2000, hereby gives the following Advisory Opinion:

1. The power of an EEA State to levy value-added tax does not exclude the application of EEA rules.

2. A national provision of an EEA State providing that books in the language of that EEA State are subject to a lower value-added tax than books in foreign languages, is incompatible with Article 14 EEA.

3. Such a national provision cannot be justified on grounds relating to the public interest of enhancing the position of the national language.

4. When a provision of national law is incompatible with Article 14 EEA, and that Article has been implemented in national law, a situation arises which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 February 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President