Case E-29/15-17

REPORT FOR THE HEARING
in Case E-29/15

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Iceland (*Hæstiréttur Íslands*), in a case pending before it between

Sorpa bs.

v

The Icelandic Competition Authority (*Samkeppniseftirlitið*)

concerning the interpretation of the EEA Agreement, and in particular Article 54 thereof.

I Introduction

1. By a letter dated 9 December 2015, registered at the Court as Case E-29/15 on 10 December 2015, the Supreme Court of Iceland (*Hæstiréttur Íslands*) requested an Advisory Opinion in the case pending before it between Sorpa bs. ("Sorpa") and the Icelandic Competition Authority (*Samkeppniseftirlitið*) ("the Competition Authority"). By its request, the Supreme Court of Iceland referred four questions concerning the interpretation of Article 54 EEA.

2. The case before the referring court concerns an action for annulment of a decision of 18 March 2013 by the Icelandic Competition Appeals Committee (*Áfrýjunarnefnd samkeppnismála*) upholding a decision by the Competition Authority to impose a fine on Sorpa for abusing its dominant position on the markets for waste acceptance and waste disposal in the metropolitan area of Reykjavík.

II Legal background

EEA law

3. Article 54 EEA reads as follows:

An abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be

prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

4. Article 59 EEA reads as follows:

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measure to the States falling within their respective territory.

National law

The Competition Act

5. Article 11 of the Competition Act No. 44/2005 (“the Competition Act”) was enacted in order to fulfil Iceland’s obligation under the EEA Agreement to implement Article 54 EEA.

6. Article 11 of the Competition Act reads as follows:

Any abuse by one or more undertakings of a dominant position is prohibited.

Abuse according to Paragraph 1 may, inter alia, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Waste Disposal Act

7. The Waste Disposal Act No 55/2003 ("the Waste Disposal Act") was adopted, inter alia, to give effect in Icelandic law to rules corresponding to Directive 75/442/EEC on waste,[1] Directive 1999/31/EC on the landfill of waste,[2] Directive 2000/53/EC on end-of-life vehicles[3] and Directive 2000/76/EC on the incineration of waste.[4]

8. According to Article 4(5) of the Waste Disposal Act, at the material time, municipalities were to determine arrangements for collecting domestic and industrial waste produced in their municipal area and they were responsible for transportation of domestic waste. They were to ensure that collection and acceptance centres were operated in their area. Under Article 5 of the Waste Disposal Act, the Environment Agency of Iceland granted licences for waste acceptance centres, which could not be operated without such a licence. Articles 6 and 8 of the Waste Disposal Act specified that licences should be issued to private as well as public entities.

9. Pursuant to Article 11(1) of the Waste Disposal Act, the entity operating a disposal site, whether this was a municipality, a municipal cooperative undertaking or a private entity, was obliged to charge a fee for the disposal of waste. As regards all other types of waste management, Article 11(2) allowed the municipality to

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[1] Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

[2] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L 182, p. 1.

[3] Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, OJ 2000 L 269, p. 34.

[4] Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ 2000 L 332, p. 91.

charge a fee. According to Article 11(3), fees charged by a municipality or a municipal cooperative undertaking could not exceed the costs incurred by it for the management of waste and the activities related thereto compatible with the aims of the Waste Disposal Act.

The Local Government Act

10. Article 98 of the Local Government Act No 8/1986 (“the Local Government Act”) provided, at the material time, that municipalities could enter into an agreement establishing a cooperative undertaking for the performance of specific functions.

11. Pursuant to Article 98 of the Local Government Act, that agreement had to specify, in particular, the share owned by each municipality in the cooperative undertaking, the functions which the cooperative undertaking was to perform, as well as the arrangements for the election of its board and the term of appointment of the board members. That agreement also had to contain provisions relating to the authority of the board to undertake commitments binding upon its owners, and the circumstances in which the municipal councils of the member municipalities were to decide on the cooperative undertaking’s affairs. It also had to include provisions authorising the cooperative undertaking to enter into contracts with either private entities or certain owners under which those private entities or individual owners assumed specific aspects of the cooperative undertaking’s functions. Further, it had to include provisions pertaining to the withdrawal of its owners from the cooperative undertaking. Finally, Article 98 of the Local Government Act provided that the owners were individually liable for the financial obligations undertaken by the cooperative undertaking. However, *inter partes* their liability was proportional to their population.

III Facts and procedure

Background

12. Sorpa was established on 15 February 1988 as a cooperative undertaking by an agreement (“the establishment contract”) between the City of Reykjavík and the municipalities of Kópavogur, Garðabær, Bessastaðahreppur, Hafnarfjörður, Mosfellsbær and Seltjarnarnes (Sorpa’s “owners”), pursuant to the Local Government Act No 8/1986. The name “Sorpa” is an abbreviation for “Sorpeyðing höfuðborgarsvæðisins”, which means “Metropolitan Area Waste Disposal”. Each of those municipalities owns a share in Sorpa. However, since the municipalities of Garðabær and Bessastaðahreppur have merged, Sorpa now has only six owners.

13. Sorpa is active in the waste management sector, including waste recycling. On 11 June 2001, two licences were issued to Sorpa for the operation of an acceptance, sorting and bundling centre for waste at Gufunes and a landfill site at Álfsnes, both situated in Reykjavík. Those licences were to run until the end of 2012.

14. Sorpa is not engaged in waste collection, either from homes or from businesses.

15. Sorpa's functions, as defined by the establishment contract, consist in providing and operating landfill sites, building and operating acceptance centres, transporting waste from such centres, producing and selling fuel and energy from waste, and processing and selling substances derived from waste for recycling. Sorpa's functions also include collaboration with companies active in the waste management sector, following technical developments in that sector, seeing to the disposal of hazardous waste, developing new methods for extracting value from waste materials, and promoting its projects. Sorpa is also engaged in advocating the importance of giving proper consideration to environmental issues in the handling of waste and the preparation of the regional plans provided for by national legislation. Moreover, the establishment contract provides that its owners may entrust Sorpa with other tasks at any given time.

16. The establishment contract provides that Sorpa's board of directors consists of one representative per member municipality. The board approves the annual budget and the project schedule, as well as all "major agreements that are made and are not considered part of the day-to-day management functions of the general manager". The board also appoints the general manager. It sets the amount of the fees to be paid for the services provided by the cooperative undertaking.

17. Sorpa's sources of income include, according to the establishment contract, the fees received "for weighed-in waste accepted from the waste disposal services of the relevant municipality and from private entities". They also include the revenues generated by the sale of substances derived from waste recycling and the sale of energy produced from waste, as well as the fees received for the acceptance and the disposal of hazardous waste substances and the dividends received from undertakings of which Sorpa is a shareholder.

18. Sorpa's expenses consist, inter alia, of dividends paid to its owners. The establishment contract provides that those dividends may take the form of "owner's discounts". Sorpa does not charge its owners the full amount of the fee that it sets for accepting waste at the Gufunes centre, and which covers only the costs incurred. Instead, Sorpa grants its owners a discount on such fee. In 2010, the owner's discount amounted to 18 % as regards domestic waste.

19. Customers other than Sorpa's owners are granted "customer discounts", whose amount varies in accordance with the monthly turnover achieved with the customer. As from 1 December 2009, customer discounts amounted to 3 % for a monthly turnover between ISK 500 000 and ISK 1 000 000; 5 % for a monthly turnover between ISK 1 001 000 and ISK 5 000 000; and 7% for a monthly turnover in excess of ISK 5 million.

20. Gámaþjónustan hf. ("Gámaþjónustan") is a private company active in the waste management and recycling business. It runs an acceptance and sorting centre at Berghella 1 in Hafnarfjörður, under an operating licence issued on 18 February

2011 and valid for 16 years. The waste treated at Berghella 1 originates, inter alia, from the municipality of Hafnarfjörður, an owner of Sorpa.

21. Gámaþjónustan has also collected waste for the municipality of Hafnarfjörður since 2003.

22. Gámaþjónustan's centre at Berghella 1 competes with Sorpa's acceptance and sorting centre at Gufunes. In 2009, the Gufunes centre accounted for 68.2 % by income and 67.3 % by volume of the market in the metropolitan area of Reykjavík, while the market share of the Berghella 1 centre amounted to 31.8 % by income and 32.7 % by volume during the same period. In 2010, while the Gufunes centre held 72.6 % of the market by income and 68.8 % by volume, the Berghella 1 centre accounted for 27.4 % of the market by income and 31.2 % by volume.

23. Gámaþjónustan does not run any landfill sites. Only one landfill site is operated in the metropolitan area: Sorpa's centre at Álfsnes. Therefore, Gámaþjónustan disposes of the waste that, after treatment at Berghella 1, cannot be recycled, by depositing it at Álfsnes.

24. On 10 December 2009, Gámaþjónustan lodged a complaint against Sorpa with the Competition Authority.

25. According to the complaint, Sorpa had engaged in discriminatory pricing, thereby infringing, in particular, Article 11 of the Competition Act. First, Sorpa granted its owners, inter alia the municipality of Hafnarfjörður, favourable discounts on the fee for waste acceptance at its Gufunes centre. Therefore, when in 2009 the municipality of Hafnarfjörður launched a tender for the collection of domestic waste, whereby tenderers could choose which acceptance centre they would deliver the waste to, Gámaþjónustan was placed at a disadvantage in comparison with Sorpa. Second, by contract of 22 May 2009, Sorpa granted favourable discounts not only to its owners but also to Sorpstöð Suðurlands bs. ("Sorpstöð Suðurlands"), a cooperative undertaking established by 13 municipalities located outside Sorpa's operating area. Such discounts amounted to between 12 % and 45 % for waste delivered to Sorpa's centre at Gufunes. Consequently, Gámaþjónustan requested the Competition Authority to prohibit Sorpa from granting such favourable discounts. Alternatively, it requested the Competition Authority to order Sorpa to grant it similar discounts.

26. By decision of 21 December 2012, the Competition Authority found that Sorpa had infringed Article 11 of the Competition Act.

27. The Competition Authority rejected Sorpa's argument that basic services of waste acceptance and treatment, prescribed by law and performed using official powers, fell outside the scope of the Competition Act. The Competition Authority also rejected Sorpa's argument that, since it was not seeking profits, it could not be regarded as an undertaking within the meaning of the Competition Act.

28. The Competition Authority defined two relevant markets: the market for waste acceptance, including the sorting and bundling of waste; and the market for waste disposal. Both markets covered the metropolitan area of Reykjavík. As regards the market for waste acceptance in the metropolitan area of Reykjavík, Sorpa held a 65-75 % market share through its Gufunes centre, while Gámaþjónustan held a 25-35 % share through its Berghella 1 centre. Therefore, Sorpa held a dominant position on that market. As regards the market for waste disposal in the metropolitan area of Reykjavík, Sorpa was the only operator through its landfill site at Álfsnes. Sorpa was thus in a dominant position on that market too.

29. The Competition Authority found that, in granting its owners favourable discounts on the fee for waste acceptance at its Gufunes centre and in granting Sorpstöð Suðurlands substantial discounts on the same fee, Sorpa had infringed Article 11(2)(c) of the Competition Act. It imposed on Sorpa a fine of ISK 45 million.

30. On 17 January 2013, Sorpa brought an appeal against the Competition Authority's decision to the Competition Appeals Committee, which upheld the decision by ruling of 18 March 2013.

31. On 11 September 2013, Sorpa brought an action before Reykjavík District Court, seeking the annulment of the decision of the Competition Appeals Committee. That action was dismissed on the merits by judgment of 16 January 2015.

32. On 15 April 2015, Sorpa brought an appeal against the judgment of Reykjavík District Court (*Héraðsdómur Reykjavíkur*) to the Supreme Court of Iceland. On 10 December 2015, the Court received a request from the Supreme Court of Iceland for an Advisory Opinion.

IV Questions

33. The following questions have been referred to the Court:

> **1. Is a municipality in a Contracting Party to the EEA Agreement which carries out, in its jurisdiction, the management of waste in conformity with the provisions of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC, an undertaking in the sense of Article 54 of the Agreement? In this connection, the Court asks whether, when this question is answered, the following are of significance: a) That the treatment of waste is among the legally-prescribed functions of municipalities according to the laws of the relevant Contracting Party. b) That competition may exist over the treatment of waste between private entities and public entities under the laws of the Contracting Party. c) That it is prescribed, in the laws of the Contracting Party, that in this field, a municipality**

may not charge a higher fee than covers the cost of the treatment of waste and related activities.

2. If the answer to the first question is in the negative, does the same apply to a cooperative undertaking which is operated by two or more municipalities and attends, on their behalf, to the management of waste in their operating areas?

3. When assessing whether Article 54 EEA applies to an activity of a municipality or a cooperative undertaking, is it of significance that the laws of the Contracting Party in question contain provisions authorising or obliging public bodies to perform the activity? Is it compatible with the EEA Agreement that a Contracting Party exempts, through legislation, certain activities by public entities from the scope of competition law?

4. Can municipalities which are the owners of a cooperative undertaking such as the one referred to in Question 2 be considered as its trading parties in the sense of Article 54(2)(c) EEA? And if so, does a discount granted to the owners which is not available to other parties constitute placing other parties at a disadvantage in the sense of the same provision?

V Written observations

34. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

— Sorpa, represented by Hörður Felix Harðarson, Supreme Court Attorney;

— the Competition Authority, represented by Gizur Bergsteinsson, Supreme Court Attorney;

— the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler, Clémence Perrin, and Øyvind Bø, Members of its Department of Legal & Executive Affairs, acting as Agents; and

— the European Commission (“the Commission”), represented by Henning Leupold and Ioannis Zervas, members of its Legal Service, acting as Agents.

VI Summary of the arguments submitted and answers proposed

Sorpa

35. As regards the first question, Sorpa states that, according to Article 1 of Protocol 22 to the EEA Agreement and the case law of the Court of Justice of the

European Union ("the ECJ")[5], the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Public entities may constitute undertakings. However, when they act in the exercise of public powers, they are not carrying out an economic activity.

36. Sorpa submits that waste management is not an economic activity, since under Icelandic law it is usually carried out by municipalities, it is performed in the public interest and serves important environmental purposes.

37. Sorpa notes that the function of waste collection and disposal has been assigned to municipalities by the Local Government Act, and municipalities are thus obliged to carry out such function. Moreover, the tasks of waste management are defined by Icelandic statutes and regulations as well as the national plans of the Environment and Food Agency on handling of waste, and they are limited to the most basic tasks of waste collection and disposal. Therefore, municipalities have no leeway in determining their exact duties. Sorpa argues that it provides only the tasks assigned to municipalities by law. Other services of waste management, such as the collection of non-domestic waste and the rental of containers, are opened to competition. However, Sorpa does not provide such services.

38. Moreover, Sorpa maintains that, in order to determine whether the activity carried out by a public entity is economic, it is irrelevant whether that activity may be performed by a private company.[6] Therefore, it is of limited significance that the municipalities do not hold exclusive rights to perform the services at stake.

39. Finally, Sorpa contends that its decision to take advantage of the authorisation laid down in Article 11 of the Waste Disposal Act to request a fee for the services it provides is irrelevant. Since the amount of such a fee cannot exceed the costs of the services provided it cannot be deduced that Sorpa seeks economic gain. Furthermore, if municipalities were subject to competition rules when deciding to levy a fee for the provision of waste management services, they would be unable to achieve the objectives of the Waste Disposal Act, for instance, they would not be in a position to reduce charges for certain categories of waste in order to encourage greater recovery.

40. As regards the second question, Sorpa claims that there is no reason to make a distinction between municipalities and municipal cooperatives. The Local Government Act provides that municipalities may establish cooperatives to perform the mandatory tasks entrusted to municipalities and which they would otherwise have to perform themselves. Therefore, the services at stake, whether

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[5] Reference is made to judgments in *Klaus Höfner and Fritz Elser* v *Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraphs 21 to 23, and *Diego Calì & Figli Srl* v *Servizi ecologici porto di Genova SpA*, C-343/95, EU:C:1997:160, paragraphs 22 and 23.

[6] Reference is made to Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* [2008] EFTA Ct. Rep. 62, paragraph 80.

provided by the municipalities or by a cooperative set up by those municipalities, do not constitute an economic activity.

41. As regards the third question, Sorpa submits that Article 54 EEA does not apply where the anti-competitive behaviour under consideration is required by national legislation.[7] In the present case, when performing the waste management services at issue, Sorpa and its owners have restricted autonomy, since they have to comply with national statutes and regulations. Therefore, Article 54 EEA is not applicable.

42. Moreover, Sorpa claims that the national legislation exempting certain activities by public entities from the scope of competition rules is compatible with the EEA Agreement. Under Article 59(2) EEA, undertakings entrusted with the operation of services of general economic interest are subject to competition rules if (i) the application of those rules does not obstruct the performance of the tasks assigned to them, and (ii) the development of trade is not affected to such an extent as would be contrary to the interest of the Contracting Parties. Waste management is to be regarded a service of general economic interest.[8] According to case law, for undertakings entrusted with services of general economic interest to fall outside the scope of competition rules, the application of those rules does not have to threaten their survival. It is sufficient that the application of those rules would obstruct the performance of the services at stake under economically acceptable conditions.[9] In the present case, if the municipalities were bound by competition rules, their ability to achieve the objectives of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC would be seriously jeopardised. Furthermore, the non-application of competition rules does not prejudice the development of trade.

43. As regards the fourth question, Sorpa submits that its owners cannot be regarded as its “trading parties” within the meaning of Article 54(2)(c) EEA, since Sorpa is a mere extension of its owners. Therefore, even if the discounts granted by Sorpa to its owners were to be regarded as discriminatory, they do not fall within the scope of Article 54(2)(c) EEA.

44. Moreover, in Sorpa’s view, Article 54(2)(c) EEA applies to conduct liable to restrict competition between the business partners of the dominant undertaking.[10] In the present case, Sorpa’s owners are not competing against

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[7] Reference is made to judgments in *Altair Chimica SpA* v *ENEL Distribuzione SpA*, C-207/01, EU:C:2003:451, paragraph 30, and *Commission of the European Communities and French Republic* v *Ladbroke Racing Ltd* and *France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33.

[8] Reference is made to the judgment in *Sydhavnens Sten & Grus ApS* v *Københavns Kommune*, C-209/98, EU:C:2000:279, paragraph 75.

[9] Reference is made, in particular, to the judgment in *Criminal proceedings against Paul Corbeau*, C-320/91, EU:C:1993:198, paragraph 16.

[10] Reference is made to judgments in *Portuguese Republic* v *Commission of the European Communities*, C-163/99, EU:C:2001:189, paragraph 52, and *British Airways plc* v *Commission of the European Communities*, C-95/04 P, EU:C:2007:166, paragraphs 143 and 144.

Gámaþjónustan. Therefore, by receiving lower discounts than Sorpa's owners, Gámaþjónustan was not placed "at a competitive disadvantage" vis-à-vis Sorpa's owners. Furthermore, Gámaþjónustan was not placed "at a competitive disadvantage" vis-à-vis Sorpa by the terms of the tender for the collection of household waste in the municipality of Hafnarfjörður. That municipality, an owner of Sorpa, simply decided to use its own facilities for the management and disposal of waste.

45. Sorpa therefore proposes that the Court should answer the questions as follows:

> *1. A municipality which carries out the management of waste in its jurisdiction, as provided for by law and regulation and in conformity with the provisions of Directives 75/442/EEC, 1999/31/EC and 2000/76/EC, is not an undertaking in the sense of Article 54 of the EEA Agreement.*
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> *2. A co-operative undertaking, operated by two or more municipalities, which attends to the management of waste on behalf of the municipalities in their operating areas and in conformity with Directives 75/442/EEC, 1999/31/EC and 2000/76/EC is not an undertaking in the sense of Article 54 of the EEA Agreement.*
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> *3. Article 54 EEA applies to anti-competitive conduct engaged in by undertakings by their own initiative. If such conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possible activity, Article 54 EEA does not apply.*
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> *4. It is compatible with the EEA Agreement that a Contracting Party exempts from the rules of competition, through legislation, a public entity which is entrusted with the operation of services of general economic interests, if the application of such rules would otherwise obstruct the performance, in law or in fact, of the tasks assigned to the public entity, and provided that development of trade is not affected to such an extent as would be contrary to the interests of the Contracting Parties.*
>
> *5. Municipalities which are the owners of a co-operative undertaking, such as the one referred to in question two, cannot be considered as its trading parties in the sense of Article 54(2)(c). A discount granted by such co-operative undertaking to its owners does not constitute placing other parties at a disadvantage in the sense of the same provision.*

The Competition Authority

46. As regards the first question, the Competition Authority submits that pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking shall

be any entity carrying out activities of a commercial and economic nature. According to settled case law, any entity engaged in an economic activity may be regarded as an undertaking, regardless of its legal status and the way in which it is financed. In that regard, any activity consisting in offering goods and services on a given market is an economic activity.[11] Moreover, an entity vested with official powers may be regarded as an undertaking within the meaning of competition rules.[12]

47. In the present case, the Competition Authority notes that Directives 75/442/EEC, 1999/31/EC and 2000/76/EC make no distinction between public and private entities as regards the permit requirements for carrying out waste treatment and consequently contends that public entities compete with private companies for the provision of waste management services. In its view, the call for tenders by the municipality of Hafnarfjörður evidenced that such competition exists, since tenderers could choose which acceptance and sorting centre they would use. Icelandic law also provides for competition between public entities and private companies for the provision of waste management services. Competition between municipalities and private companies is a clear indication that such services are to be regarded as an economic activity.[13]

48. The Competition Authority submits that entities whose controlling shareholder is a municipality or which have been granted exclusive rights have been held to be undertakings within the meaning of Article 102 TFEU.[14]

49. According to the Competition Authority, it is irrelevant that the municipalities were prescribed their task of waste management by national legislation. Since the three directives mentioned provide that waste management may be carried out by either public or private entities, municipalities cannot avoid classification as undertakings simply by reason of the legal origin of their task.

50. It is equally irrelevant, in the view of the Competition Authority, that under Article 11 of the Waste Disposal Act a municipality may not charge a fee whose

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[11] Reference is made, in particular, to judgments in *Total SA* v *European Commission*, C-597/13, EU:C:2015:613, paragraph 33; *Höfner and Elser*, cited above, paragraph 21; and *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

[12] Reference is made to the judgment in *Aéroports de Paris* v *Commission of the European Communities*, C-82/01 P, EU:C:2002:617, paragraph 74.

[13] Reference is made to the judgment in *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraph 79.

[14] Reference is made to judgments in *Chemische Afvalstoffen Dusseldorp BV and Others* v *Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, C-203/96, EU:C:1998:316, paragraphs 16 and 68, and *Sydhavnens*, cited above, paragraphs 54 and 83.

amount exceeds the costs incurred. Article 102 TFEU has been applied whether or not the activities at stake are carried out with a profit-making aim.[15]

51. As regards the second question, the Competition Authority maintains that the legal form of the entity is not a decisive factor when assessing whether that entity is an undertaking within the meaning of Article 54 EEA.[16] If a municipality carrying on waste management activities is not engaged in an economic activity, neither is a cooperative operated by several municipalities and carrying out the same activities on their behalf.

52. As regards the third question, the Competition Authority submits that a Contracting Party may not restrict by law the scope of application of Article 54 EEA, except in accordance with Article 59(2) EEA. However, an EEA State does not infringe Article 54 EEA by granting exclusive rights to an undertaking, provided that such undertaking does not abuse its dominant position or is not led necessarily to commit an abuse.[17] In the present case, Icelandic law requires that the amount of the fee received by Sorpa may not exceed the costs incurred. It neither authorises nor obliges Sorpa to set the fee at a level where it makes a profit. Therefore, Icelandic law does not authorise Sorpa to distribute dividends in the form of discounts granted to its owners.

53. As regards the fourth question, the Competition Authority claims that the concept of "trading parties" within the meaning of Article 54(2)(c) EEA encompasses all recipients of services provided by the dominant undertaking, irrespective of their financial or structural ties with that undertaking.[18] Therefore, Sorpa's owners may be regarded as trading parties of Sorpa.

54. Moreover, the Competition Authority submits that, for a trading party to be placed "at a competitive disadvantage" within the meaning of Article 54(2)(c) EEA, its competitive position must be likely to be hindered by the discriminatory behaviour of the dominant undertaking.[19] In the present case, the Competition Authority notes that, when the municipality of Hafnarfjörður tendered the collection of domestic waste, tenderers could choose which acceptance centre they would deliver the waste to, including Sorpa's Gufunes centre. Therefore, in granting discounts to the municipality of Hafnarfjörður, its owner, and to Sorpstöð

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[15] Reference is made to judgments in *Albany*, cited above, paragraphs 79 and 85, and *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, C-222/04, EU:C:2006:8, paragraph 123.

[16] Reference is made to the judgment in *Diego Calì*, cited above, paragraphs 16 to 18.

[17] Reference is made, in particular, to the judgment in *Corsica Ferries France SA* v *Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione*, C-266/96, EU:C:1998:306, paragraph 41.

[18] Reference is made to judgments in *Clearstream Banking AG and Clearstream International SA* v *Commission of the European Communities*, T-301/04, EU:T:2009:317, paragraphs 143, 194 and 195, and *GT-Link A/S* v *De Danske Statsbaner*, C-242/95, EU:C:1997:376, paragraph 46.

[19] Reference is made to the judgment in *British Airways* v *Commission*, C-95/04, EU:C:2006:133, points 143 to 145.

Suðurlands, Sorpa effectively prevented Gámaþjónustan from receiving waste from that municipality, thereby placing Gámaþjónustan at a competitive disadvantage within the meaning of Article 54(2)(c) EEA.[20]

55. Therefore, the Competition Authority proposes that the Court should answer the questions as follows:

> *1. A municipality that carries out the management of waste in accordance with Directives 75/442/EEC, 1999/31/EC, and 2000/76/EC constitutes an undertaking within the meaning of Article 54 EEA when its services are economic in nature. When answering the first question, (i) it is not relevant that the treatment of waste is a legally-prescribed function of municipalities according to the laws of the Contracting Party; (ii) it can be relevant that competition over the treatment of waste may exist between private entities and public entities under the laws of the Contracting Party; and (iii) it is not relevant that it is prescribed in the laws of the Contracting Party that a municipality may not charge a higher fee than covers the cost of the management of waste and related activities.*
>
> *2. If the first question is answered in the negative, the same applies to an inter-municipal undertaking that is operated by two or more municipalities*
>
> *3. When assessing the applicability of Article 54 EEA to activities of a municipality or an inter-municipal undertaking it is not relevant whether the laws of the Contracting Party contain provisions authorising or obliging public bodies to perform the activities. It is incompatible with the EEA Agreement for a Contracting Party, by legislation, to exempt certain activities of public bodies, which would otherwise fall within the scope of the EEA Agreement, from the scope of its competition law.*
>
> *4. Municipalities that are the owners of an inter-municipal undertaking can be considered the undertaking's trading parties within the meaning of Article 54(2)(c) EEA. In that case, a discount granted to the undertaking's owners, but not to others, can constitute placing others at a disadvantage in the meaning of Article 54(2)(c) EEA.*

ESA

56. ESA notes that the decision of the Competition Authority whose annulment is sought in the national proceedings is based on national competition law and not Article 54 EEA. Nevertheless, according to ESA, the Court has jurisdiction to give an advisory opinion. This is because, according to settled case law of the ECJ,

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[20] Reference is made to the judgment in *Deutsche Bahn AG* v *Commission of the European Communities*, T-229/94, EU:T:1997:155, paragraph 128.

where the facts in the main proceedings fall outside the scope of EU law, the ECJ may nevertheless answer the questions referred provided that the provisions of EU law at stake have been rendered applicable by national law to purely internal situations.[21] In the present case, Article 11 of the Competition Act was adopted in order to incorporate Article 54 EEA. Therefore, the former should be interpreted in accordance with the latter.

57. ESA considers it appropriate to reply to the first, second and third questions together.

58. ESA submits that, according to Article 1 of Protocol 22 to the EEA Agreement and settled case law, the concept of undertaking encompasses every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[22] Any activity consisting in offering goods or services on a given market is an economic activity.[23] Moreover, it is irrelevant whether the entity at stake is a private company or a public entity. In particular, a municipality or a cooperative undertaking operated by several municipalities may be regarded as exercising an economic activity.[24]

59. ESA states that, where an entity carries out several activities, each activity must be assessed separately in order to determine whether it is an economic activity.[25] Therefore, an entity may be classified as an undertaking and subject to EEA competition rules for some of its activities but fall outside the scope of those rules for the remainder of its activities.

60. ESA submits that, where the activity under consideration is a State prerogative and falls within the exercise of public powers, it is not of an economic nature. Such is the case with regard to the activities of the army and the police,[26] as well as that of anti-pollution surveillance.[27]

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[21] Reference is made to the judgment in *SIA «Maxima Latvija»* v *Konkurences padome*, C-345/14, EU:C:2015:784, paragraph 12.

[22] Reference is made, in particular, to Case E-8/00 *Norwegian Federation of Trade Unions and Others* v *Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA Ct. Rep. 114, paragraph 62.

[23] Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft* v *EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 16, paragraph 54.

[24] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 80.

[25] Reference is made to judgments in *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v *Elliniko Dimosio*, C-49/07, EU:C:2008:142, paragraph 25, and *SELEX Sistemi Integrati SpA* v *Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, C-113/07 P, EU:C:2009:191, paragraphs 65 to 119.

[26] Reference is made, in particular, to judgments in *Ivana Scattolon* v *Ministero dell'Istruzione, dell'Università e della Ricerca*, C-108/10, EU:C:2011:542, paragraph 44, and *MOTOE*, cited above, paragraph 24.

[27] Reference is made to the judgment in *Diego Calì*, cited above, paragraph 22.

61. However, in ESA's view, although the character of the activity must be taken into account, it cannot be determined a priori whether a given activity is economic. A concrete assessment must also be carried out. This is because an economic activity as defined by case law consists in the offering of goods or services *on a market*. Therefore, an activity cannot be regarded as economic unless it is carried out in a market environment. An activity is likely to be performed in a market environment where the entity at stake receives a remuneration for the services provided and where it faces competition from other operators.[28] Consequently, medical aid organisations entrusted with the performance of a public service obligation such as the provision of public ambulance services can be regarded as undertakings if they face competition and their services are provided for remuneration.[29] Conversely, municipalities operating kindergartens are not to be considered undertakings if there is no connection between the costs incurred and the fees paid.[30]

62. In the present case, ESA claims that, although waste management services are not intrinsically a State prerogative, since private undertakings may offer such services for remuneration, they may nevertheless be carried out in the public interest and avoid classification as an economic activity. Therefore, a closer examination of the waste management services provided by Sorpa is needed in order to determine whether they are to be regarded as an economic activity. In other words, the Court must assess whether Sorpa's activities are performed in a market environment. Moreover, since each activity must be assessed separately, Sorpa's activity consisting in the management of its owners' waste must be assessed separately from its activity consisting in the management of the waste from its other customers.

63. First, as regards the waste management services provided by Sorpa to its owners, ESA submits that the information in the request for an advisory opinion is insufficient and it is thus for the referring court to decide whether the provision of those services constitutes an economic activity. However, ESA proposes that the Court should assist the referring court by explaining how to assess whether the competition faced by Sorpa on the market (if any) and any remuneration received warrant the classification of Sorpa's services as an economic activity.

64. On the question of the competition faced by Sorpa, ESA maintains that if the referring court finds that Sorpa's owners awarded Sorpa a contract for waste management without calling for bids from other operators and that no other provider was allowed to process waste from Sorpa's owners, it must conclude that

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[28] Reference is made, in particular, to *Private Barnehagers Landsforbund*, cited above, paragraph 80, and the Opinion of Advocate General Poiares Maduro in *Federación Española de Empresas de Tecnología Sanitaria (FENIN)* v *Commission of the European Communities*, C-205/03 P, EU:C:2005:666, point 13.

[29] Reference is made to the judgment in *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz*, C-475/99, EU:C:2001:577, paragraphs 19 to 22.

[30] Reference is made to *Private Barnehagers Landsforbund*, cited above, paragraph 80.

Sorpa does not operate on a competitive market. In ESA's view, the fact that Sorpa was established by seven municipalities as an entity to which they could entrust some of their tasks suggests that it functions as an in-house operator for its owners and does not face competition from other operators on the market. The referring court should also take into consideration the upstream market for waste collection and assess whether that market is open for competition or whether Sorpa's owners hold a monopoly.

65. On the remuneration received by Sorpa, ESA argues that the existence of remuneration is not sufficient for an activity to be classified as economic. In the present case, the fees charged by Sorpa are set by its owners themselves, which is not a normal feature of a competitive market. However, the fact that those fees merely cover the costs incurred and that Sorpa did not seek to make a profit does not prevent its activity from being economic, since the same activity could be carried out by other operators seeking to make a profit.

66. Second, as regards the waste management services provided by Sorpa to its customer Sorpstöð Suðurlands, ESA submits that those services are to be regarded as an economic activity. Sorpa provides those services for remuneration and competes with other possible providers.

67. In relation to the fourth question, ESA submits that conduct qualifies as an abuse under Article 54(2)(c) EEA if three conditions are met. First, dissimilar conditions must be applied by the dominant undertaking; second, those dissimilar conditions must be applied to equivalent transactions between trading parties; third, this must place those trading parties at a competitive disadvantage. In ESA's analysis, the referring court seeks guidance on the second element (the concept of trading parties) and the third element (competitive disadvantage).

68. As regards the concept of trading parties, ESA submits that any party with which the dominant undertaking enters into a transaction is covered by that concept. If the dominant undertaking enters into a transaction with its owners, those owners are to be regarded as trading parties within the meaning of Article 54(2)(c) EEA.

69. As regards the condition that the trading parties must be placed at a competitive disadvantage, in ESA's view this condition is only met if, first, the trading parties of the dominant undertaking compete against each other, and, second, the competitive position of one trading party is likely to be hindered vis-à-vis the position of another trading party.[31] This is for the referring court to decide. However, ESA notes that Sorpa's owners (to which Sorpa grants discounts) may not be in a competitive relationship with the other trading parties (Sorpa's other customers, to which it does not grant discounts), since it appears that the

[31] Reference is made, in particular, to the judgments in *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraphs 523 to 528, and *British Airways*, cited above, paragraph 144.

municipalities owning Sorpa only deliver waste from their own municipal areas and no other operator may deliver waste from those areas.

70. Therefore, ESA proposes that the Court should answer the questions as follows:

> *1. A municipality, or a cooperative undertaking set up by two or more municipalities, processing domestic waste at a sorting and bundling centre will constitute an undertaking under Article 54 of the Agreement on the European Economic Area if, taking into account all the relevant circumstances of that activity, the processing of that waste is of a commercial or economic nature within the meaning of Article 1 of Protocol 22 to that Agreement. Whether the activity of offering waste management services consists in offering goods or services on a given market requires a concrete assessment of the circumstances of the case, taking into account, in particular, the extent of market mechanisms such as the presence of competition and whether the services are remunerated. Whether the municipalities are obliged or authorised to process the waste, whether competition exists for the treatment of the waste and whether the fee the municipality charges for processing the waste is limited to covering the costs are all matters of fact which may be taken into account in the assessment.*
>
> *2. A Contracting Party cannot in national law exempt certain activities by public entities from the scope of EEA competition law, but the way in which it organises such activities may as a matter of fact have an impact on whether that activity is subject to those rules.*
>
> *3. Municipalities which are owners of a cooperative undertaking may be considered as its trading parties within the meaning of Article 54(2)(c). Granting discounts to the owners will constitute an abuse within the meaning of that provision if the conditions of that provision are fulfilled.*

The Commission

71. The Commission considers it appropriate to reply to the first and second questions and the first part of the third question together.

72. The Commission states that pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking within the meaning of Articles 53 and 54 EEA shall be any entity carrying out activities of a commercial or economic nature. According to settled case law this applies regardless of the legal status of the entity concerned and the way in which it is financed.[32] As regards the concept of economic activity, it encompasses any activity consisting in offering goods and services on a given

[32] Reference is made to *Norwegian Federation of Trade Unions and Others*, cited above, paragraph 62.

market.[33] Moreover, the fact that an entity is a non-profit-making body is not decisive in assessing whether it is an undertaking within the meaning of Article 54 EEA. A non-profit making body may still be regarded as an undertaking.[34]

73. As regards public law entities, the Commission submits that a distinction must be made between the situation where they act in the exercise of official authority, in which case they do not constitute undertakings within the meaning of Article 54 EEA, and the situation where they carry on an economic activity, in which case they constitute undertakings.[35] An entity acts in the exercise of public powers where it carries out in the public interest an activity which forms part of the essential functions of the State.[36] In order to determine whether the activity carried out by a public entity is an economic activity, it is not decisive that by performing such activity the entity fulfils a public service obligation.[37] Conversely, it is of paramount importance whether the activity at stake is also carried out by private companies. If that is the case, and public entities compete with private companies, that activity will likely be regarded as economic.[38]

74. In the Commission's view, if a public entity carries out an economic activity and that activity can be separated from the remainder of its activities which fall within the exercise of public powers, that entity acts as an undertaking in relation to that activity.[39]

75. Moreover, the Commission claims that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic the activity of the entity holding those shares. Only if the shareholder exercises its control over the company whose shares it holds, will it be regarded as taking part in the economic activity carried on by the controlled entity and as forming one undertaking with the controlled entity.[40]

76. In the present case, the Commission submits that, in order to determine whether Sorpa is engaged in an economic activity and as such subject to Article 54 EEA, the operation of an acceptance centre at Gufunes should be assessed separately from that of a landfill at Álfsnes.

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[33] Reference is made, in particular, to the judgment in *Compass-Datenbank GmbH* v *Republik Österreich*, C-138/11, EU:C:2012:449, paragraph 35.

[34] Reference is made to the judgment in *Albany*, cited above, paragraph 85.

[35] Reference is made to *Norwegian Federation of Trade Unions and Others*, cited above, paragraph 63.

[36] Reference is made, in particular, to the judgment in *Diego Calì*, cited above, paragraph 23.

[37] Reference is made to the judgment in *Ambulanz Glöckner*, cited above, paragraph 18 et seq.

[38] Reference is made, in particular, to the judgment in *Aéroports de Paris*, cited above, paragraph 82.

[39] Reference is made, in particular, to the judgment in *Compass-Datenbank*, cited above, paragraph 38.

[40] Reference is made to the judgment in *Cassa di Risparmio di Firenze*, cited above, paragraphs 111 to 113.

77. First, as regards the operation of an acceptance centre at Gufunes, the Commission claims that this operation is to be regarded as an economic activity. Public entities and private companies compete to provide waste management services, since under Icelandic law private companies as well as public entities may obtain a licence to operate an acceptance centre. Further, Sorpa competes with Gámaþjónustan for the acceptance of waste from the municipality of Hafnarfjörður and with third parties for the acceptance of waste from Sorpstöð Suðurlands. It is irrelevant that the fees received by Sorpa for its waste management services are cost-based, since an entity that does not make profits may be regarded nonetheless as an undertaking. It is equally irrelevant that, under Icelandic law, municipalities have an obligation to ensure the operation of acceptance centres, since an entity which fulfils a public service obligation may also be regarded as an undertaking.

78. Second, as regards the operation by Sorpa of a landfill at Álfsnes, the Commission submits that this should also be regarded as an economic activity. Under Icelandic legislation private companies as well as public entities may obtain a licence for the operation of landfill sites. It is thus irrelevant that Sorpa is currently the only entity operating a landfill site in the relevant geographic market.

79. Consequently, the Commission considers that Sorpa is an undertaking within the meaning of Articles 53 and 54 EEA.

80. The Commission notes that it appears from the request for an advisory opinion that the acceptance centre at Gufunes and the landfill at Álfsnes are operated by Sorpa itself and not by its owners. However, if the municipalities owning Sorpa do, in fact, operate those centres themselves, they must be regarded as undertakings. This is because the waste management services under consideration constitute an economic activity whether they are performed by Sorpa or by its owners. Moreover, if the owners exercise control over Sorpa, which is a question of fact and as such is for the referring court to decide, they may be regarded as forming one undertaking with Sorpa.

81. As regards the second part of the third question, namely whether a Contracting Party to the EEA Agreement may exempt from the application of competition rules certain activities by public entities, the Commission claims that the EEA Agreement does not allow for an exemption *in abstracto*. Such an exemption is permitted only if it is compatible with Article 59 EEA.

82. As regards the fourth question, the Commission notes that for conduct to be incompatible with Article 54(2)(c) EEA, four conditions must be met: (i) there must be transactions between the dominant undertaking and its “trading parties”; (ii) those transactions must be “equivalent”; (iii) “dissimilar conditions” must be applied to those equivalent transactions; and (iv) this must place one or more of

the trading partners “at a competitive disadvantage” vis-à-vis other trading partners of the dominant undertaking.[41]

83. In the Commission’s view, the transactions between, on the one hand, Sorpa and either its owners or Sorpstöð Suðurlands and, on the other, Sorpa and Gámaþjónustan cannot be regarded as “equivalent” within the meaning of Article 54(2)(c) EEA, since they have different objects (the former concern the provision of waste acceptance services, whereas the latter concern the provision of waste disposal services). Consequently, the discounts granted by Sorpa to, on the one hand, its owners and Sorpstöð Suðurlands and, on the other, Gámaþjónustan do not fall within the scope of Article 54(2)(c) EEA. Therefore, there is no need, in the Commission’s view, to answer the fourth question. The Commission observes, however, that Sorpa may have infringed Article 54 EEA in some other way.

84. The Commission does not propose any specific answers to the questions referred.

Carl Baudenbacher
Judge-Rapporteur

[41] Reference is made to the judgment in *British Airways*, cited above, paragraphs 142 to 149.