REPORT FOR THE HEARING
in Case E-6/07

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 Hæstiréttur Íslands (the Supreme Court of Iceland) in a case pending before it between

HOB vín ehf.

and

Faxaflóahafnir sf.

concerning rules on taxation and on free movement of goods within the EEA.

I Introduction

1. By a letter dated 8 May 2007, registered at the EFTA Court on 21 May 2007, Hæstiréttur Íslands made a request for an Advisory Opinion in a case pending before it between HOB vín ehf. (hereinafter "the Appellant") and Faxaflóahafnir sf. (hereinafter "the Respondent").

II Facts and procedure

2. The case concerns the issue of whether Article 10, 11 or 14 of the Agreement on the European Economic Area (hereinafter "EEA") precludes a port operator such as the Respondent from levying higher port handling charges for alcoholic beverages than for non-alcoholic beverages.

3. The Respondent is a partnership founded by several municipalities around the Faxaflói bay in south-western Iceland. Its principle object is the operation of four Icelandic ports (the Port of Reykjavík, the Port of Akranes, the Port of Grundartangi and the Port of Borgarnes).

4. The Respondent's tariffs provide for four excise duty categories; excise on non-alcoholic beverages is ISK 370.80 per tonne while that on alcoholic beverages amounts to ISK 1 022.30 per tonne.

5. The Appellant, which imports alcoholic beverages from other EEA States, and which has had to pay the higher excise on alcoholic beverages, brought an action against the Respondent before the Reykjavík District Court. The Appellant claimed, principally, reimbursement of the excise duties that it had paid to the Respondent in connection with imports of alcoholic beverages. In the alternative, the Appellant claimed reimbursement of the difference between what it had paid and the amount that it would have been required to pay if the imports had consisted of non-alcoholic beverages. The Reykjavík District Court dismissed the action on the grounds, *inter alia*, that the provisions of the EEA Agreement on the free movement of goods did not apply to the Respondent, and that the excise duties that it levied could not be regarded as customs, taxes or duties of any other type to be paid to a public entity, in addition to which the court did not consider that the duties constituted a restriction on the free movement of goods.

6. The Appellant originally appealed to Hæstiréttur Íslands on 15 August 2006, but that case could not be registered (as required under Icelandic law) as the Appellant intended on 27 September 2006; thus, another appeal was lodged on 19 October 2006.

7. The significant point of dispute between the parties concerns the Appellant's argument that the provisions of the EEA Agreement on free movement of goods apply to the Respondent, and that the imposition of charges in connection with the import of alcoholic beverages via ports owned by the Respondent constitutes a violation of Article 10, 11 or 14 EEA.

III Questions

8. The following questions were referred to the Court:

> **1. Does the levying of charges by a partnership owned by several municipalities, in connection with the import of alcoholic beverages from other EEA States through a port owned by the partnership, fall under the provisions of Article 10, 11 or 14 of the EEA Agreement? The question is based on the premise that the operation of the port is not regarded in law as a public operation; the levying of the charges is based on an authorisation in law and the charges are to meet the cost of the services provided, together with a share of the joint operation of the port.**
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> **2. If the answer to the first question is such that any of the abovementioned provisions of the EEA Agreement apply, does that provision preclude the levying of charges of the type referred to in the first question? The question is based on the premise that higher charges are imposed in connection with the import of alcoholic beverages than of non-alcoholic beverages, and that in Iceland alcoholic beverages are generally imported, *inter alia* from other EEA States.**

IV Legal background

National law

9. Article 8(1)–(3) of the Ports Act No 61/2003 (Hafnalög) provides for three different forms of operation of ports. First, a port may be owned by a municipality and operated without appointing a special board of directors. Second, it may be owned by a municipality and operated under a specific board of directors. Third, it can be operated as a public limited liability company, irrespective of whether or not it is owned by a public body, as a private limited liability company, as a partnership or by a private party operating independently.

10. The Respondent was founded as a partnership under Article 8(3) of the Ports Act, which states specifically that ports operated under that paragraph are not regarded as public operators.

11. Chapter VI of the Ports Act addresses this type of ports specifically and states, amongst other things, in Article 19, that they are permitted to pay dividends to their owners only after having set aside funds for satisfactory maintenance and renewal of the port, in accordance with more detailed provisions in the regulation applying to the port, issued under Article 4 of the Act.

12. Article 20 of the Ports Act states that a port operated under Article 8(3) is authorised to operate without restrictions, and that the levying of charges by the port should meet the cost of the services provided, and a share in the joint operation of the port.

13. The Respondent's list of tariffs is issued under the provision of Article 20, cf. Article 19 of the Ports Act.

EEA law

14. Article 10 EEA reads:

> *Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Contracting Parties. Without prejudice to the arrangements set out in Protocol 5, this shall also apply to customs duties of a fiscal nature.*

15. Article 11 EEA reads:

> *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.*

16. Article 14 EEA reads:

> *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.*
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> *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.*

V Written observations

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

- the Appellant, represented by Stefán Geir Þórisson, Supreme Court Attorney;

- the Respondent, represented by Anton Björn Markússon, Supreme Court Attorney;

- the Government of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

- the EFTA Surveillance Authority, represented by Ólafur Jóhannes Einarsson and Florence Simonetti, Officers, Department of Legal & Executive Affairs, acting as Agents;

- the Commission of the European Communities, represented by Richard Lyal and Søren Schønberg, acting as Agents.

The Appellant

Scope of EEA rules on free movement on goods

18. According to the Appellant, the first question concerns the scope of Part II of the EEA Agreement, on the free movement of goods. As to this question, the Appellant points out that it is of no specific significance to the case that the Port Act explicitly states that the operation of a port company such as the Respondent is not regarded as a public operation. It must be assessed on the bases of the function and operation of the Respondent whether the company is *de facto* a public operation or not. The Appellant submits that it is clear that the Respondent, being a partnership founded by several municipalities and with the principal object of operating four ports in the area, is an entity falling within the scope of Part II of the EEA Agreement.

19. The Appellant states that the first question requires an examination of what persons or bodies are bound by Articles 10, 11 and 14 EEA and that there is no

difference between the three Articles in that respect. There is no doubt that the Contracting Parties are bound by the said Articles. In theory, however, it is less clear what entities are to be regarded as forming part of the 'Contracting Parties' for the purpose of those provisions. According to long standing case law of the Court of Justice of the European Communities (hereinafter the "ECJ"), that concept is to be interpreted widely to cover public authorities of the Member States in general. This covers not only the central government of each State but also regional and local government. It is in fact irrelevant whether discrimination against a product from another Member State stems from federal, provincial or parish authorities. It is clear from case law that the provisions apply to measures emanating from all local authorities.[1] Moreover, there is a large variety of different types of public undertakings, semi-public bodies and quasi-autonomous national government organisations in the Member States. These entities fulfil a wide variety of functions. Where a Member State uses such a body as a medium for the execution of a measure, then that measure clearly emanates from the State, regardless of the precise status of the body concerned.[2]

20. When examining whether a partnership such as the Respondent, founded and owned exclusively by municipalities, falls within the scope of Articles 10, 11 and 14 EEA, the Appellant finds that the Danish port cases must be considered.[3] The cases concerned port charges in Denmark, levied by harbour companies with very different ownership. The ports parties to the cases were either owned by municipalities or by private limited companies. The port charges of all these Danish ports were deemed by the ECJ to fall within the scope of a provision comparable to Article 14 of the EEA Agreement.

21. In addition, the Appellant points to examples of the ECJ having examined measures of privately owned companies under the rules on free movement of goods.[4] In Case C-157/94 *Commission* v *Netherlands*,[5] the ECJ pointed out that the rules must have a wide scope to ensure that the Member States do not abuse their relations with private entities in order to avoid the provisions of the EC Treaty. Otherwise, the Member States would be able to avoid the provisions directed at them, by transferring in whole or in part functions that are by nature public functions. The levying of port charges is *de facto* a public measure which must be examined under the rules on free movement of goods. Otherwise, the door will be open for the EEA Contracting Parties to discriminate against foreign

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1 The Appellant refers to Case 45/87 R *Commission* v *Ireland* [1987] ECR 1369 and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* and *Publivía* [1991] ECR I-4151.

2 The Appellant refers to *Buy Irish*, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005.

3 The Appellant refers to Case 158/82 *Commission* v *Denmark* [1983] ECR 3573; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085; Joined Cases C-114/95 and C-115/95 *Texaco* and *Olieselskabet Danmark* [1997] ECR I-4263; and Case C-242/95 *GT-Link* [1997] ECR I-4449.

4 The Appellant refers to *Buy Irish*, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005; Case C-16/94 *Dubois and Cargo* [1995] ECR I-2421; Case C-72/03 *Cabonati Apuani* [2004] ECR I-8027; and Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

5 Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

products. The fact that the levying of the charges is based on an authorisation in law and that the charges are to meet the cost of the services provided, together with a share of the joint operation of the port, merely confirms the public character of the charges.

Article 10 EEA

22. As to the second question, the Appellant's main argument is that the Respondent's levying of charges is contrary to Article 10 EEA. The difference between customs duties and charges having equivalent effect on the one hand (Article 10 EEA) and internal taxation (Article 14 EEA) on the other hand is not always obvious, but important, because if the charges belong to the former group they are completely forbidden, no matter whether they are discriminatory or not, whereas if the charges belong to the latter group it is possible to adjust the taxation so that it is neutral between goods that compete on the market. The ECJ has made it clear that a charge or tax cannot belong to both groups at the same time. When considering the difference, the ECJ looks at the subject matter rather than the form of the charges. More specifically, the ECJ looks at the effect of the charges or the tax in light of the objectives of the EC Treaty. In *Dubois and Cargo*, dealing with a charge by a private undertaking that had been given the role of clearing imported products through customs in France, the ECJ came to the conclusion that the charge in question was one having equivalent effect to a customs duty.[6]

23. If it is a correct assumption that the charge issued by the Respondent should be considered under Article 10 EEA, then it follows from case law of the ECJ that the charge cannot be greater than the actual cost for the service that is rendered. The said case law is equally clear on charges calculated in accordance with the weight or value of the goods (*ad valorem*). A charge issued *ad valorem* is contrary to Article 10 EEA as it does not fulfil the condition of being a proportional payment.[7] This is the case with the charges issued by the Respondent, as the Respondent cannot show that there is any greater cost connected to transporting alcoholic beverages than to transporting non-alcoholic beverages.

Article 14 EEA

24. Alternatively, the Appellant contends that the charges fall to be examined under Article 14 EEA, as the excise tax discriminates between for example imported beer and domestic beer production. If the measure is examined under Article 14 EEA it has to be resolved whether the charge constitutes an unlawful discrimination between similar domestic and imported products. On that matter, the ECJ has decided that differing charges levied on comparable products are not

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6 The Appellant refers to Case C-16/94 *Dubois and Cargo* [1995] ECR I-2421, at paragraphs 15–16.

7 The Appellant refers to e.g. Case C-72/03 *Cabonati Apuani* [2004] ECR I-8027 and Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575.

contrary to Article 14 EEA if those charges serve a lawful purpose and are not discriminatory towards imported goods. As it is undisputed that the basis for calculating the port charges does not reflect the actual cost of providing the service, the charges in question do not meet the conditions for being lawful in the sense of Article 14 EEA.[8]

Article 11 EEA

25. In the alternative, the Appellant contends that the charges are in violation of Article 11 EEA, as they amount to a measure having equivalent effect to a quantitative restriction. In *Enirisorse*, the ECJ stated that if a measure has been scrutinised with regard to the provisions corresponding to Articles 10 and 14 EEA, with the conclusion that it does not violate those provisions, then it needs to be considered whether the measure falls within the scope of the provision corresponding to Article 11 EEA, concerning technical barriers to trade.[9] According to the Appellant, the charges amount to measures having equivalent effect to a quantitative restriction.

Conclusion

26. The Appellant suggests answering the two questions as follows:

> *1. The levying of port charges by a partnership owned by several municipalities, in connection with the import of alcoholic beverages from other EEA States through a port owned by the partnership, fall under the provisions of Article 10, 11 or 14 of the EEA Agreement.*
>
> *2. The levying of charges of the type practised by Faxaflóahafnir sf vis-à-vis the Appellant is contrary to Article 10 of the EEA Agreement.*

The Respondent

27. The Respondent states that it has no objections to how the questions are formulated. As to the substance of the questions, the Respondent does not provide any observations.

The Government of Iceland

Scope of EEA rules on free movement on goods

28. The Government of Iceland restricts its written observations to the first question referred to the Court, but emphasises the limitations on the material scope of the rules of the EEA Agreement on free movement of goods in the area

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8 The Appellant refers to Case 158/82 *Commission* v *Denmark* [1983] ECR 3573; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085; Joined Cases C-114/95 and C-115/95 *Texaco* and *Olieselskabet Danmark* [1997] ECR I-4263; and Case C-242/95 *GT-Link* [1997] ECR I-4449.

9 The Appellant refers to Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-1424, at paragraph 57.

of alcoholic beverages. It is understood, the Government of Iceland maintains, that wine is excluded form the general scope of the EEA Agreement and that Article 11 EEA does not apply to trade in wine.[10]

29. The first question essentially concerns the scope of the obligations under the rules on free movement of goods in the EEA. The Government of Iceland contends that Articles 10, 11 and 14 EEA only lay obligations upon the Contracting Parties to the EEA Agreement. These Articles are addressed to, and relate only to measures taken by, the States themselves. The Articles do not reach an operation such as that of the Respondent which is an independent partnership with no public authority or functions. Furthermore, the Government of Iceland notes that Articles 10, 11 and 14 EEA do not have horizontal effect. Rather, they are limited to the actions of public bodies.[11]

30. The Government of Iceland submits that one of the aims pursued with the Ports Act was facilitating a move of the operation of ports from the public sphere to other forms of undertakings, public limited liability companies, irrespective of whether or not they are owned by a public body, private limited liability companies, partnerships or private parties, operating independently. This aim of the Ports Act has materialised *inter alia* with the establishment of the Respondent. A port run by such a partnership is, by law, not considered a public operation, cf. Article 8(3) of the Ports Act. The Respondent is not a public entity, and its operation cannot in any way be considered a project undertaken for the public authorities. The previous link to the municipal authorities has in fact been terminated by the Respondent's transformation into an independent partnership and the ports it owns operate on a private law basis. The Respondent is not endowed with any state powers, regulatory, disciplinary or otherwise, and furthermore is neither set up by the public authorities nor sponsored by them in any way. Even in the ECJ's broadest interpretations of 'state measure,' that term must include at least the exercise of powers derived from public law and national legislation must have conferred regulatory or disciplinary powers upon the entity concerned.[12] To further support this contention, it must be borne in mind that the Respondent's employees are not government officials and therefore do not enjoy the same benefits as employees of public entities; further, the Respondent's ports, unlike ports run as public entities, are not subject to the Icelandic Administration Act No 37/1993.

31. Moreover, the Government of Iceland maintains, a port run in the form of a partnership, unlike those run as public entities, has unlimited operational authority, whilst those not separate from a municipality are subject to limitations,

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10 Iceland refers to Case E-1/94 *Restamark* [1994–95] EFTA Ct. Rep. 15, at paragraph 40; Case E-1/97 *Gundersen* [1997] EFTA Ct. Rep. 110, [at paragraph 8] and Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, at paragraphs 24–25 and 28–29.

11 Iceland refers to e.g. Case C-159/00 *Sapod Audic* [2002] ECR I-5031.

12 Iceland refers to Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083 and Joined Cases 266/87 and 267/87 *Association of Pharmaceutical Importers* [1989] ECR 1295.

cf. Articles 10 and 15 of the Ports Act. Furthermore, it can pay dividends to its shareholders after the costs of the port's renewal and maintenance have been satisfied, cf. Article 20 of the Ports Act. The tariffs of the Respondent are in its sole discretion, unlike the tariffs of ports run as public entities, which are subject to detailed rules on account of their public financing and their imposition of service charges. The fee charged by the ports of the Respondent is not a service charge within the traditional meaning given to that term under Icelandic law, but merely remuneration for services provided. The tariffs are set by the Respondent on a private law basis and without influence from the State or municipalities. In fact, the Respondent is in competition with other ports, and can price its services as it sees fit with regard to market conditions at any given time.

32. The judgments referred to by the Appellant in order to support its contention that the Respondent should be considered part of the State are in the opinion of the Government of Iceland not relevant to the case at hand. For example, to this end the Appellant refers to *Dubois and Cargo*.[13] The facts in that case differ widely from the circumstances in this case. The case concerned a charge imposed on economic operators which included costs of controls and formalities carried out in connection with the movement of goods across frontiers within the European Community – which the Member States themselves were supposed to bear, according to Article 9 and 12 EC at the time of the proceedings. The judgment merely states that such a charge is incompatible with those provisions no matter whether the charge is imposed by a public entity or a private one. It must be borne in mind that the circumstances on the Community side are different from the EFTA side of the EEA, as the EEA Agreement does not entail any customs union between the Contracting Parties providing for rules such as the abovementioned provisions. Thus, *Dubois and Cargo* does not support the Appellant's contention, and is irrelevant as a precedent in an EEA context. The Appellant also refers to Case C-157/04 *Commission* v *Netherlands*.[14] That case concerned an undertaking afforded a monopoly on performing a service of general economic interest, which is not the case here since the Respondent has not been granted any special or exclusive rights by the municipalities.

Conclusion

33. Based on the above, the Government of Iceland suggests that the reply to the first question should be that:

> *The levying of charges by a partnership owned by several municipalities, where the operation of the port is not regarded in law as a public operation, the levying of the charges is based on an authorization in law and they meet the cost of the services provided with a share of the joint operation of the port, in connection with the import of alcoholic beverages from other EEA*

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13 Case C-16/94 *Dubois and Cargo* [1995] ECR I-2421.

14 Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

States through a port owned by the partnership, does not fall under the provisions of Article 10, 11 or 14 of the EEA Agreement.

The EFTA Surveillance Authority

General

34. The EFTA Surveillance Authority (hereinafter "ESA") clarifies, first, that its observations are applicable only insofar as the products concerned come within the scope of the EEA Agreement. In this respect, ESA recalls the extent to which this is the case with alcoholic beverages. Articles 10, 11 and 14 EEA have an identical scope of application with regards to products and it is noted that these provisions apply to spirits and beer.[15]

35. ESA then finds it appropriate to start by analysing the nature of the charges, in order to determine which of the abovementioned provisions might be applicable, before moving on to examining the scope of each of the provisions and assessing whether and to what extent they preclude the contested dock charges. First, the ECJ has held that the scope of Article 28 EC (which corresponds to Article 11 EEA) "does not extend to the obstacles to trade covered by other specific provisions of the Treaty" and that "obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles 23 EC, 25 EC and 90 EC, do not fall within the prohibition laid down in Article 28 EC."[16] Second, the EFTA Court has concluded that Articles 10 and 14 EEA are mutually exclusive.[17] Consequently, it falls to be examined which, if any, of the provisions might be applicable to the case at hand.

Article 10 EEA

36. The dock charges are not 'customs duties' in the literal sense of the term. Nor, in ESA's opinion, can they be classified as charges having an equivalent effect thereto. The dock charges must be paid to the Respondent on all products that pass through its ports, irrespective of whether the products are domestic or foreign and whether they arrive from another Icelandic port or a foreign one. The charges are, in other words, not unilaterally imposed on the goods in question by reason that they cross a frontier.

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15 ESA refers, *inter alia*, to Case E-9/00 *EFTA Surveillance Authority* v *Norway* [2002] EFTA Ct. Rep. 72, at paragraph 30, Case E-1/94 *Restamark* [1994–95] EFTA Ct. Rep. 15, at paragraph 41 and Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 56, at paragraph 22.

16 ESA refers to Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, at paragraph 32. Reference is also made to Case 27/67 *Firma Fink-Frucht GmbH* [1968] ECR English special edition 223, Case 252/86 *Bergandi* [1988] ECR 1343, at paragraph 33 and Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, at paragraph 20.

17 ESA refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 20. Reference is also made to Case C-234/99 *Nygård* [2002] ECR I-3657, at paragraph 17 and Case C-213/96 *Outokumpu* [1998] ECR I-1777, at paragraph 19.

37. In *Einarsson*, the EFTA Court held that a charge that forms part of a general system of internal duties 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.[18] Moreover, ESA submits, the ECJ has also held that port charges having similar characteristics to the ones at hand fell to be examined under the parallel provision in Article 90 EC.[19]

38. ESA is, therefore, of the opinion that the dock charges do not have the character of a customs duty within the meaning of Article 10 EEA. This is so even if it could be established that no domestic alcohol products were *de facto* subject to the dock charges, for example because they are always transported by land.[20] Indeed, even if there had been no domestic production at all, that would not by itself have made the charges subject to Article 10 EEA.

Article 14 EEA

39. At the outset, ESA emphasises that the concept of internal taxation under Article 14 EEA embraces all charges which are imposed on imports as well as on domestic products irrespective of their nature or purpose. The ECJ has ruled that the concept of taxation within the meaning of Article 90 EC (which corresponds to Article 14 EEA) must be interpreted widely.[21] The notion of taxation covers not only taxes in the technical sense, such as consumption taxes, but also parafiscal charges, monopoly levies, inspection fees and charges on loading in ports.[22] Moreover, a measure does not have to apply to the entire area of the EEA State concerned; measures of local character may also qualify as taxation within the meaning of that provision.[23] That the obstacle created by a national tax is only minor and incidental is not sufficient to prevent the application of Article 14 EEA.[24] The tax concerned may be based either on legislation, international agreements or administrative regulations and circulars.[25] The fact that a tax or levy is collected by a body governed by public law other than the State or is collected for its benefit and is a charge which is special in the sense that it is collected for a specific purpose cannot prevent it from falling within the scope of

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18 ESA refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 20.

19 ESA refers to Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraph 20 and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-1424, at paragraph 60.

20 ESA refers to Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraphs 22–23.

21 ESA refers to Case 20/76 *Schöttle* [1977] ECR 247, at paragraph 13.

22 ESA refers to Case 77/72 *Capolongo* [1973] ECR 611, at paragraph 12, Case 45/75 *Rewe-Zentrale* [1976] ECR 181, at paragraph 5, Case 46/76 *Bauhuis* [1977] ECR 5, at paragraph 10 and Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraph 20.

23 ESA refers to Case C-45/94 *Cámara de Comercio, Industria y Navegación de Ceuta* [1995] ECR I-4385, at paragraphs 2–3.

24 ESA refers to Case 20/76 *Schöttle* [1977] ECR 247, at paragraph 14.

25 ESA refers to Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, at paragraph 1; Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847; and Case 17/81 *Pabst & Richarz KG* [1982] ECR 1331, at paragraphs 17–18.

Article 14 EEA.[26] Nor is it decisive for the classification under that provision whether the charge represents payment for a service provided.[27]

40. ESA then examines whether the dock charges can be said to qualify as a measure of 'taxation' for the purposes of Article 14 EEA by virtue of the fact that they are prescribed by way of compulsory public law rules, *in casu* the Ports Act. If that is so, Article 14 will apply regardless of whether the Respondent may be regarded as a public body competent to issue rules constituting 'taxation'.

41. ESA notes that the Ports Act does not in itself fix the amount of the contested dock charges, but provides a legal basis for claiming the charge and sets out some parameters for its amount. For publicly operated ports, ESA further notes that according to Article 17 of the Ports Act, the dock charges in question "may" be collected by the ports. In practice, it would appear that such charges *must* be imposed. Indeed, while municipalities are free to change the operating form of a publicly operated port into a company, Article 18(3) of the Ports Act provides that the operating form of a port run as a company shall revert to being a port operated by the municipality without a special board of directors if the port has a negative operating result for three consecutive years. Ports such as the ones operated by the Respondent are therefore in practice prohibited from setting their fees so low that the port is operating with a deficit and with the consequence that the municipality will be forced to support it financially. As for the tariffs set by non-public ports, Article 20 of the Ports Act states that these shall be determined on the basis of covering the costs of the services provided together with a proportion of the common cost of the port's operation.

42. To ESA, it is not clear from the national court's request to what extent each port may decide how the fee structure shall be designed. In particular, it is not clear to which extent the legislation implies that the ports are obliged to ensure that they do not charge more than the actual cost of providing each service in question (in addition to a part of the common costs) or whether it is sufficient that the total income from all charges over a longer period corresponds to the total costs. It would appear that the only limitation is that referred to above, i.e. that ports which are owned by a municipality but operated on a non-public basis are prevented from charging fees that in the long run do not allow them to meet their operating costs.

43. On the one hand, as far as ESA is aware, it might be argued that according to the general principles of Icelandic administrative law a legal authorisation for a public body to charge fees that correspond to the cost of providing a service would generally not permit a cross-subsidisation between different product categories or recipients of services. On the other hand, the tariff at issue seems to build on the premise that this is indeed possible under the Ports Act, as the present list of tariffs clearly presupposes that the Respondent is permitted to

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[26] ESA refers to Case 74/76 *Iannelli & Volpi* [1977] ECR 557, at paragraph 19.

[27] ESA refers to Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraph 35.

apply different rates to products such as alcoholic beverages on the one hand and non-alcoholic on the other without it being immediately obvious that the costs of handling these products are different.

44. However, underlining that it is neither for ESA nor for the EFTA Court to provide an interpretation of Icelandic law, that competence lying solely with the national court, ESA restricts itself to the following observation: assuming that the Ports Act merely imposes loose parameters within which each port is free to set its own fee structure, and that the Act allows the port to follow other considerations than the actual costs for each service in question, the legislation leaves such a margin for discretion to each port that the charge cannot be held to be fixed by the Icelandic legislator. In such a case, the Ports Act would differ significantly from the charges at stake in *Haahr Petroleum* where the level of the charges was fixed by a ministerial regulation.[28]

45. On the basis that the dock charges cannot be classified as a tax by virtue of the Ports Act itself, the question arises whether they may, nevertheless, come within the scope of Article 14 EEA simply because they are prescribed by a body that is owned and controlled by the State in the form of municipal administration. The consequences of such an approach will be that the very same charge for the very same service would fall within the ambit of Article 14 EEA if issued by a port owned and controlled by a public body but not if it falls due in respect of a service rendered by a privately owned port.

46. ESA notes that the Respondent's status as a partnership owned by several municipalities means that, under Icelandic law, the owners carry unlimited liability for the obligations of the Respondent. According to Articles 2.2 and 2.3 of the partnership contract, other municipalities may be taken into the partnership whereas entities other than municipalities may not buy a part of the company. ESA thus cannot see any reason to regard a tariff set by the Respondent as different from one set by the municipalities themselves (as owners of a harbour or infrastructure facility). Consequently, if measures enacted by a municipality would, under the same circumstances, be considered to fall within the scope of Article 14 EEA, then ESA is of the view that the same should apply to the charges laid down by the Respondent. That the Respondent does not qualify as a public body under Icelandic law, according to Article 8(3) of the Ports Act, is in this respect immaterial.

47. As far as ESA is aware, there is no case law from either the EFTA Court or the ECJ as to whether a fee levied by a body such as the Respondent can fall within the scope of Article 14 EEA solely by reference to the public ownership structure of the body imposing the charge, even if that charge constitutes payment for a service commercially rendered.

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[28] ESA refers to Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraphs 5–6.

48. Articles 10, 11 and 14 EEA all have the purpose of ensuring that measures enacted by the Contracting Parties do not impede the free movement of goods within the EEA. Hence, it might seem logical to consider the scope *ratione personae* of these provisions as applying to the State irrespective of the guise in which it appears. Indeed, Article 11 EEA clearly applies to State entities acting outside the remit of public law functions.[29] Accordingly, ESA submits that a decision by the Respondent not to accept the unloading of goods by ships coming from other EEA States would fall within the scope of Article 11 EEA.[30] Based on this assumption, ESA poses the question whether it would not be logical to consider measures relating to charges for unloading the goods to be covered by Article 14 EEA on taxation. However, ESA then identifies several arguments against a finding to this effect.

49. In this regard, ESA notes that the notion of 'taxation' is normally associated with *compulsory* contributions to public revenue. As reflected in the wording of Article 14 EEA, in order for the 'taxation' in question to fall within the ambit of that provision, it must be said to be *imposed* on the person liable to pay the money concerned. The classic situation is where legislation (be it central or local) lays down both a legal obligation to pay and the amount of the payment. It seems less obvious to talk about a pecuniary charge as being 'imposed' by the relevant national legislation where it merely empowers a public body (in the wide sense given to that notion under the EEA Agreement) to claim a fee for a service rendered and in that respect itself set the level of the fee. That is especially so if there is no element of factual compulsion because the consumer can purchase the same goods or service elsewhere.

50. In addition, the levying of duties requires the State, at least implicitly, to be acting in a regulatory capacity. It could conceivably have far-reaching consequences to subject public bodies engaged in economic activity, such as the Respondent, to the scope of Article 14 EEA. This is so even if Article 14 EEA would not regulate the level of pricing but only require the public body not to discriminate between domestic products and products from other EEA States.

51. In the dispute in the main proceedings, the Respondent would appear to be engaged in economic activity as defined under the competition provisions of the EEA Agreement. When drawing the line as regards applicability of the competition provisions of the EC Treaty to public bodies, the ECJ has distinguished between "a situation where the State acts in the exercise of official authority and that where it carries on economic activity of an industrial or commercial nature by offering goods or services in the market."[31] Thus, it seems

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29 As an example, ESA refers to discriminatory conditions in public contracts having been held to come within the scope of Article 11 EEA. Reference is made to Case E-5/98 *Fagtún* [1999] EFTA Ct. Rep. 51, at paragraphs 30–32.

30 ESA notes that the scope *ratione personae* of Article 28 EC has been interpreted widely by the ECJ. Reference is made to e.g. Case C-325/00 *Commission* v *Germany* [2002] ECR I-9977, at paragraphs 17–20.

31 ESA refers to Case C-343/95 *Cali* [1997] ECR I-1547, at paragraph 16.

that Articles 53 and 54 EEA could be applied to the conduct of the Respondent. Even if the applicability of the competition rules does not as such exclude the application of the free movement provisions, it might still be argued that bodies engaged in economic activity, such as the Respondent, should not be subject to other constraints on their pricing decisions by the EEA Agreement, than those that follow form the application of Articles 53 and 54 EEA.

52. Concluding its analysis of whether Article 14 EEA is applicable *ratione personae*, ESA is of the opinion that neither the case law of the EFTA Court nor that of the ECJ provides an unequivocal answer. However, ESA does not find it necessary to reach a firm position on the issue as the dock charges in any event fulfil the conditions laid down in Article 14 EEA for being a non-discriminatory, and hence legal, taxation.

53. ESA submits that Article 14 EEA addresses situations in which domestic and imported products are in competition and where differentiated taxation applies to the detriment of imported products.[32] The order of the national court does not explain in what way the higher rate of duty applied on alcoholic beverages could lead to a discrimination of imported goods with regard to similar domestic products or to a protection of competing domestic products. It merely states that its second question is "based on the premise that higher charges are imposed in connection with the import of alcoholic beverages than of non-alcoholic beverages, and that in Iceland, alcoholic beverages are generally imported, *inter alia* from other EEA States."

54. Having regard to the arguments brought forward by the parties to the main proceedings, ESA understands that two types of alleged discrimination may be invoked. The first type concerns an alleged discrimination between imported alcoholic beverages and domestic alcoholic beverages. The second type of alleged discrimination concerns the competitive relationship between alcoholic and non-alcoholic beverages. The list of tariffs established by the Respondent provides for five categories of dock charges, the charge on non-alcoholic beverages being significantly lower than the charge on alcoholic beverages. Since most alcoholic beverages in Iceland are imported, the higher rate of dock charges applies *de facto* mostly to imported alcoholic beverages, whereas a lower rate applies both to imported and domestic non-alcoholic goods. According to this argument, there is discrimination against imported alcoholic beverages and a corresponding protection of domestic non-alcoholic beverages.

55. As to the first type of alleged discrimination, ESA notes that the contested dock charges do not differentiate between domestic and imported goods. On the contrary, the dock charges apply systematically and in accordance with the same criteria to both domestic and imported alcoholic beverages. Moreover, the charges cannot constitute discrimination simply because the majority of the alcohol consumed in Iceland is produced abroad. Indeed, Article 14 EEA cannot

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[32] ESA refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraphs 17 and 22.

even be invoked against internal taxation imposed on imported products where there is no similar or competing domestic product.[33]

56. This conclusion would not be altered, ESA maintains, even if it were demonstrated that domestic alcoholic beverages were in fact mostly transported by road and that, as a consequence, the dock charges applied *de facto* mostly to imported products. The comparison of taxes imposed on imported and domestic products shall take place only on the basis of the national system of internal taxation concerned (in the present case dock charges). The dock charges apply to goods that are loaded and unloaded in harbours. The situation of goods that do not enter ports shall not be taken into account. Indeed, the fact that domestic alcoholic beverages are transported predominantly by road might change at any time. It would be impracticable to suggest that the extent of the legality or illegality of a charge varies from day to day according to the way domestic goods are being transported.

57. ESA then goes on to discuss the second type of alleged discrimination at length. Restating that the aim of Article 14 EEA is to guarantee the neutrality of internal taxation as regards competition between domestic products and imported products, ESA notes that it must first be considered whether the domestic and imported goods in question are similar or competing within the meaning of Article 14 EEA. Its first paragraph covers "similar" products; once similarity between a domestic and an imported product is established, any tax must be the same for both products. Where the imported and domestic products are not similar, the second paragraph applies. That provision is more specifically intended to prevent any form of indirect fiscal protectionism affecting imported goods which are in a competitive relationship with domestic products.

58. According to the order of the national court, alcoholic beverages are mostly imported, which would imply that the higher rate of the dock charges apply in practice mostly to non-Icelandic alcoholic beverages. However, if it appeared that the national production of at least some alcoholic beverages was significant, this would be sufficient in order to state that the dock charges do not infringe Article 14 EEA.[34]

59. Turning to the first paragraph of Article 14 EEA and the question of whether the products are "similar", the first element to be assessed is whether "certain objective characteristics" are present in both products or categories of products, such as their composition and, notably in the case of alcoholic beverages, taste and alcohol content. Second, ESA states, consideration is given to whether or not these products are capable of meeting the same needs from the

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33 ESA refers to Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, at paragraph 10.

34 ESA refers to Case 243/84 *John Walker* [1986] ECR 875, at paragraph 23.

point of view of the consumers.[35] However, the relevant case law of the ECJ indicates that this second element is not taken into consideration where the products exhibit manifestly different characteristics.[36]

60. ESA observes that many of the cases brought before the ECJ regarding similarity or inter-changeability of imported and domestic products subject to different taxes have concerned alcoholic products of different types. In all those cases, the alcoholic strength of the products at stake was a decisive element. In *John Walker*, the ECJ held that since the alcoholic strength of Scotch whisky was 40% by volume whereas the alcoholic strength of fruit wine was 20%, these products were not similar.[37] The contention that those products could both be consumed in the same way did not need to be assessed because, even if it were established, it would not have been sufficient to render similar two products, Scotch whisky and fruit wine, whose intrinsic characteristics were fundamentally different.

61. ESA takes the view that, in the present case, the two categories of beverages exhibit manifestly different characteristics. In light of the abovementioned case law, a product that does not contain any alcohol does not have the same characteristics as a product that does. There is therefore no need to assess whether they could partially fulfil the same needs from the point of view of the consumer. Consequently, ESA contends that the fact that a higher rate of dock charges applies to alcoholic beverages than to non-alcoholic beverages does not lead to an infringement of the first paragraph of Article 14 EEA.

62. Turning to the second paragraph of Article 14 EEA, ESA submits that any assessment of the compatibility of a given tax with this provision requires an actual competitive relationship to be established between the products concerned. Furthermore, account must be taken of the impact of the tax on that competitive relationship. The essential question is whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products.[38]

63. The two categories of products are defined in very broad terms in the tariff. It is clear that, in general, alcoholic beverages and non-alcoholic beverages do not meet identical needs and that they are not substitutes for one another. Admittedly, it cannot be fully excluded that there may be a degree of substitution between two specific products falling under these categories. This could be the case e.g. for beers containing a very low degree of alcohol and beers containing no alcohol. However, nothing in the request from the national court refers to any

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35 ESA refers to Case 243/84 *John Walker* [1986] ECR 875, at paragraph 13, Case 106/84 *Commission* v *Denmark* [1986] ECR 833, at paragraph 12 and Case C-265/99 *Commission* v *France* [2001] ECR I-2305, at paragraph 42.

36 ESA refers to Case 243/84 *John Walker* [1986] ECR 875, at paragraphs 12–13.

37 ESA refers to Case 243/84 *John Walker* [1986] ECR 875, at paragraphs 12–13.

38 ESA refers to Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, at paragraphs 14–15.

feature specific to the Icelandic market indicating that this might be the case. Thus, ESA submits that there is no general competitive relationship between alcoholic and non-alcoholic beverages.

64. Moreover, ESA submits, even if it was established that there was a competitive relationship between alcoholic and non-alcoholic beverages, the dock charges would not have any protective effect. It does follow from case law that a tax that applies in theory equally to imported and domestic goods may nevertheless be considered as having a protective effect if the higher tax applies *de facto* exclusively or mostly to imported goods and if it has the effect of reducing potential consumption of imported products to the advantage of competing *domestic* products.[39] However, in the present case, the Respondent's tariff is drafted in such a way that both imported and domestic non-alcoholic beverages bear the lighter tax burden. It has been brought forward that alcoholic beverages are mostly imported, thus the higher rate of the dock charge applies *de facto* mostly to imported alcoholic beverages. In contrast, there is no indication that the bulk of non-alcoholic goods is produced in Iceland and that no substantial import of non-alcoholic beverages takes place. It thus seems that, even if an alleged competitive advantage to non-alcoholic products was demonstrated, it would benefit both domestic and imported products.[40] The disparity between the respective tax burdens is therefore not likely to have the effects of favouring the sale of non-alcoholic beverages produced in Iceland.

65. In conclusion, ESA submits that the fact that the dock charges are higher for alcoholic beverages than for non-alcoholic beverages does not infringe Article 14 EEA, even if the provision were to be regarded as applicable to the contested dock charges.

Article 11 EEA

66. ESA recalls that Article 11 EEA does not apply to obstacles of a fiscal nature falling within the ambit of Article 14 EEA. Conversely, in the event that the Court should find Article 14 not to be applicable to the disputed dock charges, the question arises as to whether that could trigger the application of Article 11 EEA.

67. However, in ESA's opinion, Article 11 EEA cannot preclude the disputed dock charges. It is submitted that the reasoning in *Corsica Ferries* is fully transposable to the present case.[41] First, as detailed above, the disputed dock charges apply to all products without any distinction as regards their origin.

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39 ESA refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 13 and Case C-421/97 *Yves Tarantik* [1999] ECR I-3633.

40 ESA refers to Case C-421/97 *Yves Tarantik* [1999] ECR I-3633, at paragraph 31, Case C-113/94 *Casarin* [1995] ECR I-4203, at paragraph 24, Case 200/85 *Commission* v *Italy* [1986] ECR 3953, at paragraph 20 and Case C-230/89 *Commission* v *Greece* [1991] ECR I-1909, at paragraph 10.

41 ESA refers to Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, at paragraphs 30–32.

Second, the additional expense borne by imported products (and domestic products transported by sea) subject to the dock charges is marginal. Consequently, ESA considers that any restrictive effect the dock charges might possibly have on the free movement of goods is too uncertain and indirect for their imposition to come within the scope of Article 11 EEA.

Conclusion

68. For the reasons set out above, ESA proposes that the questions be answered as follows:

> *The levying of a charge such as the one at issue in the main proceedings is not precluded by Articles 10, 11 or 14 of the EEA Agreement.*

The Commission of the European Communities

General

69. The Commission of the European Communities (hereinafter "the Commission") notes that the national court seeks to ascertain whether port charges such as those levied by the Respondent under national legislation such as the Ports Act are contrary to Article 10, 11 or 14 EEA. The Commission thus considers it useful to start with the second question and examine, first, whether a dock charge such at the one at issue falls within the scope *ratione materiae* of either Article 10, 11 or 14 EEA and then, second, whether the dock charges in substance violates the relevant provision.

70. The Commission submits that, in the context of the EC Treaty, it is well established that Article 25 EC relating to customs duties and charges having equivalent effect on the one hand, and Article 90 EC relating to discriminatory internal taxation on the other, are provisions which cannot be applied together, with the result that the same charge cannot belong to both categories.[42] Equally, Article 28 EC, which concerns quantitative restrictions on imports and measures having equivalent effect, does not extend to customs duties or obstacles of a fiscal nature, which are covered by Articles 25 and 90 EC.[43] In this respect, the logic of the EEA Agreement is no different.[44] It must therefore be determined which of the abovementioned provisions, if any, falls to be applied.

Article 11 EEA

71. The Commission dismisses application of Article 11 EEA. A port fee levied on the loading and unloading of goods in a harbour is not equivalent to a

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42 The Commission refers to Case C-234/99 *Nygård* [2002] ECR I-3657, at paragraph 17.

43 The Commission refers to, in particular, Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, at paragraph 20; and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, at paragraph 32.

44 The Commission refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 20.

quantitative restriction of the kind envisaged by Article 11 EEA (leaving aside the hypothesis of a charge so high as to be prohibitive)[45].

Article 10 EEA

72. Further, the Commission also dismisses application of Article 10 EEA. It is submitted that the port fees are manifestly not 'customs duties'. Neither can they be regarded as charges having equivalent effect. Certainly, any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and is not a customs duty in the strict sense constitutes a charge having equivalent effect within the meaning of Article 25 EC.[46] However, the port fees at issue are not applied by reason of the goods crossing a frontier. On the contrary, they apply (with the exception of vehicles owned by passengers) to all goods loaded or unloaded within the harbours operated by the Respondent. They are applied at the same time (the time of loading or unloading) and according to the same criteria (type and weight of goods). They are thus, in principle, to be regarded as forming part of a general system of internal taxation, and not as a charge having equivalent effect to a customs duty.[47]

Article 14 EEA

73. Accordingly, the Commission finds that the port fees fall to be examined (if at all) under Article 14 EEA. The Commission recalls that this provision seeks 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 from 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.[48] It is noted that Article 14 EEA covers not only taxes imposed directly on goods but also taxes on operations associated with the goods.[49]

74. According to the Commission, the first issue which arises in the present case is whether the port fees in question are properly to be regarded as constituting a form of taxation. In so far as the Respondent is a partnership governed by private law, the fees in question could equally well be regarded simply as the price of the service rendered (unloading of goods from a vessel).

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45 The Commission refers to Case 47/88 *Commission* v *Denmark* [1990] ECR I-4509, at paragraphs 12–13 and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, at paragraphs 40–42.

46 The Commission refers to Case C-173/05 *Commission* v *Italy*, judgment of 21 June 2007, at paragraph 39, not yet reported.

47 The Commission refers to Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at paragraphs 21–23.

48 The Commission refers to Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, at paragraph 22.

49 The Commission refers to Case 20/76 *Schöttle* [1977] ECR 247.

75. The Commission points to *Haahr Petroleum*[50] where the ECJ examined a similar fee. That case concerned shipping and goods duties paid by users of commercial ports (including both ports operated by local authorities and private ports). These duties, which formed part of the revenue of the ports, were laid down in regulations issued for each port by the Ministry of Transport. The duties were fixed at such a level as to enable the ports to cover their operating and maintenance expenditure and to create reserves for extensions and modernisation. Shipping duties were fixed according to tonnage. Goods duties were normally a fixed amount per tonne, though there were exemptions and special rates for certain goods.

76. The Commission notes that the ECJ found, without discussion, that the duties were fiscal in nature. However, the question whether they could instead be analysed as consideration for the port services rendered was examined by the Advocate General. He noted that a charge fixed by a public authority could be regarded in certain circumstances as the price of a service, but only under strict conditions, namely that there be a direct link between the amount paid and a specific and identifiable benefit actually conferred on the recipient of the service.[51]

77. More generally, submits the Commission, it could be argued that where a public authority imposes a charge for a service provided by it, that charge is to be regarded as a tax if it is fixed according to criteria which do not reflect the cost of providing the service. In such circumstances, the public authority does not act as a normal market participant. Instead, it spreads the cost of services among users according to other criteria such as the ability to pay.

78. In *Haahr Petroleum*[52] the charge in issue was fixed centrally by a State authority. The Commission notes, however, that the charge was considered to be fiscal in nature even where it was paid to a private operator. In a system of that kind, it may be thought that the financing of port infrastructure has been largely removed from the market mechanism and is instead governed by a set of charges based on notions of ability to pay or the utility of the goods discharged, criteria which are typically those of taxation.

79. In the present case, the port fees are fixed not by the State but by the port operators, subject to State oversight. The Commission argues that the degree of State oversight is not sufficient to render the Respondent's schedule of port fees attributable to the exercise of (central) State authority, since the State's intervention is confined to ensuring that the fees are set at a level sufficient to ensure continued operation and maintenance of the infrastructure. In the case of a

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50 Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085.

51 The Commission refers to the Opinion of AG Jacobs in Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, at point 52 referring to Case C-111/89 *Bakker Hillegom* [1990] ECR I-1735, at paragraphs 12–16.

52 Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085.

private port operator, therefore, the issue of tax could not arise, irrespective of the criteria used in determining the charge. The Respondent, however, is a partnership of public authorities, and the reasoning set out above is applicable to them. That is true notwithstanding the fact that the applicable legislation states that their ports are not regarded as public ports; the concept of a tax is an autonomous one to be interpreted by the Court in light of the relevant facts.

80. In this context, the Commission adds that for the purposes of the EC Treaty rules on free movement, the acts of all public bodies are imputable to the Member State concerned.[53] Directly effective Community law is binding on all organs and authorities of the Member States, including local authorities.[54] That is true whether or not they are acting in their regulatory capacity.[55] It is submitted that the situation is no different under the EEA Agreement.

81. The Commission suggests that if the Respondent bases its charges on the cost of providing the service, then it participates in the market in the same way as other private operators, and the port fees are to be regarded as the price of the service rendered. If, conversely, the port fees are fixed independently of cost, it is at least arguable that they fall to be examined in the light of Article 14 EEA. In that perspective, it is not obvious what relation there may be between the different levels of port fees laid down in the Respondents schedule of fees and any differences in the cost of unloading the goods comprised in the various categories, in particular categories 3 and 4.

82. However, it is not indispensable, argues the Commission, to decide whether the fees are properly to be regarded as a tax since they do not in any event discriminate against imported products. The Respondent's fee schedule does not distinguish between products on the basis of their origin. With one exception which is not material to the present case,[56] there is no overt discrimination between domestic goods and goods imported from other EEA countries.

83. Nor, in the Commission's view, is there any covert discrimination arising from the inclusion of domestic and imported goods in different categories of the fee schedule. The ECJ has held that a system of differentiated taxes under which an advantage is granted to a single product which represents the bulk of domestic production or a system structured in such a way as to give preference to domestic production may offend against Article 90 EC.[57] Conversely, Article 90 does not prohibit a differentiated scheme of taxation based on objective criteria if the

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53 The Commission refers to Case 45/87 *Commission* v *Ireland* [1988] ECR 4929.

54 The Commission refers to Case 103/88 *Costanzo* [1989] ECR 1839.

55 The Commission refers to Case 152/84 *Marshall* [1986] ECR 723.

56 The Commission notes that the Respondent's port fee schedule includes a 50% reduction for the handling of plant and machinery transported domestically, but in so far as this is to be considered discriminatory it does not render the entire fee schedule unlawful.

57 The Commission refers to, for example, Case 68/79 *Hans Just* [1980] ECR 501 and Case 112/84 *Humblot* v *Directeur des services fiscaux* [1985] ECR 1367.

scheme is not discriminatory and does not have the effect of protecting domestic products from competing imported products.[58] In the present case it is apparent that domestic and imported products both fall into the less heavily and more heavily charged categories. In particular, at least some alcoholic beverages are produced in Iceland (brennivín, beer). That conclusion is not affected by the fact that most alcoholic beverages are in fact imported products. The same is true of fruit juices, which fall into the less heavily taxed category. There does not appear to be any basis for the conclusion that goods which are typically imported are systematically allocated to the more heavily charged categories while goods which are typically of domestic production are placed in less heavily taxed categories.

84. In so far as the second question implies a comparison between alcoholic and non-alcoholic drinks, the Commission adds that these two types of product are probably not to be regarded as similar products for the purposes of the first paragraph of Article 14 EEA. This may be inferred from the conclusion that beer and wine are not to be considered similar products in that context.[59] Instead, they are in a relationship of partial competition to which the second paragraph of that provision applies. In such circumstances, the protective effect of any difference in taxation is not presumed and must be demonstrated. However, in light of the foregoing remarks regarding the absence of any apparent discrimination system, it is not necessary to engage in such an analysis.

85. Consequently, the Commission submits that the Respondent's fee schedule is not in any event contrary to Article 14 EEA, even if that fee schedule is properly to be regarded as fiscal in nature.

Conclusion

86. Based on the above, the Commission considers it unnecessary to examine separately the first question and suggests the questions be answered as follows:

> *A system of port charges is not rendered contrary to the provisions of Article 10, 11 or 14 of the EEA Agreement by the mere fact that a single type of product which is most usually imported falls within the highest category of charges.*

Henrik Bull
Judge-Rapporteur

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58 The Commission refers to Case 200/85 *Commission* v *Italy* [1986] ECR 3953.

59 The Commission refers to Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417.