JUDGMENT OF THE COURT
18 October 2002*

(Competition – Exclusive purchasing agreement – Service-station agreement – Article 53 EEA – Regulation 1984/83 – Nullity)

In Case E-7/01,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Gulating lagmannsrett (Gulating Court of Appeal) for an Advisory Opinion in the case pending before it between

Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others

and

Hydro Texaco AS

on the interpretation of Article 53 of the Agreement on the European Economic Area,

THE COURT,

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

Registrar: Lucien Dedichen,

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* Language of the Request for an Advisory Opinion: Norwegian.

having considered the written observations submitted on behalf of:

– Hydro Texaco AS, represented by Trym Landa, advokat;

– the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski and Per Andreas Bjørgan, Officers, Legal and Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Anthony Whelan and Wouter Wils, Legal Advisers, Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others, represented by Ian Anders Tobiassen, advokat; Hydro Texaco AS, represented by Trym Landa; the EFTA Surveillance Authority, represented by Per Andreas Bjørgan; and the Commission of the European Communities, represented by Wouter Wils, at the hearing on 25 June 2002,

gives the following

Judgment

I Facts and procedure

1 By a reference dated 27 September 2001, registered at the Court on 3 October 2001, the Gulating lagmannsrett made a Request for an Advisory Opinion in the case pending before it between Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others (hereinafter, jointly the "Appellants") and Hydro Texaco AS (hereinafter, the "Respondent").

2 The dispute before the national court concerns the question of whether the Respondent is entitled to lease a petrol station owned by the Appellant, under the provisions of a service station agreement concluded between the parties.

3 Hegelstad Eiendomsselskap Arvid B. Hegelstad (hereinafter, "Hegelstad") is a personal company for Arvid B. Hegelstad. Arvid B. Hegelstad and his two sons are the other three appellants in the case before the Gulating lagmannsrett. Hegelstad owns a property in Ålgård, Gjesdal kommune, Norway, on which a petrol station has been operated for several years. As of November 1990, Ålgård Servicesenter AS (hereinafter, "Ålgård") operated the petrol station owned by Hegelstad. Ålgård is also owned by Arvid B. Hegelstad.

4 The Respondent's business activities consist *inter alia* of the sale of motor fuels and lubricants through a network of service stations. On 1 January 1995, the Respondent assumed all rights and obligations of its predecessor, Norsk Texaco AS, when this latter company merged with Hydro Olje AS and changed its name to Hydro Texaco AS.

5 On 17 November 1992, Hegelstad (as distributor) and the Respondent (as supplier) concluded a "Contract of Cooperation" for the delivery of motor fuels and lubricants (hereinafter, the "cooperation agreement"). The contract includes the following provisions pertinent to the present case:

- Clause 1 gives the supplier an exclusive right to supply motor fuels and lubricants to the distributor's petrol station during the contract period. Accordingly, Clause 5 stipulates that the distributor is to obtain motor fuels and lubricants exclusively from the supplier.

- Clause 2.1 states that the supplier should grant the distributor a loan of NOK 4.760.000 to be written off by the supplier in equal annual amounts over 15 years and secured by a lien on the distributor's property. Should the contract be terminated before the expiry of 15 years, the distributor undertakes to repay the supplier that portion of the loan, which, at that time, had not been written off.

- Clause 9 provides that the contract is to run for 10 years from the time of the first delivery of motor fuel to the petrol station, and to be renewed automatically thereafter on identical terms for a new five-year period, unless the supplier gives notice of termination of the contract at least three months prior to the end of the first 10-year-period.

- Clause 10 of the contract provides that the supplier's obligation to deliver ceases if debt settlement proceedings or bankruptcy proceedings are commenced against the distributor. In that case, the supplier is entitled to assume ownership in return for settling registered debts of the distributor in the amount of NOK 4 million. Alternatively, the supplier may claim the immediate lease of the station with a fixed rent equal to the current interest rate on NOK 4 million, corresponding in time with the duration of the cooperation agreement.

- Clause 10 of the contract also mentions that the property is currently leased to Ålgård. In the event that debt settlement proceedings or bankruptcy proceedings are commenced against the lessee, the supplier's option to purchase, alternatively, the option to lease as described above, becomes exercisable, which provision Ålgård accepted by way of separate signature on the contract.

6 By order of 7 December 1994 of the probate and bankruptcy court, Ålgård entered into bankruptcy proceedings. The bankruptcy estate ran the petrol station from the commencement of bankruptcy proceedings until 7 January 1995.

Subsequently, the Respondent exercised its rights under Clause 10 of the cooperation agreement to lease and run the petrol station. The Respondent did not succeed in its claim to assume ownership of the station but continues to lease the petrol station, and is thus both the tenant of and the supplier of motor fuels and lubricants to the petrol station.

7 By a writ dated 3 April 1998, the Appellants brought an action against the Respondent before Sandnes herredsrett (Sandnes District Court), demanding vacation of the property and compensation for the damage suffered. The Respondent requested that the claim be dismissed.

8 On 23 February 1999, Sandnes herredsrett handed down judgment in favour of the Respondent. That judgment was appealed to the Gulating lagmannsrett.

9 Gulating lagmannsrett sought to clarify whether the contract and, in particular, Clause 10 thereof is void under EEA competition law, and referred the following questions to the Court:

> *1. Does a contract of cooperation between an independent petrol station operator who owns the station and a supplier of motor fuels and lubricants which contains clauses providing*
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> *– for an exclusive right for the supplier to deliver motor fuels and lubricants to the distributor for the duration of the contract,*
>
> *– for a right for the supplier to assume ownership of the petrol station for a price of NOK 4 million, as registered in the cadastre, or alternatively, a lease option at a set rental price corresponding to the contract period, in the event of debt settlement proceedings or bankruptcy on the part of the distributor,*
>
> *– that, for the owner of the station/distributor the contract period is not capable of termination and the terms of the contract may not be changed for a period of 15 years, and that the supplier is able to terminate the contract three months prior to the initial period,*
>
> *come within the block exemption in Article 53(3), cf. regulation of 4 December 1992, no. 964, chapter II, section 10?*
>
> *2. If the block exemption in Article 53(3) does not apply, is the cooperation agreement incompatible with Article 53(1)?*
>
> *3. What are the legal effects of a possible conflict, and what limitation on time period must be applied, if any?*

II Legal background

10 Article 53 EEA reads as follows:

> "1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make 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.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> – any agreement or category of agreements between undertakings;
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> –any decision or category of decisions by associations of undertakings;
>
> –any concerted practice or category of concerted practices;
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

11 According to point 3 of Annex XIV to the EEA Agreement, Commission Regulation (EEC) No. 1984/83, OJ 1983 L 173, p. 5, as corrected by OJ 1983 L 281, p. 24, on the application of Article 53(3) of the EEA Agreement to categories of exclusive purchasing agreements (hereinafter "the block exemption for exclusive purchasing agreements" or "Regulation 1984/83") is part of EEA law. The reference to the block exemption on exclusive purchasing agreements in point 3 of Annex XIV was deleted by EEA Joint Committee Decision No. 18/2000 (OJ 2001 L 103, p. 179), which entered into force on 29 January 2000. The act referred to in point 2 of Annex XIV to the EEA Agreement, Commission

Regulation (EC) No. 2790/1999, OJ 1999 L 336, p. 21, on the application of Article 53(3) to categories of vertical agreements and concerted practices (hereinafter "the block exemption for vertical restraints" or "Regulation 2790/1999"), replaced the block exemption on exclusive purchasing agreements. According to Article 12 of Regulation 2790/1999, Regulation 1984/83 remained in force until 31 May 2000.

12 Article 10 of Regulation 1984/83 states that Article 53(1) EEA shall not apply to

> "agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement."

13 Article 12(1)(c) of Regulation 1984/83 states that

> "Article 10 shall not apply where: …the agreement is concluded for an indefinite duration or for a period of more than 10 years…"

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

III Findings of the Court

The first question

15 By its first question, Gulating lagmannsrett essentially seeks to ascertain whether an agreement such as that at issue in the main proceedings falls within the block exemption for exclusive purchasing agreements in Regulation 1984/83.

16 As the relevant facts occurred when Regulation 1984/83 on exclusive purchasing agreements was still in force and the question of Gulating lagmannsrett refers only to that regulation, the Court will not deal with Regulation 2790/1999 on vertical restraints.

17 As a preliminary point, the Court notes that the application of Article 53(1) EEA or Regulation 1983/84 is not precluded by the fact that the contested cooperation agreement was concluded prior to the entry into force of the EEA Agreement. Those rules are applicable pursuant to the transitional arrangements in Articles 5 to 13 of Protocol 21 to the EEA Agreement.

18 The Appellants, supported by the EFTA Surveillance Authority and the Commission of the European Community, have argued that the contested

cooperation agreement is not exempted under Regulation 1983/84 since that agreement must be deemed to have a duration exceeding ten years.

19 The Court notes that Regulation 1984/83 contains special rules for service station agreements. Those rules, which differ from the general provisions applicable to exclusive purchasing agreements, are contained in Articles 10 to 13 of that regulation. It follows from Article 10 that the prohibition in Article 53(1) EEA shall not apply to service station agreements if the requirements in Articles 11 to 13 are fulfilled. Article 12(1)(c) provides that agreements concluded for an indefinite duration or for a period of more than 10 years are excluded from the benefit of the block exemption.

20 It is for the national court to interpret the cooperation agreement contested in the proceedings before it. The facts presented by Gulating lagmannsrett provide that the cooperation agreement is concluded for a period of ten years and is automatically renewed for a period of five years, unless terminated by the supplier. In such circumstances, Article 12(1)(c) prevents the application of the block exemption on exclusive purchasing agreements. The distributor is not entitled to terminate the agreement upon the expiry of the initial ten-year period and is therefore bound by the agreement for a fixed period of 15 years. Therefore, the agreement does not qualify for an exemption under Regulation 1984/83.

21 The inapplicability of the block exemption on exclusive purchasing agreements has no effect on the validity of the cooperation agreement. Whether the agreement is prohibited must be determined by a separate analysis of the criteria set forth in Article 53(1) EEA. The Court will consider that issue in its response to the second and third questions.

22 The answer to the first question must therefore be that an agreement between a supplier of motor fuels and lubricants and an independent service station operator that provides for an exclusive purchasing obligation that may not be terminated by the service station operator for a period of 15 years, does not fall within the block exemption on exclusive purchasing agreements in Regulation 1984/83.

The second question

23 By its second question, Gulating lagmannsrett seeks to ascertain whether the contested cooperation agreement is incompatible with Article 53(1) EEA.

24 In answering that question, the Court finds it appropriate to first consider the argument of the Respondent that, given the circumstances by which the Respondent claimed immediate lease of the service station pursuant to Clause 10 of the cooperation agreement, the agreement was converted into a lease agreement. The Respondent has contended that the exclusive purchase obligation is without object and that the prohibition in Article 53(1) EEA is without relevance.

25 With regard to this argument it suffices to note that under the procedure provided in Article 34 Surveillance and Court Agreement it is for the national court to decide to which questions it deems an answer by the Court to be necessary in order to enable it to give judgment in the case before it. The question of whether the agreement was transformed into a lease contract has no bearing on the findings of the Court. It follows from the questions referred to the Court that the national court essentially seeks guidance regarding an exclusive purchasing agreement, not a lease agreement.

26 Article 53(1) EEA may apply to an exclusive purchasing agreement. Even if such an agreement does not have as its object the restriction of competition within the meaning of Article 53(1) EEA, it is nevertheless necessary to ascertain whether it has the effect of preventing, restricting or distorting competition and may affect trade between the Contracting Parties.

27 Whether an agreement restricts competition, and thereby infringes Article 53(1) EEA, is a legal question that must be examined in the light of economic considerations (see Case E-8/00 *Landsorganisasjonen i Norge and Others* v *Kommunenes Sentralforbund and Others*, judgment (advisory opinion) of 22 March 2002, paragraph 77). In assessing whether an exclusive purchasing agreement is prohibited, the Court of Justice and the Court of First Instance of the European Communities have favoured a flexible interpretation of the corresponding provision in Article 81(1) EC (see, Case T-112/99 *Métropole télévision* [2001] ECR II-2459, paragraph 75 and the judgments of the Court of Justice and the Court of First Instance of the European Communities referred to therein).

28 The benefits of exclusive purchasing agreements to the parties, in particular the improvement in distribution, *inter alia* by reducing transaction costs and increasing the ability to plan ahead for both the supplier and the distributor, as well as to consumers are widely accepted (see, for comparison, the judgment of the Court of Justice of the European Communities in Case C-234/89 *Delimitis* [1991] ECR 935, paragraphs 11 and 12, and Recitals 5 to 7 and 13 to 17 of Regulation 1984/83).

29 In making the analysis of whether an agreement restricts competition, the relevant market must first be determined. The relevant product market comprises all products that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use. Depending on the circumstances, supply-side substitutability may also be taken into account. It appears from the facts presented by Gulating lagmannsrett that the economic activity at issue in the main proceedings is the retail sale of motor fuels and lubricants. It is for the national court to define the separate markets for those products, based on the facts before it.

30 The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and in which the conditions of competition are sufficiently homogeneous, and can be

distinguished from neighbouring areas because the conditions of competition are appreciably different. It is for the national court to assess whether the separate geographic markets for motor fuels and lubricants, are national, regional or local.

31 Exclusive purchasing agreements must be appraised in the economic and legal context in which they occur and where they might combine with others to have a cumulative effect on competition (see, for comparison, judgments of the Court of Justice of the European Communities in Case 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407 and *Delimitis*, paragraph 14). It is therefore necessary to analyse the effect of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other EEA States to gain access to the relevant market or to increase their market share (see, for comparison, *Delimitis* paragraph 15; and, Case C-214/99 *Neste Markkinointi* [2000] ECR I-11121, paragraph 25).

32 In that connection, it is necessary to examine the nature and extent of all similar agreements that tie a large number of points of sale to various suppliers. The effects of those networks of contracts on access to the market depend specifically on the number of stations thus tied to established producers in relation to the number of stations which are not so tied, the duration of the commitments entered into, the quantities of motor fuel and lubricants to which those commitments relate, and on the proportion between those quantities and the total quantities sold (see *Delimitis*, paragraph 19).

33 It is further necessary to examine whether there are real concrete possibilities for a new competitor to enter the network of contracts (see, for comparison, *Delimitis*, paragraph 21). Possible means of market penetration could be the acquisition of producers already established on the market together with their network of service station agreements, or the circumvention of the bundle of contracts by opening new service stations. In assessing whether such opportunities exist, it is necessary to consider the legal rules and the conditions regarding the acquisition of companies and the establishment of service stations, and the minimum number of service stations necessary for the economic operation of a distribution system (see, for comparison, *Delimitis*, at paragraph 21).

34 Finally, it is necessary to consider the conditions under which competitive forces operate in the relevant market (see, for comparison, *Delimitis*, at paragraph 22 and *Neste Markkinointi*, at paragraph 26).

35 According to the information presented to the Court, there were a total of 1995 service stations in Norway in 2001. The Respondent was the main or sole supplier of motor fuels to 401 (about 20.1%), Shell to 614 (about 30.8%), Esso to 458 (about 23.0%), Statoil to 453 (about 22.7%), Rema to 35 (about 1.8%) and Jet to 34 (about 1.7%) service stations. Thus, most service stations were tied to one of the four major suppliers. Of the total volume of motor fuels sold at service stations in 2001, the share of the Respondent was 13.4%, Shell 29.9%, Esso 21.8%, Statoil 31.2%, and others 3.7%. The Court does not have information on

the duration of the exclusive purchasing agreements entered into by the major suppliers, or other factors of relevance to the assessment of whether competitors may enter the markets. It is for the national court, based on the facts before it, to make the necessary assessments.

36 If an examination of all similar agreements reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the supplier concerned contribute to the cumulative effect produced by the totality of the agreements. Under Article 53(1) EEA, responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. Agreements entered into by suppliers whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition laid down in that Article. In order to assess the extent of the contribution of the agreements concluded by a supplier to the cumulative sealing-off effect, the market position of the parties must be taken into consideration. That contribution also depends on the duration of the agreements (see, for comparison, *Delimitis*, at paragraphs 24 to 26 and *Neste Markkinointi*, at paragraph 27).

37 If Gulating lagmannsrett finds that the markets are closed-off as a consequence of all the exclusive purchasing agreements in the markets, it is necessary to assess whether the agreements entered into by the Respondent make an appreciable contribution to the cumulative effect or whether that contribution is insignificant. The factors to be taken into account are set out in the foregoing paragraph. The importance of the contractual duration with regard to market foreclosure is particularly high in the motor fuel market because only one brand is sold at a particular service station. The fundamental factor of this type of exclusive purchasing agreement for the supplier is less the exclusivity clause itself than the duration of the purchase obligation assumed by the distributor (see, *Neste Markkinointi*, paragraphs 31 and 32).

38 The type of cooperation agreement at issue in the main proceedings is distinguished from the Respondent's other exclusive purchasing agreements in that it has a duration of 15 years. Fixed term contracts concluded for a number of years are more likely to restrict access to the market than those which may be terminated upon short notice at any time (see, for comparison, *Neste Markkinointi*, paragraph 33). The restrictive effect of the duration of fixed term contracts must also be assessed in the light of the over-all economics of the relevant market. If the duration is manifestly excessive in relation to the average duration of contracts generally concluded in the relevant market, the individual agreement falls under the prohibition laid down in Article 53(1) EEA. It has been stated that all the other exclusive purchasing agreements entered into by the Respondent have been amended in order to come within the scope of the block exemption for exclusive purchasing agreements in Regulation 1984/83 or were already exempted by virtue of Article 12(1)(c) of the regulation. This information has not been contested and is for Gulating lagmannsrett to verify.

39 However, if the type of agreement contested in the main proceedings represents only a very small proportion of all the exclusive purchasing agreements entered into by the Respondent, it is only under very exceptional circumstances that such agreement(s) may be regarded as making any significant contribution to market foreclosure, which is the requirement for being caught by the prohibition in Article 53(1) EEA. This may *inter alia* be the case where the market positions of both parties are extraordinarily strong. From the facts before it, the Court is not aware of such circumstances in the present case.

40 The Court finally notes that any restriction of competition by an exclusive purchasing agreement is only prohibited under EEA law insofar as it is capable of affecting trade between EEA States. The contested cooperation agreement appears to be part of a network of agreements that bind a considerable number of retailers within one EEA State to four large international suppliers. Such an agreement may affect trade between EEA States within the meaning of Article 53(1) EEA (see the judgment of the Court of Justice of the European Communities in Case 43/69 *Bilger* v *Jehle* [1970] ECR 127, at paragraph 5).

41 The answer to the second question must therefore be that the prohibition laid down by Article 53(1) EEA does not apply to an exclusive purchasing agreement entered into between a supplier of motor fuels and lubricants and a service station operator for a fixed period of 15 years, where that type of agreement makes only an insignificant contribution to the cumulative closing-off effect produced by the totality of agreements on the market.

The third question

42 By its third question, Gulating lagmannsrett seeks to ascertain the legal effects of an infringement of Article 53(1) EEA, in particular whether the finding that an exclusive purchase obligation is void affects the validity of the remainder of the agreement.

43 Article 53(2) EEA provides that agreements or decisions prohibited by Article 53(1) shall be automatically void. As the Court has previously held, the automatic nullity applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently, it is for the national court to determine, in accordance with the relevant national law, whether the nullity affects the validity of other parts of the agreement (see, to that effect, Case E-3/97 *Jæger* v *Opel Norge* [1998] EFTA Court Report 1, at paragraph 77). The legal effect of the nullity on the provisions not affected by the prohibition is not governed by EEA law.

44 The answer to the third question must therefore be that the automatic nullity provided for in Article 53(2) EEA applies only to those parts of the agreement affected by the prohibition in Article 53(1) EEA. It is for the national court to

determine, in accordance with the relevant national law, whether the nullity affects the validity of other parts of the agreement.

IV Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Gulating lagmannsrett by a reference of 27 September 2001, hereby gives the following Advisory Opinion:

1 An agreement between a supplier of motor fuels and lubricants and an independent service station operator that provides for an exclusive purchasing obligation that may not be terminated by the service station operator for a period of 15 years, does not fall within the block exemption on exclusive purchasing agreements in Regulation 1984/83.

2 The prohibition laid down by Article 53(1) EEA does not apply to an exclusive purchasing agreement entered into between a supplier of motor fuels and lubricants and an independent service station operator for a fixed period of 15 years, where that type of agreement makes only an insignificant contribution to the cumulative closing-off effect produced by the totality of agreements on the market.

3 The automatic nullity provided for in Article 53(2) EEA applies only to those parts of the agreement affected by the prohibition in Article 53(1) EEA. It is for the national court to determine, in accordance with the relevant national law, whether the nullity affects the validity of other parts of the agreement.

Thór Vilhjálmsson	Carl Baudenbacher	Per Tresselt

Delivered in open court in Luxembourg on 18 October 2002.

Lucien Dedichen Registrar	Thór Vilhjálmsson President