



REPORT FOR THE HEARING
in Cases E-8/94 and E-9/94

REFERENCE 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 Markedsrådet (the Market Council) for an advisory opinion in the two cases pending before it between

Forbrukerombudet (the Norwegian Consumer Ombudsman), on the one hand, and Mattel Norge A/S and Mattel Scandinavia A/S, and Lego Norge A/S, respectively, on the other,

on the interpretation of Council Directive 89/552/EEC, as well as Articles 11, 13 and 36 of the EEA Agreement.

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I. Introduction

1. By order of 28 October and 28 December 1994, received at the Court Registry on 28 December 1994 (fax) and 3 January 1995 (original), the Markedsrådet (the Market Council) made a reference to the EFTA Court for an advisory opinion in two cases brought before it by Forbrukerombudet (the Norwegian Consumer Ombudsman) against Mattel Norge A/S and Mattel Scandinavia A/S (Mattel), and Lego Norge A/S (Lego), respectively. The legal background, facts, procedure of the case and observations of the parties are summarized below.

2. On hearing the preliminary report of the Judge-Rapporteur, the Court decided under Article 39 of the Rules of Procedure, after having given the parties an opportunity to express their views, to order that the two cases be joined for the purpose of the oral procedure and the final judgment.

3. In view of the fact that the lawyer for Mattel Scandinavia A/S in her defence dated 10 January 1995 informed the Markedsrådet that there is no such company as Mattel Norge A/S and that she only represented Mattel Scandinavia A/S, a company registered in Denmark and operating in Norway through a sales office, the Markedsrådet has been asked by the Court under Article 96(4) of the Rules of Procedure for clarification as to which are the parties in the case against Mattel.

II. Legal background – Facts and procedure

A. National legislation

4. Markedsrådet and Forbrukerombudet are established pursuant to Section 10 of the Act no 47 of 16 June 1972 relating to control of Marketing and Contract Terms and Conditions (the Marketing Act), as permanent bodies which assist in the implementation of the provisions of the Act. From the Act itself as well as from information contained in the request for an advisory opinion from the Markedsrådet, the following appears as to the composition, competence etc. of Markedsrådet.

5. In accordance with Section 11 of the Marketing Act, Markedsrådet consists of nine members with personal deputies, all of which are appointed by the King. Their term of office, which is renewable, is four years. The King appoints the chairman and the vice-chairman. So far, the chairman has always been a judge.

6. The competence of the Markedsrådet is set out in Section 12 of the Marketing Act, which reads:

The Market Council may prohibit an act which the Council deems a violation of a provision laid down in or pursuant to Chapter I, if it finds that such intervention is necessary in the interest of the consumers or, pursuant to Section 1, second paragraph, in the interest of equality of the sexes. The Market Council may also forbid the party before the Market Council to use terms and conditions as mentioned in Chapter II or to engage in actions aimed at such use. The Market Council may also prohibit an action which it finds to be contrary to rules for the observance of which Forbrukerombudet is responsible, according to Regulations issued pursuant to Section 3-1, third paragraph of the Broadcasting Act of 4 December 1992 no 127, when this is called for in the interest of consumers or in the interest of equality between sexes. The Market Council may order such measures as it deems necessary to ensure that the actions stop and the prohibition is respected.

The Market Council has a quorum when the chairman or the vice-chairman and at least 4 other members or deputies are present. Decisions are made by simple majority. In the event of a tie, the chairman has a casting vote.

The Market Council must state reasons for adopting a decision. There is no administrative appeal against the decision of the Market Council.

7. Under Section 13 of the Marketing Act, Forbrukerombudet must in the interest of the consumer, *inter alia*, seek to prevent market abuses under the Act. To this end, where voluntary compliance is not obtained, he may submit a case to Markedsrådet for a decision under Section 12. Such a procedure begins with Forbrukerombudet drawing up a summary of the case, where the background of the case as well as the standpoint of Forbrukerombudet is expressed. The summary is then submitted to Markedsrådet, which invites the parties in the case to make comments.

8. Further, according to this information, the procedure before Markedsrådet follows "ordinary procedural rules" and is otherwise conducted in accordance with the Public Administrative Act. Normally a hearing is arranged where Forbrukerombudet presents the case and the reasons for bringing it before Markedsrådet. The other party is usually present, accompanied by counsel. Markedsrådet may also allow others to make comments.

9. Section 1 of the Marketing Act provides:

In the conduct of business no act may be performed which runs counter to good business practice in the relationship between entrepreneurs or which is unreasonable in relation to consumers.

10. Section 17, first paragraph, of the Marketing Act provides:

Anyone who intentionally violates Sections 2–9 of this Act or decisions made pursuant to this Act or is an accomplice thereto shall be punishable by a fine or imprisonment of up to 3 months.

11. Section 3-1, second paragraph of the Broadcasting Act of 4 December 1992 provides:

Advertisements may not be broadcast in connection with children's programmes, nor may advertisements target children specifically.

B. *Provisions of the Agreement on the European Economic Area*

12. Article 36 of the EEA Agreement provides:

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

2. Annexes IX to XI contain specific provisions on the freedom to provide services."

13. Annex X on Audiovisual Services refers to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the TV Directive).¹ Article 2(2) of the Directive, which is contained in "CHAPTER II General provisions", provides as far as here is of relevance:

"2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this

¹ OJ No L 298, 17.10.1989, p.23.

Directive. Member States may provisionally suspend retransmission of television broadcasts if the following conditions are fulfilled:

- (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;
- ... "

14. Article 16 of the TV Directive, which is contained in "CHAPTER IV Television advertising and sponsorship", provides:

"Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations."

15. Article 22 of the TV Directive, which forms the only provision in "CHAPTER V Protection of minors", reads:

"Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."

16. Article 11 EEA Agreement states:

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

17. Article 13 of the EEA Agreement states:

"The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."

C. *Facts and procedure*

18. The broadcasting company TV 3 is set up with a parent company in the United Kingdom and subsidiary companies in Denmark, Sweden and Norway. Each of these companies broadcasts from the United Kingdom via satellite television programmes specifically directed to the respective country. In the autumn of 1993, Lego and Mattel broadcast commercials on TV 3 Norway. In letters dated 25 November 1993, Forbrukerombudet requested Lego and Mattel to refrain from broadcasting the commercials in the future. According to Forbrukerombudet, the commercials which were contained in broadcasts directed at Norway specifically targeted children and were therefore contrary to Section 1 of the Marketing Act read in conjunction with Section 3-1, second paragraph, of the Broadcasting Act.

19. Lego and Mattel expressed the opinion that international agreements concluded by Norway prevented Forbrukerombudet from holding the advertiser responsible under the Marketing Act, as the commercials were distributed via TV 3.

20. Forbrukerombudet in summaries dated 1 November 1994 brought the cases before Markedsrådet, which decided to request an advisory opinion from the EFTA Court before deciding on the cases. By orders of 28 October and 28 December 1994, the Markedsrådet requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/EFTA Court Agreement) on the following questions:

- **Is Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, to be interpreted as preventing the receiving State from applying national provisions according to which an advertiser may be prohibited from making use of a commercial which specifically targets children, in a transmission which is specifically directed at Norway from another EEA State?**
 - **Is Article 36 of the EEA Agreement on the freedom to provide services to be interpreted as preventing the receiving State from applying national provisions according to which an advertiser may be prohibited from making use of a commercial which specifically targets children, in a transmission which is specifically directed at Norway from another EEA State?**
 - **Is the application of Section 1 of the Marketing Act, in conjunction with Section 3-1 of the Broadcasting Act, compatible with Articles 11 and 13 of the EEA Agreement concerning quantitative restrictions on imports?**
21. The order for reference was received at the Court Registry on 28 December 1994 (fax) and 3 January 1995 (original).
22. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97(1) of the Rules of Procedure, written observations were received by fax on 9 March 1995 from:
- Forbrukerombudet Kjersti Graver;
 - Mattel Scandinavia A/S, represented by Siri Teigum, advokat at the law firm of Thommessen Krefthing Greve Lund;
 - Lego Norge A/S, represented by Hans Skirstad, advokat at the law firm of Bull & Co;
 - the Government of Norway, represented by Didrik Tønseth, Attorney at the Office of the Attorney General for Civil Affairs, acting as Agent;
 - the Government of Sweden, represented by Ingrid Larén-Marklund, Assistant Under-Secretary of the Ministry for Foreign Affairs, acting as Agent;
 - the Government of Greece, represented by Joanna Kiki, member of the Legal Service of the Ministry of Foreign Affairs and Sophia Hiniadou, counsellor of the Minister for Press and Mass Media, acting as Agents;
 - the EFTA Surveillance Authority, represented by Håkan Berglin, Director of its Legal Service, acting as Agent;

- the EC Commission, represented by Berend Jan Drijber, a member of its Legal Service, acting as Agent.

III. Written observations submitted to the Court

A. *The questions referred*

(a) The first question

23. A brief summary of the observations received from the parties, institutions and governments on the first question is set out in paragraphs 24–38 below. In short, *Forbrukerombudet*, the *Governments of Norway, Sweden and Greece* and the *EFTA Surveillance Authority* are all of the opinion that the first question should be answered in the negative, i.e. that the TV Directive is to be interpreted as not preventing the receiving State from applying national provisions of the Norwegian type. On the other hand, *Mattel and Lego* and the *EC Commission*, argue that the question should be answered in the affirmative.

Forbrukerombudet

24. Before commenting on the actual questions, *Forbrukerombudet* makes some general remarks on the scope of the Broadcasting Act, the territorial scope of the Norwegian Marketing Act, and the organisation and practices of TV 3. Thus the prohibition in the Broadcasting Act regarding advertisements targeting children is only applicable to broadcasting companies which have been granted a Norwegian concession, which is not the case with TV 3 which has a British concession. *Forbrukerombudet* states that a prohibition according to Section 1 of the Marketing Act on an advertiser cannot be seen as restricting retransmission of a television broadcast within the meaning of the TV Directive. *Forbrukerombudet* further submits that as the TV Directive does not contain any specific provisions on targeted advertising, there is no obstacle to applying the special provisions of the European Convention on Transfrontier Television on the matter. If the transmitting State principle were also extended to advertisers, the result would, according to *Forbrukerombudet*, be a circumvention of the rules. The receiving State must, in such cases, be allowed to take action. *Forbrukerombudet* refers in this context to the judgment of the EC Court of Justice in *TV 10*².

25. *Forbrukerombudet* therefore submits that the EFTA Court should hold that the TV Directive does not prevent a receiving State from applying national

² Case C-23/93 *TV 10 SA v. Commissariat voor de Media*, judgment of 5 October 1994, not yet published.

provisions according to which an advertiser may be prohibited from making use of a television advertisement which is specifically directed at Norway from another EEA State.

The Government of Norway

26. The Government of Norway argues that the TV Directive only coordinates broadcasting activities but does not cover the relationship between advertisers and receiving States. In the opinion of the Government of Norway services by broadcasters in certain States to advertisers established in particular in the State where programmes are received are not harmonized by the TV Directive. In case the EFTA Court decides otherwise, the Norwegian Government maintains that advertisements which are directed specifically at the viewers of a particular EEA State in circumvention of national law fall outside the scope of the Directive. The fact that no mention of circumvention of national advertising rules is made in the TV Directive does not mean that such circumvention is protected by the TV Directive. The Norwegian Government in that respect refers *inter alia* to case law of the EC Court of Justice (*Van Binsbergen*³, *Veronica*⁴ and *TV 10*), general principles of law, a declaration made by a member of the Commission in 1990 and aspects of fair competition.

27. Thus, the Government of Norway proposes that the first question posed by the Markedsrådet should be answered as follows:

"Council Directive 89/552/EEC is not to be interpreted as preventing the receiving State from applying national provisions according to which an advertiser may be prohibited from making use of a commercial which specifically targets children, in a transmission which is specifically directed at one EEA State from another EEA State."

The Government of Sweden

28. The Government of Sweden submits that the transmitting State principle only applies in areas which explicitly fall within the fields coordinated by the TV Directive. The Directive contains no provisions concerning trade practices, a fact which is confirmed in the preamble. The Government of Sweden also submits that even in areas which fall within the fields coordinated by the TV Directive, the transmitting State principle does not limit the power of receiving States to regulate

³ Case 33/74 *van Binsbergen v. Bestuur van de bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

⁴ Case C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariat voor de Media* [1993] ECR I-487.

how undertakings under their jurisdiction use advertising via TV broadcasts as long as a receiving State does not restrict reception or retransmission of a TV broadcast transmitted from another Member State, as the action in question is directed at the advertiser and not the broadcaster. If the transmitting State principle does limit the power of receiving States to regulate how undertakings under their jurisdiction use advertising via TV broadcasts, the Government of Sweden is of the opinion that a derogation from this principle must be accepted where there is circumvention.

29. The Swedish Government submits that the first question should be answered in the same way as proposed by the Government of Norway (see paragraph 27 above).

The Government of Greece

30. The Government of Greece submits that the internal legislation of a Member State may provide for prohibitions or restrictions on advertisements which are directly aimed at minors and that a temporary suspension, according to Article 2 (2)(a) of the Directive, is permissible.

The EFTA Surveillance Authority

31. The Surveillance Authority examines what fields are co-ordinated by the Directive and whether the protection of children from television advertising is such a field. It submits that the particular need for protection of children from television advertising is a field covered by the Directive and that therefore, in relation to this aspect, the transmitting State principle applies. The transmitting State is thus obliged under Article 3(2) of the Directive to ensure that rules laid down in the Directive are complied with and Article 2(2) precludes the receiving State from restricting the reception and retransmission of the broadcast. In the view of the EFTA Surveillance Authority, Article 2(2) of the TV Directive does not however prevent a receiving State from taking action in respect of an advertisement broadcast from another EEA State, as long as the action is directed against and concerned only with the activities of the advertiser and, consequently, is not aimed at the broadcaster or otherwise intended to interfere with the broadcasting or the retransmission of the broadcast.

32. For these reasons, the EFTA Surveillance Authority proposes that the first question should be answered as follows:

"The Act referred to in point 1 of Annex X to the EEA Agreement (Council Directive 89/552/EEC) is to be interpreted so as not to preclude a receiving State from applying national provisions according to which an advertiser

may be prohibited from making use of, in a television transmission broadcast from another EEA State and directed at the receiving State, a commercial which specifically targets children, as long as the provisions are not applied against the broadcaster or otherwise for the purpose of interfering with the broadcasting, retransmission or receipt of the transmission."

Mattel and Lego

33. Mattel and Lego stress that a possible prohibition on the defendants from using the advertisements in question in broadcasts directed to Norwegian audience would have legal consequences for TV 3. This is due to the fact that, according to Norwegian law (Section 17 first paragraph of the Marketing Act), TV 3 may be subject to penal sanctions if it transmits the advertisements after the Market Council has prohibited Mattel and Lego from using them. The defendants urge the Court to bear this in mind when pronouncing itself, in particular, on whether it is possible to distinguish between the protection of broadcasting companies and advertisers. The defendants submit that the Norwegian prohibition of advertisements specifically directed towards children has a wider scope than that of Article 16 of the TV Directive. The Norwegian provision therefore goes beyond the requirements contained in that article. The defendants also underline that in order to ensure the "effet utile" of the transmitting State principle embodied in Article 2(2) of the Directive, the prohibition of restrictions on broadcasts containing such advertisements may not be narrowly construed as referring only to measures which result in the suspension of the transmission of a television broadcast in the technical sense.

34. Although agreeing that in principle an EEA State may be entitled to resort to actions against persons who, by invoking the rules of EEA law, circumvent lawful national legislation, the defendants are of the opinion that the question of circumvention is of no relevance to the cases in question. The absence of a provision in the Directive corresponding to Article 16 of the European Convention on Broadcasting on circumvention of national rules on advertising suggests, in the view of the defendants, that the Directive does not provide for the possibility of such protection. If the Court does not agree with that view, the defendants submit that the scope of Article 16 in the European Convention should also have an impact on the interpretation of the notion of circumvention under EEA law. However, in that eventuality as well, it is submitted that no circumvention whether by the advertiser or by the broadcasting company is at issue in the present cases.

35. For these reasons, Mattel and Lego propose that the Court should answer the first question as follows:

"Articles 2(2) and 16 of Directive 89/552/EEC do not allow a national authority in an EEA state to prohibit an economic operator from showing an advertisement in an emission by a broadcaster established in another EEA state, if such a decision directly or indirectly is based on a measure of national law which contains a general prohibition of advertisement specifically directed to children."

The EC Commission

36. The Commission states that the main objective of the TV Directive is to facilitate the free movement of television broadcasts within the Community. This is the reason why it is known as the "Television Without Frontiers Directive". The Directive pursues this aim by laying down minimum standards which must be complied with by broadcasters under the jurisdiction of the Member State. Broadcasts which complies with these standards may be transmitted to other Member States. Article 2(2) of the Directive provides that Member States must ensure freedom of reception and may not restrict retransmission on their territory of broadcasts coming from other Member States for reasons which fall within the fields coordinated by the Directive. This rule is known as the "transmitting State principle". The only exception to this rule is laid down in the second sentence of Article 2(2). Member States are allowed, subject to strict conditions, to suspend broadcasts which manifestly, seriously and gravely infringe the rules aimed at the protection of the physical, mental or moral developments of minors (Article 22).

37. The Commission is of the opinion that Article 16 of the TV Directive does not in principle leave room for diverging national rules. Unlike Section 3-1, second paragraph, of the Norwegian Broadcasting Act, Article 16 of the Directive does not, according to the Commission, contain an absolute ban on television advertising targeting children specifically or a ban on advertising in connection with children's programmes, but seeks to avoid children being unduly influenced by television messages. The Commission therefore submits that Article 16 lays down harmonized rules which are aimed at protecting young children against moral or physical detriment caused by television advertising, which in principle do not leave room for diverging national rules. Therefore the Norwegian provision goes beyond the requirements in Article 16 of the Directive. As to whether the TV Directive can be relied on by advertisers or only by broadcasters, the Commission is of the opinion that such a distinction between the two categories is neither relevant nor tenable and that, therefore, any State measure having as its object or effect the creation of an obstacle to television broadcasts from other Member States, including the television advertisements contained in such a broadcast, is contrary to the transmitting State principle. This would only be different if the Directive itself provided for an exception. There is no such exception here. Since Article 16 harmonizes the laws on advertisements in respect of the protection of

minors, national rules which are at variance with that provision can no longer be applied to broadcasts from other Member States.

38. The Commission proposes one common answer for all the three questions, namely:

"Articles 2(2) and 16 of Directive 89/552/EEC do not allow a prohibition to be ordered by which an economic operator is enjoined from showing an advertisement contained in a television programme of a broadcaster established in another EEA state if such a prohibition is based on a measure of national law which contains a general prohibition of advertisements targeting children."

(b) The second question

39. *Forbrukerombudet*, the *Governments of Norway, Sweden and Greece* and the *EFTA Surveillance Authority*, all answer the second question, regarding Article 36 EEA, also in the negative, while *Mattel and Lego* propose an affirmative answer. *The EC Commission* is of the opinion that Article 36 is of no relevance following the entry into force of the TV Directive. A brief summary of the observations received from parties, institutions and governments on this matter is set out in paragraphs 40–51 below.

Forbrukerombudet

40. *Forbrukerombudet* refers to case law of the EC Court of Justice and underlines that, in non-harmonized areas, the Member States are free to introduce or keep provisions contrary to the principle of freedom to provide services on condition that those provisions may be justified on grounds of public interest, are non-discriminatory and proportionate to the aim pursued. *Forbrukerombudet* is of the opinion that the judgment in *Keck*⁵ is also of importance for what should be considered as restrictions on the free movement of services. If the EFTA Court considers that the Norwegian prohibition is a restriction on the freedom to provide services, *Forbrukerombudet* submits that the prohibition is justified on the grounds of public interest and that it is non-discriminatory and proportionate.

41. *Forbrukerombudet* therefore submits that the EFTA Court should hold that Article 36 of the EEA Agreement on the freedom to provide services does not prevent a receiving State from applying national provisions according to which an advertiser may be prohibited from making use of a television advertisement which

⁵ Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

specifically targets children, in a transmission which is specifically directed at Norway from another EEA State.

The Government of Norway

42. The Government of Norway particularly stresses consumer protection as a public interest consideration and submits that there can be no doubt that the protection of children against television advertisements is a ground of general interest which is protected under existing Community law.

43. The Norwegian Government proposes that the answer to the second question of the Markedsrådet should be:

"Article 36 of the EEA Agreement on the freedom to provide services is to be interpreted as allowing the receiving State to apply national provisions according to which an advertiser may be prohibited from making use of a commercial which specifically targets children, in a transmission which is specifically directed at Norway from another EEA State."

The Government of Sweden

44. The Government of Sweden refers to *Debauve*⁶ and argues that the case law of the EC Court of Justice contains clear indications that an analogous application of the free movement of goods provisions (Articles 30–36 EC), taking into account considerations of general interest, is possible. It also states that the contested action is against the advertiser and only means that he is forbidden to use the advertisement in question in the future and that, therefore, it cannot be stated that an intervention of this nature creates obstacles to the free movement of services as the actual transmission is not prevented nor is the programme company's possibility of offering advertising time.

45. The Government of Sweden therefore submits that the second question should be answered as follows:

"Article 36 of the EEA Agreement on the freedom to provide services cannot be interpreted as preventing the receiving State from applying national provisions according to which an advertiser may be prohibited from making use of a commercial which specifically targets children, in a transmission which is specifically directed at Norway from another EEA State."

⁶ Case 52/79 *Procureur du Roi v. Debauve* [1980] ECR 833.

The Government of Greece

46. The Government of Greece also stresses, with references to case law of the EC Court of Justice, the protection of consumers and in particular the protection of minors as a general interest which may legitimately restrict the freedom to provide services.

The EFTA Surveillance Authority

47. The EFTA Surveillance Authority also underlines that, in interpreting Article 59 EC (identical in substance to Article 36 EEA), the EC Court of Justice has consistently recognized the right of the Member States under certain circumstances to impose restrictions on the freedom to provide services on grounds of public interest, including consumer protection. According to the Surveillance Authority, the purpose of the national provisions concerned is to ensure sound business practices and, more particularly, to provide child consumers with adequate protection. The Surveillance Authority admits that the TV Directive contains rules aimed at the protection of children in TV advertising. Those rules cannot however, according to the Authority, be taken to secure the level of protection at which a State may be entitled to aim. In view of this, the Surveillance Authority submits that it must be permissible, and amount to a legitimate choice of policy pursued in the public interest, for Norway to fix the level of protection of children to be respected by advertisers within Norwegian jurisdiction and to lay down and apply such national rules as are necessary to ensure the enforcement of the policy chosen.

48. The EFTA Surveillance Authority proposes that the EFTA Court should answer the second and the third questions in the same manner, namely:

"Articles 11 and 36 EEA are to be interpreted as not precluding an EFTA State from applying national provisions according to which an advertiser may be prohibited from making use of a television advertisement which is specifically targeted at children, even if the advertisement is to be broadcast from another EEA State, provided that the prohibition applies equally to all advertisers without distinction as regards their nationality or place of establishment."

Mattel and Lego

49. Mattel and Lego refer to *Säger*⁷ and *Commission v. the Netherlands*⁸ and point out that restrictions on advertisements may be incompatible with Article 36 EEA, even if there is no discrimination between foreign and national service providers. The defendants underline that television advertising involves various services at different levels. The Norwegian prohibition would indeed restrict the possibility of broadcasters to provide advertising services to advertisers. The defendants agree that consumer protection is a public interest which may justify restrictions on advertisements. However, given that there are minimum standards regarding advertisements towards children in the TV Directive, and that rules as strict as the Norwegian rules are unheard of in most other EEA States, the Norwegian restrictions on the possibility of purchasing cross border broadcasting of advertisements do not seem necessary to protect children as an audience of television broadcasts. The defendants therefore submit that the application of the Norwegian prohibition as presupposed by the authorities is not proportionate to the general interest pursued. According to the defendants, the application of the Norwegian Marketing Act to advertisers is therefore, even if the advertisers themselves are not considered to be protected by the Directive, incompatible with Article 36 EEA. The question of circumvention is, in the view of the defendants, also irrelevant in this context.

50. The defendants therefore suggest that the Court should answer the second question as follows:

"Article 36 EEA does not allow a national authority in an EEA State to prohibit an economic operator from showing an advertisement in an emission by a broadcaster established in another EEA state, if such a decision directly or indirectly is based on a measure of national law which contains a general prohibition of advertisements specifically directed at children."

The EC Commission

51. Concerning the applicability of both Articles 11 and 36 EEA, the *Commission* only examines them "for the sake of completeness", being of the opinion that its conclusions as to the interpretation of the TV Directive already permits the Court to give its advisory opinion. In relation to Article 36, the Commission points out that since the TV Directive entered into force, restrictions

⁷ Case C-76/90 *Säger v. Dennemeyer* [1991] ECR I-4221, paragraph 12.

⁸ Case C-353/89 *Commission v. the Netherlands* [1991] ECR I-4069, paragraph 17.

on television broadcasts from other Member States must be exclusively assessed under that Directive, which is the *lex specialis* in relation to Article 36 EEA.

(c) The third question

52. *Forbrukerombudet*, the *Governments of Norway and Sweden* and the *EFTA Surveillance Authority* all answer the third question in the affirmative, while *Mattel and Lego*, on the other hand, propose a negative answer. The *EC Commission* again claims that restrictions on television broadcasts from other Member States must be exclusively assessed under the TV Directive. A brief summary of the observations received from parties, institutions and governments on this matter are set out in paragraphs 53–66 below.

Forbrukerombudet

53. *Forbrukerombudet* refers to the *Keck* judgment as well as *Hünermund*⁹ and *Leclerc-Siplec*¹⁰ and submits that the requirement in Section 1 of the Marketing Act, in conjunction with Section 3-1, second paragraph, of the Broadcasting Act, that an advertisement must not target children specifically, must be considered as a "selling arrangement" within the meaning of the *Keck* judgment. In the opinion of *Forbrukerombudet*, the prohibition does not imply a general ban on the marketing of certain products, but imposes requirements on the manner in which this is done. Toys can be marketed, but the advertiser must model the advertisement so that it does not have a particular appeal to children. If the EFTA Court considers that the Norwegian provisions constitute a quantitative restriction on imports, *Forbrukerombudet* submits that the prohibition is justified on grounds of public interest, is non-discriminatory and proportionate.

54. *Forbrukerombudet* therefore submits that the EFTA Court should hold that the application of Section 1 of the Marketing Act, in conjunction with Section 3-1, second paragraph, of the Broadcasting Act, is compatible with Articles 11 and 13 of the EEA Agreement concerning quantitative restrictions on imports.

The Government of Norway

55. According to the Government of Norway, the Norwegian legislation at issue prohibits a particular method of sales promotion, i.e. television advertisements targeted at children. It applies to all traders in Norway, without

⁹ Case C-292/92 *Hünermund* [1993] ECR I-6787.

¹⁰ Case C-412/93 *Leclerc-Siplec v. TF1 Publicité and M6 Publicité*, judgment of 9 February 1995, not yet published.

distinction as to the origin of the product advertised. Such measures would fall outside the scope of Article 11 of the EEA Agreement. The Government of Norway refers in this context to *Keck*, *Hünermund* and *Leclerc-Siplec*.

56. The Government of Norway therefore proposes the following answer:

"National legislation which prohibits a particular method of sales promotion, including television advertisements targeted at children, falls outside the scope of Article 11 of the EEA Agreement, even if it could restrict the volume of sales from other EEA States."

The Government of Sweden

57. According to the Government of Sweden, the Norwegian prohibition on advertising aimed at children does not have as its purpose the regulation of trade between Member States. Since the prohibition only affects TV advertisements specifically aimed at children, there is no restriction directed at advertising of certain products, nor any requirements to be met by these products. Furthermore, in the view of the Swedish Government, it can not be established that the prohibition may create obstacles in the form of additional costs. In addition, the prohibition applies to all traders operating within the national territory and affects in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. Since, according to the Government of Sweden, these conditions are fulfilled, the prohibition is not by nature such as to prevent access to the market for foreign products or to impede their access any more than it impedes access of domestic products. Following the case law of *Keck*, the application of the prohibition falls outside the scope of Article 11 of the EEA Agreement. If the prohibition were considered to fall within the scope of Article 11 EEA, the application would be justified on the grounds contained in Article 13 of the EEA Agreement.

58. In the light of these observations, the Government of Sweden suggests that the third question should be answered as follows:

"The application of Section 1 of the Marketing Act, in conjunction with Section 3-1, is compatible with Articles 11 and 13 of the EEA Agreement concerning quantitative restrictions on imports."

The EFTA Surveillance Authority

59. The EFTA Surveillance Authority also refers to the reasoning of the EC Court of Justice in the cases of *Keck*, *Hünermund* and *Leclerc-Siplec* and submits that the prohibition involved in the cases at hand relates to a "selling arrangement"

within the meaning of the *Keck* judgment. The prohibition therefore falls outside the scope of Article 11 EEA, provided that it applies to all traders operating in Norway and that it affects in the same manner, in law and in fact, the marketing of Norwegian products and those from other EEA States. According to the Surveillance Authority both these conditions are fulfilled, and, consequently, the prohibition falls outside the scope of Article 11 EEA. This being so, the Surveillance Authority does not consider it necessary to consider the matter under Article 13 EEA. The EFTA Surveillance Authority proposes a common answer to questions two and three (see paragraph 48 above).

Mattel and Lego

60. While referring to recent case law of the EC Court of Justice (*Keck*, *Hünermund and Leclerc-Siplec*, including the opinion of the Advocate General in the latter case), the defendants point out that the restrictions on advertisements in the present case are of a more far-reaching nature than the restrictions the EC Court of Justice had to deal with in *Hünermund* and *Leclerc*, which both concerned restrictions on the advertising activities of distributors. The EC Court of Justice did not pronounce itself on restrictions on advertisements of a more general nature, where neither producers, importers, distributors nor anybody else can lawfully advertise their goods or services on television. According to the defendants, television advertising is a main method of communication with children as consumers. In practice, advertisements in newspapers and magazines, on hoardings, on the radio and so forth is no alternative for economic operators who wish to advertise to children. Mattel and Lego therefore submit that the prohibition may have foreclosing effects which are incompatible with Article 11 EEA, and that these foreclosing effects in practice also may affect the commercialization of products from other EEA States differently from Norwegian products.

61. Against this background, the defendants propose that the third question be answered as follows:

"A prohibition under national law of television advertisements specifically directed towards children, which is applicable on advertisements ordered by economic operators in other EEA states in broadcasts from other EEA States, constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 11 of the EEA Agreement."

The EC Commission

62. As already stated above, the Commission only examines Article 11 EEA "for the sake of completeness", being of the opinion that its conclusions as to the interpretation of the TV Directive already permit the Court to give its advisory opinion.

63. The Commission first raises the question whether so general a ban on television advertising should not be regarded as an unjustified restriction of other services, e.g. services provided by broadcasters to advertisers or by advertising agencies to advertisers. It notes that the EC Court of Justice consistently examined national rules limiting advertising under the rules of free movement of goods and not under Article 59 EC. Only Article 11 EEA could thus be relevant. The Commission then addresses recent case law relating to advertising, especially the consequences of the *Keck* judgment. The notion of "selling arrangements", as expressed in that judgment, should be understood as a common term for national rules defining who may sell what goods at what time and in which manner. In the *Leclerc-Siplec* case, the EC Court of Justice held that a provision such as the French rule preventing the distribution sector from advertising on television concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution). In the light of this unambiguous wording, it is, in the view of the Commission, difficult to see why the Norwegian provision prohibiting advertising directed at children should be treated differently.

64. A different view may, however, according to the Commission, be defended, if it can be shown that the measure in question affects the possibility of foreign producers to have access to the market. A general ban on television advertising may be difficult to qualify as a selling arrangement if it affects market access and reduces the total volume of sales of the products concerned. This would be the case if it can be shown that television advertising is the only efficient way of marketing a product and that it cannot be replaced by other forms of promotion without reducing the volume of sales. This might be true of advertising aimed at children, since it seems fair to assume that children are consumers of television programmes rather than of printed matter.

65. If it is nevertheless assumed that the Norwegian measure in issue does constitute a selling arrangement it is necessary to examine further whether the two additional conditions set out in *Keck* are fulfilled. According to the Commission, a ban on television advertising might have the effect of protecting domestic manufacturers which may have as a result that the marketing of products from other Member States may be in law, but not in fact, affected in the same manner as the marketing of domestically produced goods.

66. The Commission finds itself unable, on the basis of information in the file, to apply the criteria expressed in *Keck* and subsequent case-law to the case at hand.

Sven Norberg
Judge-Rapporteur